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**Datasheet for the decision  
of 19 July 2007**

**Case Number:** T 1337/04 - 3.3.09

**Application Number:** 96911968.4

**Publication Number:** 0817574

**IPC:** A23L 1/39

**Language of the proceedings:** EN

**Title of invention:**  
Sauce base composition

**Patentee:**  
UNILEVER N.V., et al

**Opponent:**  
Meggler AG

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 54, 56

**Keyword:**  
"Public prior use (yes) - not novelty-destroying"  
"Inventive step (no)"

**Decisions cited:**  
-

**Catchword:**  
-



Case Number: T 1337/04 - 3.3.09

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.09  
of 19 July 2007

**Appellant:** Meggle AG  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office orally announced 6 July  
2004 and posted 9 August 2004 rejecting the  
opposition filed against European patent  
No. 0817574 pursuant to Article 102(2) EPC.

**Composition of the Board:**

**Chairman:** P. Kitzmantel  
**Members:** W. Ehrenreich  
W. Sekretaruk

## Summary of Facts and Submissions

- I. Mention of the grant of European patent No. 0 817 574 in respect of European patent application No. 96 911 968.4 in the names of UNILEVER N.V. and UNILEVER PLC filed on 28 March 1996 as International application PCT/EP96/01392, was announced on 4 July 2001 (Bulletin 2001/27).
- II. The patent, entitled "Sauce Base Composition" was granted with twelve claims, Claim 1 reading as follows:
- "1. A fat continuous composition suitable for the preparation of sauces, which in addition to fat comprises a flavour and a protein, characterised in that the composition is a sauce base comprising 5-80 parts by weight of a vegetable fat or fat blend, the total fat composition having a trans unsaturated fatty acids residue level of less than 4%, 0,5-15 parts by weight of water dispersible dry milk ingredients, 1-20 parts by weight of a starch or starch-like product, such as a starch derivatives, modified starch and hydrolyzed starch, up to 40 parts by weight of water, and taste and/or flavour compounds, and, optionally, 0,25-5 parts by weight of gelatin or a similar hydrocolloid."

Claims 2 to 9 were, either directly or indirectly, dependent on Claim 1. Claim 10 was directed to a sauce prepared on the basis of the composition according to Claims 1 to 9, and Claims 11 and 12 concerned a process for preparing the sauce base according to Claims 1 to 9.

III. Notice of opposition requesting revocation of the patent in its entirety on the grounds of Article 100(a) EPC was filed by

*Meggle GmbH, now Meggle AG*

on 3 April 2002.

The opponent submitted that the claimed subject-matter was anticipated by the product "Sauce Hollandaise" developed by the opponent and marketed since 1 May 1992.

It was furthermore held that the subject-matter lacked an inventive step.

In support of its objections the opponent, *inter alia* cited the following documents:

- D1 Product Specification and Sales Statistics of "Sauce Hollandaise", including a recipe for "Saoce [sic] Hollandaise konzentriert", dated 20 May 1992;
- D2 Center for Food Safety and Applied Nutrition, Office of Food Labelling: "Questions and Answers on Trans Fat Proposed Rule, U.S. Food and Drug Administration, November 1999;
- D3 Steinhart and Pfalzgraf: "*Trans-Fettsäuren in Lebensmitteln*" in "Fat Science and Technology", vol. 96, no 2, 42-44 (1994);
- D4 Pfalzgraf et al., "*Gehalte von trans-Fettsäuren in Lebensmitteln*" in "Zeitschrift für Ernährungswissenschaft", 33:24-43, 1993.

With a letter dated 5 May 2004 the document

D5 Declaration of Mr. Alois Blüml in his position as branded products general manager of Meggle GmbH & Co. KG, dated 26 April 2004

was filed.

IV. With its decision orally announced on 6 July 2004 and issued in writing on 9 August 2004 the Opposition Division rejected the opposition.

The decision held that the claimed subject-matter was novel over the cited prior art, *inter alia* because the alleged prior public use of the Meggle "Buttersauce Hollandaise" was not proved up to the hilt by the evidence of D1 and D5.

Document US-A 2 811 452, referred to as an appropriate starting point for the assessment of inventive step by the opponent for the first time in the oral proceedings, was not considered sufficiently relevant for its admission at that late stage.

In the Opposition Division's view, neither of the further citations D3 and D4, both referring to health risks related to the consumption of trans unsaturated fatty acids (TUFAR), suggested the claimed solution of the existing technical problem of providing a fat continuous composition which was comparable in texture and taste to a home made sauce, but which was healthier.

V. On 8 October 2004 the opponent (hereinafter: the appellant) lodged an appeal against the decision of the Opposition Division. The statement of the Grounds of Appeal was submitted on 9 December 2004.

In the appeal proceedings, the appellant submitted further documents in order to support its prior public use allegation of "Butter-Sauce Hollandaise". These documents included:

- D6 A binding customs tariff information of the European Community dated 15 March 1994;
- D7 A product sheet concerning the whey powder "Megglomil F";
- D8 A letter from "muva Kempten" dated 3 November 2004;
- D15 Sales statistics for several Meggle Products including "Buttersauce Hollandaise";
- D16 Sheet marking a certain packaging size for the Meggle product "Die Sauce Hollandaise" with the article No. "00018";
- D17 Advertising sheet dated 1992 (in French) for three Meggle butter sauces marking "Buttersauce Hollandaise" with the article No. 0018.

VI. The patent proprietor (hereinafter: the respondent) defended, as its main request, the maintenance of the patent as granted and submitted, with a letter dated 5 August 2005, a set of Claims 1 to 12 as the basis for an auxiliary request. As compared to Claim 1 as granted, Claim 1 of the auxiliary request expressly indicated that the fat blend is a vegetable fat blend.

The auxiliary request was withdrawn during the oral proceedings held on 19 July 2007 after the Board had indicated that the subject-matter of the main request was considered to be novel.

VII. During these oral proceedings the public availability of the Meggle "Buttersauce Hollandaise" in a composition according to the recipe D1 or the customs tariff information D6, as well as novelty and inventive step of the subject-matter according to the main request, was discussed. The appellant's arguments concerning these issues were as follows:

(a) Public prior use

As confirmed by the declaration given by Mr. Blüml in D5, the Product "Buttersauce Hollandaise, in a composition according to the recipe in the product specification D1, was available on the market from 1992. The date of D1 (20 February 1994, in the right bottom corner of the first page) was furthermore very close to the date of the customs tariff information D6 (15 March 1994) requested by Mr. Blüml himself on 27 January 1994, which also gave under section 8 a composition of the Buttersauce Hollandaise.

Considerable sales of the product "Buttersauce Hollandaise" marked with the article No. 18 had been made up to 31 December 1994, as was derivable from the sales statistics D15 in combination with D16 and D17.

The above documents in combination therefore clearly demonstrated

- the public availability of "Buttersauce Hollandaise" before the priority date
- typically in a composition according to D1 and D6.

(b) Novelty

The feature in Claim 1 as granted "vegetable fat or fat blend" in connection with the passages in paragraph [0010] "*the fat blend can ... also be a melange comprising fish or animal fat, the latter preferable being butter*" (lines 13 to 15) and in paragraph [0011] "*Any type of fat or fat blend can be applied ...*" (lines 50/51) implied that the fat composition of the invention also embraces a mixture comprising only animal fats (eg butter) such as the "Buttersauce Hollandaise" in accordance with D1 or D6.

The butter in "Buttersauce Hollandaise" also met the requirement of the invention that the trans unsaturated fatty acid (TUFAR) content is below 4%. Only local milk products were processed for "Buttersauce Hollandaise", which products had an average TUFAR content of about 3%. This emerged from the letter of "muva Kempten", D8. The TUFAR content of 4.14% for Irish butter - a butter which was not processed by Meggle - was an extreme value not applicable to Meggle's products.

The Buttersauce Hollandaise, in the composition according to D1 or D6, therefore anticipated the claimed subject-matter.



(c) Inventive step

If Claim 1 of the patent as granted did not embrace fat compositions only comprising animal fat, Buttersauce Hollandaise in a composition as indicated in D6 represented the closest prior art for the assessment of an inventive step.

The claimed composition differed from this composition only in that the fat component was a vegetable fat or a vegetable fat blend instead of butter fat.

It could, however, be clearly derived from D3 or D4 that a need already existed before the priority date of the patent to replace animal fats, having an enhanced TUFAR content which were suspected to cause coronary diseases, by vegetable fats containing considerably lower amounts of TUFAR.

A skilled person intending to provide a more healthy fat continuous composition was therefore motivated to replace the butter contained in "Buttersauce Hollandaise" by a vegetable fat component.

The claimed subject-matter was therefore not inventive.

VIII. Concerning the issues of alleged prior public use, novelty and inventive step the respondent argued as follows:

(a) Prior public use

The appellant had not proved the alleged public prior use of Buttersauce Hollandaise up to the hilt in accordance with the case law of the Boards of Appeal. In particular, no sufficient evidence was provided that a product with the composition of one of the two recipes of D1 or D6 was available on the market before the effective date of the patent in suit. Therefore the link between "what" and "making public" was missing.

When considering the recipe in D1 and Mr. Blüml's corresponding declaration D5 it should be noted that Mr. Blüml was an employee of the appellant and therefore not an independent person. Thus, the declaration in D5 was not sufficient proof for the appellant's allegation that a Buttersauce Hollandaise according to the recipe in D1 was commercially available at the relevant time.

Regarding the binding customs tariff information D6, this only signified the appellant's intention (emphasis added by the Board) to place a product on the market. Such a tariff classification could however not prove beyond reasonable doubt that a product with the composition indicated therein had indeed been placed on the market, or when.

(b) Novelty

It was the respondent's position that the claimed invention as described in the patent specification in its whole context related to fat-continuous

compositions based on vegetable fats or fat blends including major amounts of vegetable fats, from which the Buttersauce Hollandaise differed in that it was based purely on animal fat.

(c) Inventive step

The compositions of Buttersauce Hollandaise indicated in D1 and D6 represented specific recipes based on animal fat. Neither of these documents gave a hint that butter fat could be replaced by vegetable fat without adversely affecting the desired properties of the compositions as regards taste and consistency.

Thus, although the desire existed to reduce the content of trans fatty acids and saturated fatty acids in fat-based compositions, a person skilled in the art was not motivated to replace butter fat in Buttersauce Hollandaise by a vegetable fat component in accordance with the invention.

IX. The appellant requested that the decision under appeal be set aside and the patent be revoked.

X. The respondent requested that the appeal be dismissed.

**Reasons for the Decision**

1. The appeal is admissible.

2. *Prior public use*

In the course of the opposition and the appeal proceedings it was established by sales statistics and advertising sheets (e.g. D1, D15, D17) that a Meggle product named "Buttersauce Hollandaise" was available on the market since 1992. This was not contested by the Respondent.

The question, however, arises whether the composition according to the recipe in D1 and/or the product description in section 8 of D6 is representative of the Buttersauce Hollandaise marketed since 1992.

The Board does not share the respondent's view that the correctness of Mr. Blüml's declaration in D5, that *the Buttersauce Hollandaise was on the market from 1 May 1992 until March 2002 in a composition as described in the recipe according to D1 with a variation of  $\pm 5$  weight %* was questionable because Mr. Blüml was an employee of the Appellant Meggle.

In the Board's judgment, the mere fact that a declaration is made by a person testifying in favour of its employer or a company he is professionally engaged with does not automatically nullify the veracity of such a declaration. Rather any declaration is *prima facie* to be taken at its face value unless accompanying circumstances cast doubt on its correctness, the burden of disproving the correctness being on the contesting party. No objective circumstances have been brought forward by the respondent patentee in the present case which could justify disregarding the statements made by Mr. Blüml in document D5.

On the contrary, the Board accepts that Mr. Blüml's position of responsibility as marketing manager of Meggle brought him into contact with its day-to-day business, making it credible that he was well informed about the details of the recipe. This is corroborated by the fact that in D6, Mr. Blüml's request to the Oberfinanzdirektion München made on 27 January 1994, a precise "Buttersauce Hollandaise" recipe is indicated. That at the time this was Meggle's standard recipe for this product can be inferred from its closeness to the recipe in D1 dating from 20 May 1992:

The ingredients listed in D6 and their amounts correspond to the respective ingredients given in the recipe according to D1 within a 5 weight-% margin, with the proviso that the component "7,4% Compound Molkepulver" in D6 corresponds to the sum of "4,74% Molkepulver" plus "2,67% Caseinat" disclosed in D1.

It was moreover confirmed by the Appellant during the oral proceedings - and stands to reason - that within the relevant time period Meggle did not commercialise different versions of Sauce Hollandaise. Rather, butter sauce variations were commercialised under different trade designations: see D17: "Sauce Choron" and "Sauce Béarnaise".

The Board therefore concludes that the product compositions indicated in either of D1 or D6 are representative of the Meggle Buttersauce Hollandaise which was on the market and available to the public before the priority date of the patent.

3. *Novelty*

In the Board's judgment, it follows from the patent specification in its whole context that the claimed invention is concerned with a fat-continuous composition which is mainly based on vegetable fats. This can be derived from paragraph [0001]: "*The present invention relates to a fat continuous composition ... which in addition to **vegetable fat** comprises a flavour, and a protein.*"; paragraph [0010]: "*Thus, in a preferred embodiment the fat or fat blend is free of tufar. The fat blend is therefore substantially composed of **vegetable fats**.*"; paragraph [0011]: "*Examples of suitable **vegetable fat** are ...*" and "*The use of some butterfat is desirable for flavour reasons.*", the latter implying that only minor amounts of butter (animal) fat can be present.

Under these aspects, the word "vegetable" according to the feature in granted Claim 1 "*... the composition is a sauce base comprising 5-80 parts by weight of a vegetable fat or fat blend ...*" also refers to the fat blend variant and indicates that the main portion of the fat blend is of vegetable origin.

The Board therefore does not accept the appellant's interpretation that the passages in paragraph [0010]: "*The fat blend ... can also be a melange comprising fish or animal fat ...*" and in paragraph [0011]: "*Any type of ... fat blend can be applied ...*" also include the exclusive use of animal fat blends.

For the above reasons the claimed fat-continuous composition differs from "Sauce Hollandaise" in that

the fat component is based on vegetable fats and is therefore novel.

4. *Inventive step*

4.1 The subject-matter of the patent in suit

The claimed invention relates to a fat-continuous composition on the basis of vegetable fats suitable for the preparation of sauces by adding water or an aqueous liquid, which also take into account health aspects. Paragraphs [0003] to [0005] of the patent specification point to the demand for "low trans or trans-free products" in view of publications appearing in 1993 and 1994 dealing with the risk of coronary diseases influenced by the trans unsaturated fatty acids (TUFAR) in fat compositions.

According to Claim 1 of the patent as granted (main request) the composition is characterised by the following ingredients:

- (a) a vegetable fat/fat blend having a TUFAR content of less than 4%: 5-80 parts by weight;
- (b) water dispersible dry milk ingredients: 0.5-15 parts by weight;
- (c) starch or starch-like products: 1-20 parts by weight;
- (d) water, taste and/or flavour compounds: up to 40 parts by weight;
- (e) optionally gelatin or similar hydrocolloid: 0.25-5 parts by weight.

#### 4.2 The closest prior art

The closest prior art is represented by the Meggle "Buttersauce Hollandaise" which, as stated under point 2, was typically composed as described in D1 or D6. All ingredients listed in Claim 1 of the patent are also ingredients in Buttersauce Hollandaise. These are:

- (a) butter fat (animal fat instead of vegetable fat):  
76.2% (D1)/76.1% (D6);
- (b) whey powder (corresponding to water dispersible  
dry milk ingredients): 7.41%/7.4%;
- (c) modified starch: 3.57/4.1%;
- (d) white wine/lemon juice (corresponding to  
taste/flavour compounds including water):  
1.84/1,9%;
- (e) carob flour "Johannisbrotkernmehl" (corresponding  
to gelatin/hydrocolloid): 0.44/0.4%.

#### 4.3 The problem to be solved

As already stated in point 3 under novelty, the claimed subject-matter differs from Buttersauce Hollandaise only in the fat component, in that the butterfat base is replaced by a vegetable fat base.

In relation to the issue of novelty, the hotly debated issue of whether or not the TUFAR content of the Meggle Buttersauce Hollandaise meets the "less than 4%" upper limit of the claimed invention is of no importance, having regard to the novelty establishing difference between animal fat (Buttersauce Hollandaise) and vegetable fat (claimed invention). However, it is clear from D3 (page 43, point 3.1), D4 (page 28, Table 2,



"Butter: 6. - 10."), and D8 that it is much more probable that the TUFAR content of the prior-used Meggle Buttersauce Hollandaise was below 4% (thus meeting this requirement of the claimed invention) than above.

Therefore, the problem to be solved by the invention in relation to this prior art product is merely the provision an alternative fat-continuous composition for the preparation of sauces in which the TUFAR portion is similarly low or even lower.

#### 4.4 Obviousness

It is well known that vegetable fats/oils may have a very low TUFAR content. According to D3, point 3.3 under "Fette und Öle" (page 43, right column) salad and vegetable oils are virtually free of (unsaturated) trans fatty acids. According to Table 2 of D4 (group 3, oils Nos. 117 to 122) the TUFAR content of vegetable oils is between 0 and 1.5 wt% .

A skilled person looking for alternative fats with low TUFAR content, possibly even lower than in the animal fat based "Buttersauce Hollandaise", would therefore have been motivated to replace, at least partially, the butter fat by vegetable fats.

Further motivation for this could be derived from the fact that vegetable fats generally have lower contents of saturated fatty acids, known to be another risk factor for coronary disease because of their LDL-C (low density lipoprotein cholesterol) raising effect (D2, answers to the questions "What are the main types of

fatty acids?" and "How do saturated and unsaturated fat relate to heart disease?"). While D2 itself is post-published (1999), the information in the table on page 3 concerning the saturated fat content of margarine vs. butter dates from January 1995. Moreover, this health problem was known long before, and is eg also reflected in D4, page 41, lines 28 to 30.

The respondent's counter-argument that the skilled person would not have envisaged such a change to vegetable fats for fear of adversely affecting taste and consistency is not convincing, since the claimed subject-matter is not restricted to any special composition able to counteract these alleged problems but encompasses any vegetable fat or fat blend having a low TUFAR content, ie fats already used prior to the effective date of the patent in suit for the formulations of margarines and spreads (see eg D4, Table 2, page 33, "Diät- und Halbfettmargarinen").

#### 4.5 Conclusion

For the reasons set out in points 4.1 to 4.4 the subject-matter of Claim 1 is not inventive.

The Respondent's single request is therefore not allowable.

**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

G. Röhn

P. Kitzmantel