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**Datasheet for the decision  
of 9 October 2024**

**Case Number:** T 2097/22 - 3.3.03

**Application Number:** 10175095.8

**Publication Number:** 2264486

**IPC:** G02B1/04, C08L83/04, G02C7/04,  
B29D11/00

**Language of the proceedings:** EN

**Title of invention:**

Ophthalmic, tinted molding composition, molding having high Dk-value and method of its production

**Patent Proprietor:**

Alcon Inc.

**Opponents:**

Schumacher, Henrik  
Gill Jennings & Every LLP

**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Basis of decision - text or agreement to text withdrawn by patent proprietor - patent revoked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, T 0186/84, T 0646/08, T 2434/18



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

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European Patent Office  
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Case Number: T 2097/22 - 3.3.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.03**  
**of 9 October 2024**

**Respondent:**  
(Patent Proprietor)

Alcon Inc.  
Rue Louis-d'Affry 6  
1701 Fribourg (CH)

**Representative:**

Breuer, Markus  
Sendlinger Straße 29  
80331 München (DE)

**Appellant:**  
(Opponent 2)

Gill Jennings & Every LLP  
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20 Primrose Street  
London EC2A 2ES (GB)

**Representative:**

Gill Jennings & Every LLP  
The Broadgate Tower  
20 Primrose Street  
London EC2A 2ES (GB)

**Party as of right:**  
(Opponent 1)

Schumacher, Henrik  
An der Christuskirche 18  
30167 Hannover (DE)

**Representative:**

Gramm, Lins & Partner  
Patent- und Rechtsanwälte PartGmbH  
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30173 Hannover (DE)

**Decision under appeal:**

**Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
1 July 2022 concerning maintenance of the  
European Patent No. 2264486 in amended form.**

**Composition of the Board:**

**Chairman**            D. Semino  
**Members:**            M. Barrère  
                              A. Bacchin

## **Summary of Facts and Submissions**

- I. The appeals lodged by the patent proprietor and opponent 2 lie from the interlocutory decision of the opposition division concerning maintenance of European Patent No. 2 264 486 in amended form on the basis of the claims of auxiliary request 1 filed with letter of 11 September 2020.
- II. The patent proprietor initially requested that the decision under appeal be set aside and that the patent be maintained as granted (main request). In the alternative, the patent proprietor requested that the appeal of opponent 2 be dismissed (i.e. maintenance of the opposed patent on the basis of auxiliary request 1); or that the patent be maintained in amended form on the basis of the claims of one of auxiliary requests 2 to 63 filed with the rejoinder to the statement of grounds of appeal of opponent 2.
- III. Opponent 2 requested that the decision be set aside and the patent be revoked.
- IV. Opponent 1 did not file any request and did not make any submissions in appeal.
- V. The Board scheduled oral proceedings and subsequently issued a communication under Article 15(1) RPBA (dated 23 September 2024).
- VI. On 9 October 2024 oral proceedings were held before the Board. Following a discussion on inventive step, the patent proprietor withdrew their appeal and stated that they no longer approved the text of the patent in any

form (see minutes of the oral proceedings, page 3, third paragraph).

### **Reasons for the Decision**

1. Article 113(2) EPC stipulates that the European Patent Office shall decide upon the European patent only in the text submitted to it, or agreed by the proprietor of the patent.
2. Since the text of a patent is at the disposition of the patent proprietor, their patent cannot be maintained against their will. In the case at hand the patent proprietor withdrew their approval of the text of the patent in any form (see point VI. above). They thus unequivocally withdrew their approval of the text of the patent as granted and as amended by the auxiliary requests. Consequently, there is no longer any text of the patent in the proceedings which the Board can consider for compliance with the requirements of the EPC, so that it is not possible to take a decision on the merits (see e.g. decisions T 186/84, OJ 1986, 79, Reasons 5; T 646/08, Reasons 4 and T 2434/18, Reasons 4).
3. It is established case law of the Boards of Appeal that, in the present circumstances, the decision under appeal must be set aside and the patent be revoked without further substantive examination as to patentability (see decision T 73/84, OJ EPO 1985, 241 and Case Law of the Boards of Appeal of the European Patent Office, 10<sup>th</sup> edition 2022, sections III.B.3.3 and IV.D.2). The Board has no reason to deviate from

this established jurisprudence of the Boards of Appeal, with the consequence that the patent is to be revoked.

4. The appeal fee paid by the patent proprietor is to be reimbursed in accordance with Rule 103(3) (a) EPC.

## 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

D. Semino

Decision electronically authenticated