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**Datasheet for the decision  
of 28 June 2022**

**Case Number:** T 0435/18 - 3.3.09

**Application Number:** 09718670.4

**Publication Number:** 2252167

**IPC:** A23L33/135, A23L33/17,  
A23L33/185, A23L33/19,  
A23L33/00

**Language of the proceedings:** EN

**Title of invention:**

HIGH PROTEIN LIQUID ENTERAL NUTRITIONAL COMPOSITION

**Patent Proprietor:**

N.V. Nutricia

**Opponents:**

Fresenius Kabi Deutschland GmbH  
Fonterra Co-Operative Group Limited  
Société des Produits Nestlé S.A.  
Arla Foods Amba  
FrieslandCampina Nederland B.V.

**Headword:**

High protein liquid composition/NUTRICIA

**Relevant legal provisions:**

EPC Art. 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Basis of decision - text or agreement to text withdrawn by  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 - withdrawal of appeal

**Decisions cited:**

T 0073/84, T 0186/84, T 0655/01, T 1526/06, T 2405/12



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

Boards of Appeal of the  
European Patent Office  
Richard-Reitzner-Allee 8  
85540 Haar  
GERMANY  
Tel. +49 (0)89 2399-0  
Fax +49 (0)89 2399-4465

Case Number: T 0435/18 - 3.3.09

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.09**  
**of 28 June 2022**

**Appellant:** N.V. Nutricia  
(Patent Proprietor) Eerste Stationsstraat 186  
2712 HM Zoetermeer (NL)

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

**Appellant:** Fresenius Kabi Deutschland GmbH  
(Opponent 1) Else-Krömer-Strasse 1  
61352 Bad Homburg (DE)

**Representative:** Fresenius Kabi Deutschland GmbH  
Patent Department  
Borkenberg 14  
61440 Oberursel (DE)

**Appellant:** Fonterra Co-Operative Group Limited  
(Opponent 2) 9 Princes Street  
Auckland (NZ)

**Representative:** Forresters IP LLP  
Skygarden  
Erika-Mann-Straße 11  
80636 München (DE)

**Appellant:** Société des Produits Nestlé S.A.  
(Opponent 3) Entre-deux-Villes  
1800 Vevey (CH)

**Representative:** Elkington and Fife LLP  
Prospect House  
8 Pembroke Road  
Sevenoaks, Kent TN13 1XR (GB)

**Appellant:** Arla Foods Amba  
(Opponent 4) Sønderhøj 14  
8260 Viby J (DK)

**Representative:** Guardian  
IP Consulting I/S  
Diplomvej, Building 381  
2800 Kgs. Lyngby (DK)

**Appellant:** FrieslandCampina Nederland B.V.  
(Opponent 5) Stationsplein 4  
3818 LE Amersfoort (NL)

**Representative:** FrieslandCampina IP Department  
Bronland 20  
6708 WH Wageningen (NL)

**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
15 December 2017 concerning maintenance of the  
European Patent No. 2252167 in amended form.**

**Composition of the Board:**

**Chairman** A. Haderlein  
**Members:** F. Rinaldi  
F. Blumer

## **Summary of Facts and Submissions**

- I. Appeals were filed by the patent proprietor and the five opponents against the opposition division's decision according to which the European patent in amended form was allowable.
- II. During the oral proceedings held before the board, the patent proprietor withdrew its appeal and stated that it no longer approved of the text of the patent in any form.
- III. The opponents requested that the decision under appeal be set aside and that the patent be revoked.

## **Reasons for the Decision**

1. Under Article 113(2) EPC, the European Patent Office shall consider and decide upon the European patent only in the text submitted to it, or agreed, by the proprietor of the patent. This principle has to be strictly observed also in opposition and opposition appeal proceedings.
2. By disapproving the granted text of the patent in any form, the patent proprietor has withdrawn its approval of any text for maintenance of the patent. Since the text of the patent is at the disposition of the patent proprietor, a patent cannot be maintained against the patent proprietor's will. There is therefore no text of the patent on the basis of which the board can consider the appeals of the opponents.

3. In the case of T 73/84 (OJ EPO 1985, 241, Headnote and Reasons), the board decided that if the proprietor of a European patent stated in opposition or appeal proceedings that it no longer approved the text in which the patent was granted, and did not submit any amended text, the patent was to be revoked. This approach was confirmed, *inter alia*, by decisions T 186/84 (OJ EPO 1986, 79), T 655/01, T 1526/06 and T 2405/12.
4. In the circumstances of the present case, the board sees no reasons for deviating from the principles set out in the above-mentioned decisions. The patent must therefore be revoked, without a substantive examination first being carried out.
5. The patent proprietor withdrew its appeal after the expiry of the time limit set under Rule 103(3) (a) EPC but before the decision was announced at oral proceedings. Therefore, its appeal fee is 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 patent proprietor's appeal fee is reimbursed at 25%.

The Registrar:

The Chairman:



A. Nielsen-Hannerup

A. Haderlein

Decision electronically authenticated