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**Datasheet for the decision
of 19 September 2023**

Case Number: T 0665/22 - 3.3.04

Application Number: 14804528.9

Publication Number: 3003485

IPC: A61K38/17, A61K35/20, A61P1/00

Language of the proceedings: EN

Title of invention:

Composition comprising beta-casein A2 for use in the prevention of inflammation of the bowel

Patent Proprietor:

The A2 Milk Company Limited

Opponents:

Fresenius Kabi Deutschland GmbH
Arla Foods amba

Headword:

β-casein A2 against inflammation/A2 MILK COMPANY

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Basis of decision - text or agreement to text withdrawn by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



Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
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Case Number: T 0665/22 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 19 September 2023

Appellant: The A2 Milk Company Limited
(Patent Proprietor) Level 10
51 Shortland Street
Auckland 1010 (NZ)

Representative: EIP
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Appellant: Fresenius Kabi Deutschland GmbH
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61352 Bad Homburg (DE)

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

Appellant: Arla Foods amba
(Opponent 2) Sønderhøj 14
8260 Viby J (DK)

Representative: Guardian
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
25 January 2022 concerning maintenance of the
European Patent No. 3003485 in amended form**

Composition of the Board:

Chairman A. Chakravarty
Members: O. Lechner
 M. Blasi

Summary of Facts and Submissions

- I. European patent No. 3 003 485 was opposed under Article 100(a) to (c) EPC.
- II. In an interlocutory decision, the opposition division held that the patent as amended in the form of auxiliary request 6, met the requirements of the European Patent Convention.
- III. The patent proprietor as well as opponent 1 and opponent 2 filed appeals against the decision.
- IV. With its statement of grounds of appeal, the patent proprietor requested, in so far as relevant to the present decision:
 - that the decision under appeal be set aside
 - that the patent be maintained in amended form on the basis of the set of claims of the main request filed with the statement of grounds of appeal or, alternatively,
 - that the patent be maintained in amended form
 - on the basis of one of the sets of claims of auxiliary requests 1 to 5 as submitted with the statement of grounds of appeal
 - as considered allowable by the opposition division (auxiliary request 6), i.e. that the opponents' appeals be dismissed
 - on the basis of one of the sets of claims of auxiliary requests 7 to 14 as submitted with the statement of grounds of appeal
- V. In their statements of grounds of appeal, the opponents requested, in so far as relevant to the present

decision, that the decision under appeal be set aside and the patent be revoked.

- VI. All parties replied to the other parties' respective statement of grounds of appeal.
- VII. The board appointed to oral proceedings, as requested, and on 5 July 2023, issued a communication pursuant to Article 15(1) RPBA.
- VIII. With letter dated 6 September 2023, the patent proprietor withdrew its appeal and stated that it disapproved the text of the European Patent as granted. It also withdrew all of its requests, including the request for oral proceedings, and announced that it would not file any replacement text or any further request. The patent proprietor stated that it expected the revocation of the patent and a termination of the appeal proceedings, as well as a reimbursement of the appeal fee of at least 25%.
- IX. The board subsequently cancelled the oral proceedings.

Reasons for the Decision

- 1. Pursuant to Article 113(2) EPC, the EPO shall examine, and decide upon, the European patent application or the European patent only in the text submitted to it, or agreed, by the applicant or the proprietor of the patent.
- 2. Such an agreement cannot be deemed to exist if the patent proprietor expressly states that it no longer approves the text of the patent as granted and no alternative text is offered.

3. There is therefore no text of the patent on the basis of which the board can consider compliance with the requirements of the EPC. It is established case law of the boards of appeal that in these circumstances the patent must be revoked without further substantive examination (see decision T 73/84, OJ EPO 1985, 241, and further decisions cited in Case Law of the Boards of Appeal, 10th ed., 2022, IV.D.2.).
4. There are no remaining issues that have to be dealt with by the board in the present appeal case.
5. The consequence of the patent proprietor's declaration (see point 2., above) is that the patent is to be revoked. Thus, the appeals of the opponents are allowed. The decision can be taken without holding oral proceedings since the opponents' requests for oral proceedings were conditional on the board not granting their main requests.
6. The patent proprietor withdrew its appeal. A date for oral proceedings had been set, but the withdrawal of the appeal occurred after expiry of one month of notification of the board's communication pursuant to Article 15(1) RPBA issued in preparation for these oral proceedings.
7. Therefore, the patent proprietor's appeal fee is to be reimbursed at 25% in accordance with 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:



I. Aperribay

A. Chakravarty

Decision electronically authenticated