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**Datasheet for the decision
of 14 June 2007**

Case Number: T 1499/05 - 3.3.02

Application Number: 92904428.7

Publication Number: 0568608

IPC: C12P 7/64

Language of the proceedings: EN

Title of invention:

Fungal oil containing arachidonic acid, method for its preparation and composition containing said oil

Patent Proprietor:

MARTEK BIOSCIENCES CORPORATION

Opponents:

- (04) Suntory Limited
(05) BASF Aktiengesellschaft

Headword:

Fungal oil/MARTEK

Relevant legal provisions:

EPC Art. 113(2)

Keyword:

"Basis of decision - patent proprietor (no longer approves of the text of the patent)"

Decisions cited:

T 0073/84

Catchword:

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Case Number: T 1499/05 - 3.3.02

D E C I S I O N
of the Technical Board of Appeal 3.3.02
of 14 June 2007

Appellant: Suntory Limited
(Opponent 04) 1-40 Dojimahama 2-chome
Kita-ku
Osaka-shi
Osaka (JP)

Representative: Stoner, Gerard Patrick
Mewburn Ellis LLP
York House
23 Kingsway
London WC2B 6HP (GB)

Appellant: BASF Aktiengesellschaft
(Opponent 05) Patentabteilung C6
Carl-Bosch-Straße 38
D-67056 Ludwigshafen (DE)

Representative: Schweiger, Georg
Patentanwälte
Reitstötter, Kinzebach & Partner
Sternwartstraße 4
D-81679 München (DE)

Appellant: MARTEK BIOSCIENCES CORPORATION
(Patent Proprietor) 6480 Dobbin Road
Columbia, MD 21045 (US)

Representative: Hallybone, Huw George
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London WC1A 2RA (GB)

Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
6 October 2005 concerning maintenance of
European patent No. 0568608 in amended form.

Composition of the Board:

Chairman: U. Oswald
Members: H. Kellner
E. Dufrasne

Summary of Facts and Submissions

- I. By an interlocutory decision announced orally at the end of the oral proceedings, which lasted from 27 April 2005 to 29 April 2005, and issued in writing on 6 October 2005, the opposition division maintained the European patent No. 0 568 608 in amended form.
- II. The appellants (opponents 04 and 05) lodged an appeal against this decision on 15 December 2005 and 13 December 2005, respectively, with simultaneous payment of the prescribed fees. They filed written statements setting out the grounds of appeal and requesting the revocation of the patent. Oral proceedings were requested for the case that the patent was not revoked.

The patent proprietor filed an appeal on 5 December 2005 with simultaneous payment of the prescribed fee. In the written statement of the grounds of appeal it requested that the decision of the opposition division, insofar as it related to the main request considered by the opposition division, be set aside and that the patent be maintained on the basis of that main request or on the basis of one of the 1st to 10th auxiliary requests, all of which were filed with the statement of the grounds of appeal.

Opponents 01, 03 and 06 withdrew their oppositions during the procedure before the opposition division, and opponent 02 its opposition during the procedure before the board of appeal (letter of 13 January 2006); therefore they are not parties in this appeal procedure.

III. In its letter dated 18 May 2007, the appellant (patent proprietor) withdrew its approval of the text of the patent as granted and declared that it "will not be submitting an amended text". The appellant (patent proprietor) stated that it was understood that, in these circumstances, the patent was to be revoked.

IV. As a reply to the communication of the board of 29 May 2007 asking for further clarification, the appellant (patent proprietor) stated in a letter dated 30 May 2007

- that it withdrew all pending claim requests and that it would not be filing any further claim requests,
- that it withdrew its approval of the text in which the patent was granted and that it would not be filing a replacement text; and
- that it requested revocation of the patent.

Assuming that, in the light of these requests, the patent was to be revoked without substantive examination of the appeal, it withdrew its request for oral proceedings.

Reasons for the Decision

1. The appeal is admissible.
2. Article 113(2) EPC states that the European Patent Office confines its considerations in proceedings to the text of the European patent application or the European patent "submitted to it, or agreed, by the applicant for or proprietor of the patent".
3. In the present case, as indicated in sections III and IV above, the appellant (patent proprietor) made it clear that it no longer approved the text of the patent as granted and that it declined to submit an amended text.
4. It thus follows that there is no longer a text on the basis of which the board of appeal could consider compliance with the requirements of the EPC. Therefore, the patent must be revoked without any further substantive examination (see T 73/84, OJ EPO 1985, 241).

Order

For these reasons it is decided that:

1. The appeal of the appellant (patent proprietor) is dismissed.
2. The decision under appeal is set aside.
3. The patent is revoked.

The Registrar:

The Chairman:

A. Townend

U. Oswald