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**Datasheet for the decision
of 19 April 2018**

Case Number: T 2588/12 - 3.3.04

Application Number: 07787193.7

Publication Number: 2041289

IPC: C12N15/82

Language of the proceedings: EN

Title of invention:

Resistance to powdery mildew and absence of necrosis in
Cucumis sativus

Patent Proprietor:

Enza Zaden Beheer B.V.

Opponents:

Monsanto Company
Nunhems B.V.

Headword:

Powdery mildew resistance/ENZA ZADEN BEHEER

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Basis of decision - text or agreement to text withdrawn by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

Catchword:

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Case Number: T 2588/12 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 19 April 2018

Appellant: Enza Zaden Beheer B.V.
(Patent Proprietor) Haling 1E
1602 DB Enkhuizen (NL)

Representative: van Kooij, Adriaan
Arnold & Siedsma
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Respondent: Nunhems B.V.
(Opponent 2) Voort 6
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Representative: Majer, Dorothea
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6080 AA Haelen (NL)

Party as of right: Monsanto Company
(Opponent 1) 800 North Lindbergh Boulevard
St. Louis, Missouri 63167 (US)

Representative: Uexküll & Stolberg
Partnerschaft von
Patent- und Rechtsanwälten mbB
Beselerstraße 4
22607 Hamburg (DE)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
18 October 2012 concerning maintenance of the
European Patent No. 2041289 in amended form.**

Composition of the Board:

Chairwoman G. Alt
Members: B. Claes
 M. Blasi

Summary of Facts and Submissions

- I. This decision concerns the appeal of the patent proprietor (hereinafter "appellant") against the interlocutory decision of the opposition division concerning maintenance of European patent No. EP 2 041 289 with the title "*Resistance to powdery mildew and absence of necrosis in Cucumis sativus*".
- II. With the statement of grounds of appeal, the appellant requested to set aside the decision under appeal and to maintain the patent based on the claims of a main request or, alternatively, on one of auxiliary requests 1 to 3 filed with the same. As an auxiliary measure oral proceedings were requested.
- III. The board issued a summons to oral proceedings accompanied by a communication of the board.
- IV. With a letter dated 26 March 2018 the appellant declared that it no longer approved the text in which the patent was granted and that it "*will not submit an amended text*". In reply to a request from the board to clarify its requests, the appellant submitted a further letter dated 17 April 2018 stating that "*all requests on file are withdrawn*" and that "*a decision in writing revoking EP 2 041 289 is expected*".
- V. The board thereafter cancelled the oral proceedings.

Reasons for the Decision

1. Pursuant to Article 113(2) EPC, the European Patent Office may decide upon the European patent only in the text submitted to it, or agreed, by the proprietor of the patent.

2. Such an agreement cannot be deemed to exist if the patent proprietor - as in the present case - expressly states that it no longer approves the text of the patent as granted and withdraws all claim requests on file (see section IV). There is therefore no text of the patent on the basis of which the board can consider compliance with the requirements of the EPC.

3. It is established case law that in the present circumstances, the proceedings are to be terminated by a decision ordering revocation of the patent without substantive examination as to patentability (see e.g. decision T 73/84, OJ EPO 1985, 241 and Case Law of the Boards of Appeal of the EPO, 8th edition, 2016, IV.C. 5.2). The board has no reason in the present case to deviate from this consistent approach of the boards of appeal, with the consequence that the patent is to be revoked.

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:



P. Cremona

G. Alt

Decision electronically authenticated