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**Datasheet for the decision  
of 31 May 2021**

**Case Number:** T 0469/20 - 3.3.04

**Application Number:** 10010195.5

**Publication Number:** 2289352

**IPC:** A61K38/52, A61P1/00, A61P3/00

**Language of the proceedings:** EN

**Title of invention:**  
Agent for use in the case of fructose intolerance

**Patent Proprietor:**  
Vitacare GmbH & Co. KG

**Opponent:**  
STADA Arzneimittel AG

**Headword:**  
Fructose intolerance/VITACARE

**Relevant legal provisions:**  
EPC Art. 113(2)

**Keyword:**  
Basis of decision - text or agreement to text withdrawn by  
patent proprietor

**Decisions cited:**

T 0073/84

**Catchword:**



**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 0469/20 - 3.3.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.04**  
**of 31 May 2021**

**Appellant:** STADA Arzneimittel AG  
(Opponent) Stadastrasse 2-18  
61118 Bad Vilbel (DE)

**Representative:** Lederer & Keller Patentanwälte  
Partnerschaft mbB  
Unsöldstraße 2  
80538 München (DE)

**Respondent:** Vitacare GmbH & Co. KG  
(Patent Proprietor) Konrad-Adenauer-Allee 8-10  
61118 Bad Vilbel (DE)

**Representative:** Ruckerl, Florian  
Dehmel & Bettenhausen  
Patentanwälte PartmbB  
Herzogspitalstraße 11  
80331 München (DE)

**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 7 January 2020  
rejecting the opposition filed against European  
patent No. 2289352 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chair** B. Claes  
**Members:** R. Morawetz  
P. de Heij

## **Summary of Facts and Submissions**

- I. An appeal was lodged by the opponent (appellant) against the decision of the opposition division rejecting the opposition against European patent No. 2 289 352 (the patent).
- II. With their statement of grounds of appeal, the appellant requested that the decision under appeal be set aside and that the patent be revoked. Auxiliarily, oral proceedings were requested.
- III. With their reply to the statement of grounds of appeal the patent proprietor (respondent) requested that the appeal be dismissed, i.e. the patent be maintained as granted, or, alternatively, that the patent be maintained in amended form on the basis of one of the sets of claims of auxiliary request 1 to 20, all filed with the reply to the statement of grounds of appeal. Auxiliarily, oral proceedings were requested.
- IV. The board scheduled oral proceedings to be held on 17 May 2021 and issued a communication pursuant to Article 15(1) RPBA setting out its preliminary assessment of the appeal.
- V. By letter dated 12 April 2021, the respondent filed a set of claims of auxiliary request 21 and requested that it be admitted into the appeal proceedings.
- VI. In a letter dated 10 May 2021, the respondent declared as follows "*Hiermit nimmt die Patentinhaberin alle bisher in diesem Beschwerdeverfahren gestellten Anträge zurück und erklärt, dass sie der Aufrechterhaltung des Patents in der erteilten Fassung nicht mehr zustimmt*".

*und auch keine geänderte Fassung vorlegen wird."*  
*(The patent proprietor hereby withdraws all requests submitted during the appeal proceedings and declares that it no longer approves the text in which the patent was granted and that it will not submit an amended text [translation by the board]).*

VII. The parties were informed by a communication dated 12 May 2021, sent by email in advance on 11 May 2021, that the oral proceedings were cancelled.

### **Reasons for the Decision**

1. The appeal complies with Articles 106 to 108 and Rule 99 EPC and is admissible.
2. Pursuant to Article 113(2) EPC the EPO shall decide upon the European patent only in the text submitted to it, or agreed, by the proprietor of the patent.
3. Such an agreement cannot be deemed to exist if the patent proprietor - as in the present case - expressly declares that it no longer approves the text in which the patent was granted and that it will not submit an amended text (see section VI.).
4. There is therefore no text of the patent on the basis of which the board can consider the appeal. In these circumstances, the proceedings are to be terminated by a decision ordering revocation of the patent, without examination on the appeal on its merits (see decision T 73/84, OJ EPO 1985, 241, followed by numerous decisions, see Case Law of the Boards of Appeal of the European Patent Office, 9th Edition 2019, IV.D.2).

5. There are no remaining issues that need to be dealt with by the board in the present appeal case.
6. As the appellant's request for oral proceedings was conditional on the board not granting their main request and the respondent withdrew their request for oral proceedings, the present decision can be taken without holding oral proceedings.

## Order

### **For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chair:



A. Chavinier Tomsic

B. Claes

Decision electronically authenticated