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**Datasheet for the decision
of 15 January 2021**

Case Number: T 2632/16 - 3.3.09

Application Number: 09011197.2

Publication Number: 2140771

IPC: A23L33/00, A61K31/702,
A23C9/20, A23L33/135

Language of the proceedings: EN

Title of invention:

Method for stimulating the intestinal flora in infants
delivered by caesarean section

Patent Proprietor:

N.V. Nutricia

Opponent:

Société des Produits Nestlé S.A.

Headword:

Method for stimulating the intestinal flora in infants
delivered by caesarean section/NUTRICIA

Relevant legal provisions:

EPC Art. 101, 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Basis of decision - text or agreement to text withdrawn by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 at 25% - withdrawal of appeal
before decision announced at oral proceedings (yes)

Decisions cited:

T 2405/12

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
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Case Number: T 2632/16 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 15 January 2021

Appellant:
(Patent Proprietor)

N.V. Nutricia
Eerste Stationsstraat 186
2712 HM Zoetermeer (NL)

Representative:

Nederlandsch Octrooibureau
P.O. Box 29720
2502 LS The Hague (NL)

Appellant:
(Opponent)

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

Representative:

Plougmann Vingtoft a/s
Strandvejen 70
2900 Hellerup (DK)

Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
4 October 2016 concerning maintenance of the
European Patent No. 2140771 in amended form.**

Composition of the Board:

Chairman A. Haderlein
Members: M. Ansorge
D. Rogers

Summary of Facts and Submissions

- I. This decision concerns the appeals filed by the patent proprietor and the opponent against the interlocutory decision of the opposition division holding the European patent No. 2 140 771 in amended form to be allowable.
- II. In the written proceedings, the patent proprietor (appellant I) requested that the decision under appeal be set aside and the patent be maintained on the basis of the main request or auxiliary requests, filed with the reply to the opponent's appeal.
- III. The opponent (appellant II) requested that the decision under appeal be set aside and the patent be revoked.
- IV. The parties were summoned to oral proceedings and oral proceedings took place on 15 January 2021 by videoconference.
- V. In the course of the oral proceedings, appellant I stated that it no longer approved the text of the patent in the form as held allowable by the opposition division, nor in any other form, and that it withdrew its appeal.

Reasons for the Decision

1. Article 113(2) EPC stipulates that the European Patent Office shall consider and decide upon the European

patent only in the text submitted to it, or agreed, by the patent proprietor.

2. Agreement cannot be deemed to be given if the patent proprietor, without submitting an amended text, expressly states that it no longer approves the text of the patent as granted or as amended.
3. Where there is no text of the patent on which basis the board can consider the appeal of the opponent, the only possibility available to the board is to revoke the patent as envisaged in Article 101 EPC. In this context, reference is made to the Case Law of the Boards of Appeal of the EPO, in particular to T 2405/12 and the decisions cited therein.
4. The patent proprietor withdrew its appeal after the expiry of the period under Rule 103(3) (a) EPC but before the decision was announced at oral proceedings. The appeal fee of the patent proprietor is therefore 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 of the patent proprietor shall be reimbursed at 25%.

The Registrar:

The Chairman:



A. Nielsen-Hannerup

A. Haderlein

Decision electronically authenticated