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**Datasheet for the decision  
of the Enlarged Board of Appeal  
of 21 January 2015**

**Case Number:** R 0001/14

**Appeal Number:** T 0518/10 - 3.3.01

**Application Number:** 02753988.1

**Publication Number:** 1417211

**IPC:** C07F 9/10, C07D 407/14,  
A23J 7/00, A61K 31/683,  
A61K 31/685, A61P 25/00,  
A61P 35/00, C11B 1/10

**Language of the proceedings:** EN

**Title of invention:**  
Natural phospholipids of marine origin containing flavonoids  
and polyunsaturated phospholipids and their uses

**Patent Proprietor:**  
Neptune Technologies & Bioressources Inc.

**Opponent:**  
Enzymotec Ltd.  
Aker Biomarine ASA

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 112a(2)(c), 113(1),  
EPC R. 106, 109(2)(a)

**Keyword:**  
Petition for review clearly inadmissible (yes)

**Decisions cited:**  
R 0003/08, R 0009/09

**Catchword:**

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Case Number: R 0001/14

**DECISION**  
of the Enlarged Board of Appeal  
of 21 January 2015

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**Decision under review:** Decision of the Technical Board of Appeal  
3.3.01 of the European Patent Office of  
9 April 2013.

**Composition of the Board:**

**Chairman:** W. van der Eijk  
**Members:** M. Vogel  
G. Raths

## Summary of Facts and Submissions

- I. This petition under Article 112a EPC, filed on 2 January 2014 and accompanied by the payment of the associated fee, concerns decision T 518/10 of Technical Board of Appeal 3.3.01, posted on 10 and notified on 31 October 2013, by which it dismissed the appeal against the decision of the opposition division revoking European patent No. 1417211 (application No. 02753988.1). The petition is based on the ground that the petitioner/appellant's right to be heard was violated by the dismissal of its request for postponement of the date of oral proceedings before the board of appeal (Articles 112a(2)(c) and 113 EPC). The subject-matter of the patent in suit is "Natural phospholipids of marine origin containing flavonoids and polyunsaturated phospholipids and their uses".
- II. In the opposition proceedings, the opponents had contested the patent on the grounds of lack of novelty, lack of inventive step, insufficiency of disclosure and added subject matter (Article 100(a), (b) and (c) EPC). In its decision posted on 30 December 2009, the opposition division held that the main request and the first and second auxiliary requests, all filed with letter of 13 November 2009, complied with Article 123(2) and (3) EPC but did not disclose their subject-matter sufficiently for it to be carried out by a person skilled in the art (Article 83 EPC).
- III. On 9 March 2010 the petitioner (proprietor) lodged an appeal based on the original main request and new first and second auxiliary requests, all filed with the

grounds of appeal on 10 May 2010. With a letter dated 27 September 2012, it filed further analytical evidence.

IV. In a letter of 20 November 2012, the board summoned the parties to oral proceedings to be held on 9 April 2013, annexing a communication setting out its preliminary view of the case. On 21 February 2013 the appellant's representative requested postponement of the oral proceedings for at least two months because he had been summoned to three oral proceedings on three consecutive days, preventing him from adequately preparing each case. Furthermore, he cited an explosion at the appellant's production plant which had restricted contact with his client, thereby making it almost impossible to adequately deal with the present case. The opponents objected to a postponement, arguing that the representative had learned more than two months ago of both the oral proceedings scheduled on three consecutive days and the explosion in the appellant's plant, which had already occurred at the beginning of November 2012.

V. In a communication dated 6 March 2013, the board refused the appellant's request for postponement and maintained 9 April 2013 as the date for oral proceedings. After deliberation during the oral proceedings the board concluded that the main request and the first and second auxiliary requests contravened Article 123(2) EPC. Then, after discussion with the parties and after deliberation, the board decided to admit auxiliary requests 3 and 4, filed with letter of 8 March 2013, to the proceedings but refused to admit documents E55 to E60, filed by the appellant with letters of 27 September 2012, 8 March 2013,

3 April 2013 and 4 April 2013. During the discussion of admission of these documents to the proceedings, the appellant stated that it intended to file an objection under Rule 106 EPC if they were not admitted.

Then, sufficiency of disclosure in auxiliary request 3 was discussed. During this discussion, the appellant filed a new auxiliary request 4. After deliberation, the board concluded that auxiliary request 3 did not comply with the requirements of Article 83 EPC. As a consequence, the appellant withdrew auxiliary request 4 and filed an objection in respect of procedural defects. It read as follows:

The refusal of the request for postponement of oral proceedings in view of the explosion in the proprietor's facility and the refusal to admit documents E55, E56 and E60 into the proceedings, although filed at least four weeks before the oral proceedings represent a fundamental violation of our right to be heard and constitutes a procedural defect.

After discussion with the parties and deliberation, the board dismissed this objection raised under Rule 106 EPC.

VI. In its written decision, the board stated that, according to Article 15(2) RPBA, a request for postponement of the date for oral proceedings was within the discretionary power of the board and could be allowed only exceptionally, account being taken of the interests of the parties, the internal organisational burden on the board and the interests of parties in other appeal cases, since any postponement

of a hearing could cause delay in other proceedings (see the examples given by the Vice-President of DG 3 in his notice concerning oral proceedings, Supplement to OJ EPO 1/2013, 68 to 69).

Furthermore, this notice stated that a request to fix another date should be filed as soon as possible after the grounds preventing the party concerned from attending oral proceedings have arisen. However, in this case, the appellant had filed its request for postponement only on 21 February 2013, although its representative had already known since December 2012 that he had been summoned to oral proceedings on three consecutive days. No satisfactory reasons had been provided to explain why he had not filed the request immediately, why he had requested postponement only in this case and why another representative covered by his law firm's general authorisation could not substitute for him.

Moreover, the board held that the tragic explosion in the appellant's plant at the beginning of November 2012 was not a convincing reason for postponement. It conceded that, after such a tragedy, patent matters might not be among the most pressing issues, but the appellant's general counsel had already received the summons to the oral proceedings scheduled for 9 April 2013 on 3 December 2012. If this date for oral proceedings had posed problems, a request for postponement should have been filed immediately. Finally, the board observed that the appellant's representative had made contact with his client on 20 February 2013, and no convincing reasons had been given to explain why adequate preparation for the oral

proceedings as scheduled had been impossible, particularly since the board's communication sent with the summons had not changed the relevant legal and technical framework and it could therefore be legitimately expected that the appellant had previously made its complete case as required by Article 12(2) RPBA.

VII. In the reasons for its petition, the appellant cited only the ground that its right to be heard was violated by the dismissal of its request to postpone the scheduled oral proceedings. The ground that documents D55 to D60 were not admitted into the proceedings, included in its written objection, was not dealt with in the reasoned petition of 2 January 2014.

The petitioner (appellant) requests that

1. the decision under review be set aside, the proceedings be reopened, and the replacement of the members of the board of appeal who participated in the decision under review be ordered;
2. reimbursement of the fee for the petition for review be ordered;
3. oral proceedings be appointed in case the Enlarged Board is not minded to allow request No. 1.

VIII. In its submissions, the petitioner described in detail the course of the appeal proceedings and the factual basis for its petition, namely the far reaching consequences of the explosion in its production plant in Canada. The respondents had been wrong to argue that



the petitioner could not have been prevented from dealing with patent matters after the tragic accident because it had dealt extensively with a large array of other patent matters, namely in Australia. In fact, these cases had largely been dealt with before the explosion.

The petitioner's representative had wanted to discuss the board's communication with the petitioner's general counsel on 4 December 2012 but the latter had not been in a position to prepare for the oral proceedings, because other issues had been more pressing at that time. The possibility of requesting a postponement had been discussed, as evidence would be required to support the requests made by the appellant. Although the petitioner's representative had sent reminder e-mails and attempted to reach his client over the many weeks that followed, they had had no further contact until 20 February 2013, when the petitioner gave the instruction to request postponement of the oral proceedings in order to allow sufficient time to prepare and to supply more information on the effect of the explosion. It had to be kept in mind that the general counsel was the only person responsible for dealing with patent matters and could do so only with the assistance of the inventor, Dr T. S.

In the petitioner's view, the board was wrong not to postpone the oral proceedings, because in refusing the request it fundamentally violated its right to be heard under Article 113(1) EPC. Pursuant to Article 15(2) RPBA, a change of date of oral proceedings may exceptionally be allowed at the board's discretion. But, when exercising its discretion, the board did not

take into account the examples given in the notice of the Vice-President of DG 3 dated 16 July 2007 concerning oral proceedings before the boards of appeal (OJ EPO 2007, Special edition No. 3, p. 115).

In exercising their discretion, the boards should consider procedural economy, optimum use of resources and capacities, the public interest and the interests of the parties. But this was not done in this case: the board did not exercise its discretion properly, as only two weeks had been left for the petitioner to deal with the issues raised in the summons, i.e. from 20 February 2013, when contact between the petitioner and its representative had been re-established, to the date of final submissions (9 March 2013). Furthermore, there had not been enough time left to prepare for the oral proceedings. The respondents on the other hand had not presented any evidence that a postponement would have had a negative impact on them. Contrary to their submissions, the petitioner had prepared for the patent matters dealt with after the explosion before that accident happened. There had been no public interest in a prompt hearing as the board had not had a particularly busy schedule for dates in June (3 oral proceedings), July (3) and August (3).

Thus, it should have been straightforward to find another date at least two months after the originally scheduled hearing date. Instead, the petitioner had been forced to rush the submissions filed on 8 March 2013 and including additional evidence which the representative had had insufficient time to fully consider. Consequently, the board's decision not to

postpone the oral proceedings was a fundamental procedural violation.

### **Reasons for the decision**

1. The petition for review was filed with reasons, and the prescribed fee paid, within two months of notification of the contested decision. It was thus filed in time.
2. It is, however, questionable whether the petitioner's objection to the alleged fundamental procedural violation consisting in a denial of the right to be heard (Article 113(1) EPC) was validly raised in accordance with Rule 106 EPC.

For petitions including those based on an infringement of the right to be heard under Articles 112a(2)(c) and 113(1) EPC, Rule 106 EPC requires that an objection to the alleged procedural defect already has been raised and subsequently dismissed by the board during the appeal proceedings, unless it could not be raised during those proceedings. In this case, the petitioner raised its objection under Rule 106 EPC concerning the refusal to postpone the oral proceedings towards the end of the oral proceedings. It is therefore doubtful whether the objection was raised in good enough time to enable the board to investigate and rectify the alleged defect before the proceedings were closed.

3. That an objection is raised in good time is an indispensable prerequisite for the admissibility of a petition under Article 112a EPC. The wording of Rule 106 EPC does not say so explicitly, but it is in

keeping with its spirit and purpose, which is that a party should draw the board's attention expressly, and separately from its other submissions, to any fundamental procedural defect to enable it to investigate and, if necessary, rectify the alleged defect while the proceedings are still pending - as envisaged in Rule 106 EPC - and thereby obviate the need for subsequent review proceedings under Article 112a EPC.

4. For this case, that means that the petitioner was obliged to raise its objection at a time when the board could still rectify the alleged violation.
- 4.1 Unlike the objection under Rule 106 EPC which the petitioner filed in writing at the end of the oral proceedings on appeal, its petition of 2 January 2014 does not cite the refusal to admit the late-filed documents D55, D56 and D60 and asks only for review of the refusal to postpone the date of oral proceedings. The Enlarged Board therefore only has to consider the admissibility of the petition with respect to this ground.
- 4.2 In the current case the alleged procedural flaw is the refusal to postpone the date of the oral proceedings. This refusal was communicated to the petitioner on 6 March 2013. However, despite its misgivings the petitioner did not object to this procedural violation, but apparently prepared for the oral proceedings by filing further auxiliary requests and further documents, by letters of 8 March, 3 April and 4 April 2013. The representative of the petitioner appeared at the oral proceedings on the originally fixed date and took an

active part, inter alia by participating in the discussions and by filing a new auxiliary request. After the discussion had come to an end and the requests were all dealt with, the petitioner raised an objection under Rule 106 EPC.

- 4.3 However, an objection to a refusal to postpone the date of oral proceedings only makes sense if it is made before the date of the oral proceedings or at the latest at the beginning of the oral proceedings. How could the Board remedy the alleged procedural defect, when the oral proceedings - with the full participation by the petitioner - have already taken place? It cannot undo the oral proceedings nor the procedural acts that have been committed by the petitioner during the oral proceedings. Should it have declared the oral proceedings null and void and set a date for new oral proceedings? The Technical Board was put in an impossible position by the objection at this stage. The Enlarged Board therefore agrees with the Technical Board when it writes on p. 46: "With respect to the issue of postponement of oral proceedings, the board had no other option than to dismiss the objection, since at the end of a full day of oral proceedings, the board was unable to revert to its communication of 6 March 2013 to maintain the date of the oral proceedings. The appellant should have raised any objection against this communication immediately after the notification of this communication (see R 3/08 point 1.4; R 9/09 point 1.5)."

5. In light of the above, the Enlarged Board is of the view that the requirement of Rule 106 EPC has not been met because the objection was made at a point in time

at which it could no longer fulfil its purpose. The objection had to be dismissed because under these circumstances the Technical Board was unable to react positively to it.

6. The petition for review must therefore be dismissed as clearly inadmissible (Rule 109(2)(a) EPC) owing to the failure to raise an objection under Rule 106 EPC in good time.

### **Order**

The petition for review is dismissed as clearly inadmissible.

Registrar

Chairman

P. Martorana

W. van der Eijk