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**Datasheet for the decision
of 30 January 2015**

Case Number: T 1617/12 - 3.3.09

Application Number: 07108969.2

Publication Number: 1815755

IPC: A23L1/29, A23L1/30

Language of the proceedings: EN

Title of invention:

Improvement of intestinal barrier integrity

Patent Proprietor:

N.V. Nutricia

Opponents:

ABBOTT LABORATORIES
NESTEC S.A.
Friesland Brands B.V.

Headword:

Relevant legal provisions:

EPC Art. 113(2)
RPBA Art. 16(1)

Keyword:

No text agreed by patentee - revocation of the patent
Apportionment of costs (no)

Decisions cited:

T 0073/84, T 0186/84, T 0490/05

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

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Case Number: T 1617/12 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 30 January 2015

Appellant: NESTEC S.A.
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Appellant: Friesland Brands B.V.
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Respondent: N.V. Nutricia
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Party as of right: ABBOTT LABORATORIES
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
3 May 2012 concerning maintenance of the
European Patent No. 1815755 in amended form.**

Composition of the Board:

Chairman	W. Sieber
Members:	M. O. Müller
	K. Garnett

Summary of Facts and Submissions

- I. This decision concerns the appeals filed by opponents 02 and 03 against the interlocutory decision of the opposition division that European patent No. 1 815 755 as amended met the requirements of the EPC.
- II. On 3 July 2012, opponent 03 (hereinafter: "appellant 03") filed an appeal and, on the same day, paid the prescribed fee. The statement setting out the grounds of appeal was filed on 10 September 2012.
- III. On 9 July 2012, opponent 02 (hereinafter: "appellant 02") filed an appeal and, on 11 July 2013, paid the prescribed fee. The statement setting out the grounds of appeal was filed on 13 September 2012.
- IV. Appellants 02 and 03 requested that the decision under appeal be set aside and the patent be revoked.
- V. With its letter of 1 July 2013, the proprietor (hereinafter: "the respondent") filed a response to the grounds of appeal together with a main request and auxiliary requests 1 to 8.
- VI. By communication dated 3 February 2014, the parties were summoned to oral proceedings scheduled to take place on 2 October 2014.
- VII. By letter of 22 September 2014, the respondent stated the following:

"Please be informed that the Proprietor no longer approves of the text and that the Proprietor requests revocation of the above referenced patent EP 1815755.

To be clear, Proprietor's disapproval concerns the text of the patent as granted as well as of the amended patent documents filed during oral proceedings on 29. 03. 2012."

- VIII. By fax dated 23 September 2014, the oral proceedings were cancelled.
- IX. By letter of 29 September 2014, appellant 02 requested reimbursement of some expenses that would still be incurred (air ticket and/or hotel) due to the late cancellation of the oral proceedings. Evidence for these costs was filed by letters of 20 October and 17 November 2014 together with a claim for reimbursement of the hotel and air ticket expenses for both Mr Corticchiato and Ms Salou.
- X. By communication dated 27 November 2014, the board informed the parties that, in its preliminary view, appellant 02's request for apportionment of costs should be rejected. The appellant was asked to clarify whether its request for oral proceedings extended to the issue of apportionment of costs.
- XI. By letter dated 21 January 2015, appellant 02 stated that it did not wish any oral proceedings to be arranged for the issue of apportionment of costs.

Reasons for the Decision

1. The appeal is admissible.
2. Article 113(2) EPC requires that the EPO may decide upon the European patent only in the text submitted to it, or agreed by the proprietor of the patent.

Agreement cannot be held to be given if the respondent (proprietor) expressly states that it requests revocation and no longer approves the text of the patent as granted or previously amended (see point VII above).

In such a situation a substantive requirement for maintaining the patent is lacking and the proceedings are to be terminated by a decision ordering revocation, without going into the substantive issues (see eg decisions T 73/84, OJ EPO 1985, 241 and T 186/84, OJ EPO 1986, 79).

3. Apportionment of costs

- 3.1 Appellant 02's request for reimbursement of some expenses that would still be incurred due to the late cancellation of the oral proceedings (point IX above) is not allowable for the following reasons:

Firstly, the respondent's right to withdraw its approval to the text of the patent is part of the principle of party disposition which should not be restricted, even implicitly, by the threat of an apportionment of costs. The board does not see anything in the withdrawal or its timing which amounts to an abuse of procedure.

Secondly, due to the fact that the respondent withdrew its approval to the text, appellant 02 knew that the patent would be revoked and that it did not need to further prepare for the oral proceedings after 23 September 2014 (the day the oral proceedings were cancelled, see point VIII above). These advantages have to be set against the disadvantage of having to pay for non-refundable costs (hotel and/or air ticket) and

weighed in the balance against the respondent's right to withdraw its approval to the text of the patent.

All things considered it would not be equitable to apportion these costs to the respondent.

- 3.2 The board further notes that the circumstances of the present case do not fall within any of the examples given in Article 16 RPBA, although the board acknowledges that these examples are not exclusive.
- 3.3 The above reasoning follows the findings in the similar case T 490/05 (point 3 of the Reasons). In that case, the sole issue to be discussed at the oral proceedings was the proprietor's request for apportionment of costs, all other requests having been withdrawn the day before the oral proceedings. In the oral proceedings, then the opponent (also) requested an apportionment of costs incurred due its presence at the oral proceedings. The board in that case decided that an apportionment of costs in the opponent's favour was not equitable since firstly, the withdrawal of the proprietor's requests had the advantage for the opponent that the contested decision to revoke the patent would become final and secondly, an appellant (proprietor in that case) had always the right to withdraw its appeal, which right should not be restricted by the implicit threat of an apportionment of costs.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. Respondent 02's request for apportionment of costs is refused.

The Registrar:

The Chairman:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated