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**Datasheet for the decision
of 22 February 2024**

Case Number: T 1708/23 - 3.3.09

Application Number: 17703302.4

Publication Number: 3410874

IPC: A23L33/18, A23C21/00, A23L2/66,
A23L33/19, A23L2/60

Language of the proceedings: EN

Title of invention:
WHEY PROTEIN BASED LIQUID NUTRITIONAL COMPOSITION

Patent Proprietor:
Abbott Laboratories

Opponents:
Fresenius Kabi Deutschland GmbH
Société des Produits Nestlé S.A.

Headword:
Whey protein based liquid nutritional composition/ABBOTT

Relevant legal provisions:
EPC Art. 113(2)

Keyword:

Basis of decision - text submitted or agreed by patent
proprietor (no) - revocation of the patent at request of the
patent proprietor



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 1708/23 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 22 February 2024

Appellant: Société des Produits Nestlé S.A.
(Opponent 2) Entre-deux-Villes
1800 Vevey (CH)

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

Respondent: Abbott Laboratories
(Patent Proprietor) 100 Abbott Park Road
Abbott Park, IL 60064-3500 (US)

Representative: Boulton Wade Tennant LLP
Salisbury Square House
8 Salisbury Square
London EC4Y 8AP (GB)

Party as of right: 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)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
13 July 2023 concerning maintenance of the
European Patent No. 3410874 in amended form.**

Composition of the Board:

Chairman A. Haderlein
Members: F. Rinaldi
 A. Jimenez

Summary of Facts and Submissions

I. This decision concerns the appeal filed by opponent 2 against the interlocutory decision of the opposition division that the European patent as amended met the requirements of the EPC.

II. In reply to the statement setting out the grounds of appeal, the patent proprietor made the following written statement:

"I withdraw all claim requests, including the claims maintained by the Opposition Division.

I also no longer approve of the text as granted.

I understand that this action will mean that EP-B-3,410,874 is revoked."

III. Opponent 2 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 examine, and decide upon, the European patent only in the text submitted to it, or agreed, by the proprietor of the patent. This principle, according to which the text of the patent is at the disposition of the proprietor, has to be strictly observed also in opposition and opposition appeal proceedings.

2. As the proprietor of the patent no longer approves the text of the patent as granted (main request) and does

not pursue the patent according to the auxiliary requests on file, there is no text of the patent on which the board can base its consideration of the appeal of opponent 2.

3. If the proprietor of a European patent states in opposition or appeal proceedings that it no longer approves the text in which the patent was granted, and does not submit any amended text, the patent is to be revoked (Case Law of the Boards of Appeal, 10th edition 2022, IV.D.2, third paragraph and III.B.3.3, first paragraph). Therefore, the patent must be revoked, without any preceding substantive examination.

Order

For these reasons it is decided that:

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

The Registrar:

The Chairman:



K. Götz-Wein

A. Haderlein

Decision electronically authenticated