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**Datasheet for the decision
of 10 December 2009**

Case Number: T 0535/06 - 3.3.09

Application Number: 00918791.5

Publication Number: 1161154

IPC: A23K 1/10

Language of the proceedings: EN

Title of invention:

Fried pet treats

Patentee:

SOCIETE DES PRODUITS NESTLE S.A.

Opponent:

THE IAMS COMPANY

Headword:

-

Relevant legal provisions:

EPC Art. 54, 56, 114(2)

Relevant legal provisions (EPC 1973):

-

Keyword:

"New document - admitted (filed in due time)"

"Document cited in the description - admitted (technical evidence)"

"Main request (novelty - yes; inventive step - no)"

"Auxiliary requests I and II (novelty - yes; inventive step - no)"

Decisions cited:

-

Catchword:

-



Case Number: T 0535/06 - 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 10 December 2009

Appellant:
(Opponent)

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Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 2 February 2006
rejecting the opposition filed against European
patent No. 1161154 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: N. Perakis
Members: J. Jardón Álvarez
M-B. Tardo-Dino

Summary of Facts and Submissions

I. Mention of the grant of European patent No. 1 161 154 B1 in respect of European patent application No. 00918791.5 in the name of SOCIETE DES PRODUITS NESTLE S.A., which had been filed as International application No. PCT/EP00/02177 on 8 March 2000 claiming a US priority of 10 March 1999 (US 123692 P), was announced on 25 June 2003 (Bulletin 2003/26). The patent, entitled "Fried pet treats", was granted with twenty-four claims. Independent Claims 1, 5, 8, 12, 18 and 24 read as follows:

"1. A pet treat comprising a sealed container; and one or more pieces of a formulated food product in the container, each piece comprising a fried body of a thermally gelled matrix containing protein and starch and being characterised in that the piece or each piece has a moisture content of at least 25% by weight."

"5. A retorted pet treat comprising a sealed container; and one or more pieces of a formulated food product in the container, each piece comprising a fried body of a thermally gelled matrix containing protein and starch and characterised in that the container is retortable and the piece or each piece has a moisture content of above 30% by weight."

"8. A pet treat comprising a sealed container and one or more pieces of a formulated food product and a preservative in the container, each piece comprising a fried body of a thermally gelled matrix containing protein and starch and having a moisture content of at least 25% by weight."

"12. A process for producing a fried pet treat product, the process comprising:
thermally gelling a protein source and a starch source for providing a thermally gelled matrix;
forming the thermally gelled matrix into pieces;
frying the pieces for providing fried pieces and reducing the moisture content of the pieces;
filling the pieces into a container; and
sealing the container,
the process being characterised in that the moisture of the pieces is reduced to no less than 25% moisture by weight."

"18. A process for producing a retorted pet treat, the process comprising:
thermally gelling a protein source and a starch source for providing a thermally gelled matrix; and
forming the thermally gelled matrix into pieces;
the process being characterised by flash frying the pieces for providing fried pieces having a moisture content of no less than 25% by weight; and
filling the pieces into a retortable container and retorting the container."

"24. A retorted, pet treat comprising a retortable, sealed container and one or more pieces of a formulated food product comprising a fried body of a thermally gelled matrix in the container, characterised in that each piece has a moisture content of no less than 25% by weight, the pet treat being obtainable by a process comprising:
thermally gelling a protein source and a starch source for providing a thermally gelled matrix;

forming the thermally gelled matrix into pieces;
flash frying the pieces for providing fried pieces; and
filling the pieces into a retortable container and
retorting the container."

A corrected European patent specification,
EP 1 161 154 **B9** (corrections, page 2), was issued on
3 December 2003 (Bulletin 2003/49) to which reference
is made in this decision when referring to the patent
specification.

- II. A notice of opposition was filed against the patent by
THE IAMS COMPANY on 25 March 2004. The opponent
requested the revocation of the patent in its entirety,
relying on Article 100(a) EPC.

The following documents were filed during the
opposition proceedings:

D1: US-A-5 869 121
D2: WO-A-97/02760
D3: US-A-4 039 692
D4: US-A-4 054 674
D5: US-A-5 773 070
D6: US-A-5 004 624

The opponent argued that the independent claims were
not novel or not inventive in the light of the
disclosures of D3, D5, common general knowledge and
common general practice.

- III. By its decision orally announced on 19 January 2006 and
issued in writing on 2 February 2006 the opposition
division rejected the opposition.

The opposition division considered that the claimed subject-matter was novel over the disclosure of D3 because that document did not unambiguously disclose the technical features of (i) a sealed container and (ii) a thermally gelled matrix of protein and starch. With regard to the second feature the opposition division held, contrary to the arguments of the opponent, that no gelled matrix would be formed during the deep fat frying step disclosed in D3, which was performed at 149°C for 3 minutes. Despite the fact that 149°C was higher than the gelatinisation point of starch, which on the basis of the general knowledge of the skilled person was at 83°C (see D5), simply deep frying at that temperature was not sufficient *per se* to produce the claimed thermally gelled matrix. Therefore also in view of this distinguishing feature the disclosed product was different from that claimed.

Concerning the issue of inventive step the opposition division held that the claimed subject-matter was not obvious in view of the state of the art. According to the opposition division D1 was considered to represent the closest state of the art since it related to pet food products having a soft texture that simulated the appearance of cooked meat, which products were manufactured using a very similar process to that of the opposed patent. The opposition division considered that the claimed subject-matter differed from the disclosure of D1 only in the value of the moisture content, which was claimed to be of at least 25% by weight whereas in D1 it was disclosed to be of less than 20% by weight. With regard to the technical problem to be solved the opposition division considered

that it should be formulated as the provision of a further improved product with respect to the properties of meat-like appearance and texture. The opposition division argued that the skilled person starting from D1 and looking for the solution to this problem would not find in the state of the art any motivation to increase the moisture content. It therefore concluded that the subject-matter of claim 1 was not obvious and that it involved an inventive step.

IV. On 31 March 2006 the opponent (appellant) lodged an appeal against the decision of the opposition division and paid the appeal fee on the same day. The statement setting out the grounds of appeal was filed on 12 June 2006.

V. The appellant filed additional documents, D7 with the statement of grounds of appeal and D8 and with its letter dated 11 November 2009:

D7: US-A-3 745 021

D8: US-A-5 132 137

The appellant essentially disputed the conclusions of the opposition division and requested the revocation of the patent in its entirety. It argued that the subject-matter of independent claims 1, 8, 12 and 18 lacked novelty over D3 and that the subject-matter of all claims lacked an inventive step on the basis of D3 or D1, each considered alone, or on the basis of the obvious combinations of D3 with D7, or D7 with D3, or D1 with D3 or D7.

- VI. With a letter dated 16 October 2006 the patent proprietor (respondent) contested the arguments of the appellant. It essentially argued that the decision of the opposition division was correct on each of the issues it dealt with.
- VII. On 10 December 2009 oral proceedings were held before the Board. During these oral proceedings the patent proprietor submitted two auxiliary requests. Auxiliary request I included 12 claims corresponding to granted claims 5-7 and 18-26. Auxiliary request II included 9 claims corresponding to granted claims 5-7 and 18-23.
- VIII. The appellant (opponent) requested that the decision under appeal be set aside and that the European patent No. 1 161 154 be revoked.
- IX. The respondent (patent proprietor) requested that the appeal be dismissed and the patent be maintained as granted, or alternatively on the basis of the set of claims of auxiliary request I or auxiliary request II both filed during the oral proceedings. It further requested that documents D7 and D8 be not admitted into the proceedings.
- X. The arguments put forward by the appellant (opponent) in its written submissions and at the oral proceedings can be summarized as follows:

Admissibility of documents D7 and D8

- Documents D7 and D8 should be admitted into the proceedings. D7 was filed with the grounds of appeal. D8 was cited in the application as originally filed, in which it was mentioned that its disclosure was

incorporated by reference; thus its content would not have surprised the patent proprietor.

Novelty

- The subject-matter of independent claim 1 of the main request was not novel over D3.
- Although D3 did not disclose the feature related to a sealed container, this was commonplace to the skilled person.
- Furthermore, contrary to the arguments of the patent proprietor, D3 disclosed the claimed fried body of a thermally gelled matrix containing protein and starch. Though D3 referred in explicit terms only to a frying step, the conditions of this step inevitably led to the simultaneous formation of a gelled matrix. Reference was made to column 4, lines 64-65, which exemplified frying a composition in corn oil for 3 minutes at a temperature of 300°F (149°C). The appellant argued that this heat treatment did not technically differ from the claimed thermal gelation treatment of the matrix ingredients, protein (meat) and starch.
- For this interpretation of the specific disclosure of D3 the appellant referred on the one hand to D5 (column 9, lines 64-67), which disclosed that heating protein and starch to a temperature above the gelatinisation point of starch, ie 83°C, formed a continuous matrix, and on the other hand to D8 (column 2, lines 9-15) which disclosed that gelatinisation of the meat (proteinaceous material) occurred when heating it at 40°-75°C in the gap between the plates of a high speed emulsifier.
- In view of the claimed subject-matter, which did not require that both constituents, starch and protein,

should be gelled in the matrix, it was enough that at least one of the matrix ingredients was gelatinised under the frying conditions of D3.

- Furthermore, the emulsification conditions disclosed in the specification of the opposed patent, namely the use of a specific emulsion mill (paragraphs [0035]-[0037]), should not be considered limiting the claimed subject-matter because they were not recited in it and because they did not constitute the only conditions used for the manufacture of a gelled matrix (paragraph [0038]).

Inventive step

- The subject-matter of independent claims 1, 5, 18 and 24 of the main request, of independent claims 1, 4 and 10 of auxiliary request I, and of independent claims 1 and 4 of auxiliary request II lacked an inventive step over D1 considered alone.
- D1 should be considered to represent the closest state of the art. The subject-matter of claim 1 of the main request was novel over D1 because it claimed a moisture content of at least 25% by weight. In principle D1 did not consider the moisture content as an essential feature of the disclosed invention since it did not mention it in its broadest definition.
- The technical problem to be solved by the claimed invention in view of D1 would be to provide an alternative pet treat. The patent specification did not comprise any data in support of an unexpected or surprising effect resulting from the moisture content of the claimed subject-matter nor such data have ever been filed by the patent proprietor in order to support an unexpected effect. Thus the

alleged improvement of the pet food properties was not technically founded.

- The solution of this problem was achieved by the provision of a pet food with a moisture content of at least 25% by weight, which corresponded to the so-called intermediate-moisture pet foods. The claimed moisture content was a little higher than the preferred content of D1, namely of less than 20% by weight.
- In view of the disclosed pet foods, those claimed with an intermediate-moisture content of at least 25% by weight were, however, obvious to the skilled person since intermediate-moisture content pet foods belonged to his general technical knowledge. This was illustrated in D3 (column 1, second paragraph) and D4 (column 1, first paragraph).
- Moreover, contrary to the arguments of the patent proprietor, there was no technical prejudice in the art which would prevent the skilled person from increasing the moisture content above the disclosed value of 20% by weight. In particular because a content of less than 20% by weight was only a preferred moisture content. Anyway the skilled person knew that a pet food with higher moisture content had a better palatability despite the fact that it was less convenient as it required a sealed container in order to avoid microbial growth. The preference of D1 for drier food products was guided by the desire to avoid sealed containers.
- In both D1 and the opposed patent the reduction of the moisture content of the gelled matrix was performed by carrying out a frying step. In D1 the frying step was carried out longer in order to drastically reduce the pet food moisture content.

However, the skilled person aiming at satisfying his customers who were used to purchase intermediate-moisture pet treats would also perform the frying under such conditions so that a higher moisture content than the disclosed 20% by weight, such as above 25% by weight, be attained, and this without exercising an inventive step.

- With regard to the additional feature of a retorted product/ a retortable container/ a retorting step (claims 5, 18 and 24 of the main request, which corresponded to the independent claims of the auxiliary requests I and II), the appellant argued that this/these feature/features was/were well known measure/measures at the priority date of the opposed patent, which was/were conventionally used in order to sterilize the food and avoid bacterial growth. D2 (example 4) illustrated this common general knowledge of the skilled person.
- Therefore it was obvious to the skilled person starting from D1 and seeking to prevent bacterial growth to sterilise the pet treat of D1 by the use of retorting. Consequently the subject-matter of claims 5, 18 and 24 of the main request and the corresponding claims of the auxiliary requests lacked an inventive step.

XI. The arguments put forward by the respondent (patent proprietor) in its written submissions and at the oral proceedings can be summarized as follows:

Admissibility of new documents

- Documents D7 and D8 filed during the appeal should not be admitted in the proceedings as they were late filed and not more relevant than the documents already on file.

Novelty

- The subject-matter of claim 1 of the main request was novel over the opposed state of the art.
- D2 and D7 did not disclose that the thermally gelled matrix was fried, with the consequence that the disclosed products were different from the claimed fried food product.
- D3 disclosed neither a sealed container nor a pet food product having a thermally gelled matrix.
- A novelty objection raised against the feature of the thermally gelled matrix could not be based on the combination of D3 with D5 and D8.
- In this context, D5 and D8 should not be considered as technical evidence on which the interpretation of the frying step of D3 could be based, namely that this frying step simultaneously led to the formation of a heat gelled matrix.
- Anyway the opponent had not submitted technical evidence to show that the disclosure of D3 implicitly comprised all the features of the claimed subject-matter.
- The subject-matter of at least claims 5, 18 and 24 of the main request and of the corresponding claims of auxiliary requests I and II differed from the disclosure of D3 in that it additionally comprised the retorting of the pet food in a retortable container.

Inventive step

- The subject-matter of claims 1, 5, 18, 24 of the main request and of the corresponding claims of auxiliary requests I and II involved an inventive step.
- The subject-matter of claim 1 differed from the disclosure of D1, which the appellant considered to represent the closest state of the art, in the moisture content of the pet food product: claim 1 required a moisture content of at least 25% by weight, whereas D1 disclosed a remarkably lower moisture content, namely less than 20% by weight, preferably between 5% and 16% by weight.
- In view of the disclosure of D1 the objective technical problem should be defined as to provide a further pet treat that was of excellent palatability and which had texture and appearance similar to that of cooked meat while being of relatively low moisture content.
- Nevertheless, the skilled person was taught by D1 that the disclosed pet food was advantageous. Consequently he would find no motivation in that document, contrary to the argument of the appellant, to increase the moisture content to that claimed, namely to at least 25% by weight. In fact, D1 aimed at keeping the moisture content under 20% by weight and thus taught fully away from a pet food with a moderate moisture content. The additional advantage imparted by the disclosed moisture content was that the pet treats did not stick.
- Moreover, the difference between the disclosed range of less than 20% by weight or the preferred range of 5%-16% by weight and the claimed range of at least

25% by weight or above 30% by weight (claim 5 of the main request; claim 1 of the auxiliary requests) was not a small one as argued by the appellant but a substantial one.

- With regard to the additional difference of claims 5, 18 and 24 (which corresponded to claims 1, 4 and 10 of the auxiliary requests), namely to the retorted product/retorting step/retortable container, the skilled person would find no hint in D1 for the use of a retortable container or the application of a retorting step. In fact the skilled person would not consider such a container or such a step because D1 concerned dry products which did not need sterilisation contrary to the much more humid products of the claimed invention. Furthermore, the skilled person would not take into consideration example 4 of D2 because the disclosed food product was different from that claimed.

Reasons for the Decision

1. The appeal is admissible.
2. Admissibility of documents D7 and D8

The appellant filed document D7 together with the grounds of appeal. The Board considers that the filing of this document at that stage related to the substantiation of the appellant's arguments in reply to the reasoning set out in the decision of the opposition division. In this respect it was filed in due time according Article 114(2) EPC. Under these circumstances the Board admitted D7 into the proceedings.

The appellant made reference to document D8 for the first time in its letter dated 11 November 2009. The Board concurs with the appellant that this document is cited in the opposed patent (column 4, line 49 and column 5, line 2) in relation to a specific type of emulsion mill and the conditions of its use. The appellant has used this document as technical evidence when arguing against the novelty of the claimed subject-matter. Since this document and its specific disclosure are neither new nor surprising for the patent proprietor it was admitted into the proceedings.

Main Request

3. Novelty

3.1 Claim 1 concerns a pet treat comprising a sealed container and one or more pieces of a specifically formulated product in the container. The product comprises a fried body of a thermally gelled matrix containing protein and starch and has a moisture content of at least 25% by weight.

The Board in agreement with the opposition division and the patent proprietor considers that the subject-matter of this claim is not anticipated by any cited document.

3.1.1 **D3** (column 1, lines 6-8; column 1, line 51 to column 2, line 17; column 2, lines 31-40; column 3, lines 15-46; column 4, line 37 to column 5, line 6) discloses intermediate-moisture pet food products which have been prepared under specific frying conditions. Contrary to the claimed products, those of D3 have not been

disclosed to comprise a thermally gelled matrix. Nor has the opponent appellant provided any experimental evidence in order to show that such a matrix was the direct product of the process of D3.

3.1.2 The appellant has only interpreted the disclosure of D3 and has considered that the frying step simultaneously led to the gelatinisation of the matrix with the consequence that the final product cannot be distinguished from that claimed. The appellant referred to the specific disclosure of D3 (column 4, line 37 to column 5, line 4) according to which frying is carried out at 149°C (300°F) for a period of 3 minutes. The appellant argued that under these conditions the proteins which gelatinise at lower temperatures, namely between 40°-75°C (see D8: column 2, lines 3-20 and 40-46; figure 2), would form a thermally gelled matrix. It also argued that under these conditions also the starch, which has a gelatinisation temperature of 83°C (see D5: column 9, lines 64-67), would form a thermally gelled matrix.

The Board, however, does not concur with this interpretation of the appellant for the following reasons:

- D8 (see *supra*) not only discloses the gelatinisation of meat (proteinaceous ingredient) alone, ie not in admixture with starch, but further discloses that this gelatinisation takes place under specific emulsification conditions which include the passing of the meat between the plates of a high speed emulsifier. Such a specific emulsification of the meat (proteinaceous ingredient) is not, however, part of the disclosure of D3. Consequently this

document does not directly and unambiguously disclose that gelatinisation of the meat proteins will take place during the frying at 149°C for 3 minutes.

- D5 (example 4) discloses not only heating a mixture comprising starch and water at a temperature above the gelatinisation point of starch, namely above 83°C, but its simultaneous treatment in a twin-screw extruder in order to mix and shear the composition ingredients. It is actually the combination of these treatment conditions that leads to the formation of a continuous matrix. These specific combined conditions are not, however, part of the disclosure of D3. Consequently this document does not directly and unambiguously disclose the gelatinisation of starch.

In view of the above the Board concludes that the subject-matter of claim 1 is novel over the disclosure of D3.

- 3.1.3 **D1** (claim 1; column 1, lines 5-10 and 38-50) discloses pet treats similar to those claimed. However it does not specify that the moisture content of the formulated pieces is at least 25% by weight. The broadest disclosure concerning the moisture content of the pet treats in D1 is that they are "moisture-reduced" (claim 1; column 1, lines 38-41); more specifically that their moisture content is less than about 20% by weight (column 1, lines 42-45; column 3, lines 66-67) and even more specifically less than 16% by weight (column 1, lines 52-60).

3.1.4 **D2** (abstract; claims; page 2, lines 8-17 and 26-28; page 3, lines 6-8; page 6, line 34 to page 7, line 9; page 7, lines 31-32) and **D7** (claim 1; column 1, line 56 to column 2, line 25; column 2, lines 49-50; example II) disclose pet food products with a thermally gelled matrix. Contrary to the claimed products, those disclosed by D2 and D7 have not been fried. Consequently compared to the claimed fried products they have neither their texture nor their fat coating (cf patent: paragraph [0041], lines 48-51; D1: column 4, lines 46-49; D3: column 2, lines 1-5).

3.1.5 The other cited documents are less relevant for the issue of novelty.

3.2 The other independent claims of the main request have not been contested for lack of novelty by the appellant. The Board in view of the considerations set out above (see point 3.1) acknowledges the novelty of the subject-matter of all further independent claims, namely claims 5, 8, 12, 18 and 24. In particular with regard to independent claims 5, 18 and 24 the Board, comparing their subject-matter to that of claim 1, makes the following remarks:

- the subject-matter of claim 5 comprises the additional feature of a retorted pet treat, of a retortable container and of moisture content of above 30% by weight;
- the subject-matter of claim 24 comprises the additional feature of a retorted pet treat, of a retortable container and of a specific process leading to the claimed product;
- the subject-matter of claim 18 relates to a process for producing a pet treat which, compared to that of

claim 1, is additionally retorted and which further comprises a retortable container.

4. Inventive step

4.1 Closest state of the art

4.1.1 The Board considers D1 to represent the closest state of the art. D1 (see *supra*) relates to the same technical field of the patent in suit, namely the provision of a pet treat with an appearance which simulates that of meat and with improved palatability. In comparison to the other cited documents D1 discloses the most of the technical features of the subject-matter of claim 1 of the main request.

The pet treats of D1 are said to be **moisture-reduced** (claim 1; column 1, lines 38-42) with a moisture content of less than about 20% by weight, preferably less than 16% by weight, for example 5%-16% by weight (column 1, lines 43-46 and 56-60; bridging paragraph columns 3 and 4).

4.1.2 The pet treats of claim 1 of the present request differ from those of D1 (see point 3.1.3 *supra*) only in their moisture content, which is claimed to be of at least 25% by weight. The claimed pet treats are therefore **intermediate-moisture (semi moist)** pet treats whose moisture content varies in the range of 15%-60% by weight (see D3: column 1, lines 9-16; D4: column 1, lines 4-10; D5: column 3, lines 31-41; D6: column 1, lines 36-39; D7: column 1, lines 14-18 and 56-60).

4.2 The technical problem to be solved

- 4.2.1 The patent cites as the technical problem to be solved the provision of a pet treat which simulates the texture and appearance of meat and which has excellent palatability (paragraph [0005]).
- 4.2.2 However this problem has already been solved by D1 (column 1, lines 5-8, 29-35 and 48-51).

With regard to the texture and appearance of the product the Board refers to the patent specification which discloses that the required highly striated appearance and the texture of the meat is provided to the claimed pet treats by the formation of a gelled matrix (paragraph [0037]). This is also the case in D1 (column 3, lines 3-40). The Board makes particular reference to respective "example 1" of the opposed patent and of D1, which both disclose exactly the same gelled matrix/product as far as the ingredients and the preparation method are concerned, which gelled matrix/product has in both cases a moisture content of about 55% by weight.

The subsequent frying of the gelled matrix does not have any negative impact on the texture and the appearance of the product (patent: paragraphs [0041] and [0051]). The different frying conditions according to D1 do not negatively alter these properties (D1: column 4, lines 7-12 and column 5, lines 7-13).

With regard to the palatability, the opposed patent does not provide any technical evidence for an improvement over D1.

4.2.3 Under these circumstances the technical problem has to be reformulated. The Board notes that in the absence of technical evidence related to an improvement or an unexpected effect obtained by the pet treats according to the main request over those disclosed by D1, the objective technical problem can only be defined as the provision of **an alternative** pet treat with a texture and appearance which simulates that of meat and with excellent palatability.

The solution of the technical problem is provided by the pet treats according to claim 1 of the main request which have a moisture content of at least 25% by weight. The experimental part of the patent specification provides the technical evidence of the manufacture of such pet treats.

4.3 Obviousness

4.3.1 The question which remains to be answered is whether it would be obvious for the person skilled in the art starting out from D1, and aiming at the provision of an alternative pet treat with equally appealing texture, appearance and palatability, to consider treats with a moisture content of at least 25% by weight.

In the Board's judgement it would be indeed obvious for the skilled person to solve the above problem by the means claimed. The Board has come to this conclusion because the claimed moisture range is a conventional one in pet food technology (see D2: abstract; D3: claim 1; D5: column 5, lines 31-40; D7: column 1, lines 56-60). Furthermore the Board considers that there is no technical prejudice in the art and

specifically in D1 against using such a moisture content in pet treats. On the contrary, it is clear from D1 that the frying step is made in order to reduce the moisture content of the pet treats and that the specific time and temperature needed to achieve a particular moisture level can be determined by the skilled person using routine methods (D1: column 3, line 56 to column 4, line 6). A comparison of respective examples 1 of the opposed patent and D1 shows that a different moisture content is achieved by following exactly the same procedure and by modifying only the frying duration (3 minutes in D1 and 20 seconds in the opposed patent). In view of the above, the Board concludes that it would have been obvious for the skilled person looking for an alternative pet treat of D1 to apply milder frying conditions than those disclosed in D1 in order to obtain pet treats having a higher moisture content.

- 4.3.2 The Board does not concur with the patent proprietor who argued that D1, by disclosing low moisture content pet treats, would not motivate the skilled person to increase the moisture content to that of intermediate moisture content pet treats. To the Board's understanding the technical significance of the low moisture content in the pet treats of D1 is limited to its unexpected ability to maintain the meat-like appearance of the treats (column 4, line 7-12). This effect at low moisture content does not cause any prejudice against the claimed higher moisture content which as mentioned above is disclosed to have satisfactory appearance.

- 4.4 The Board therefore comes to the conclusion that the subject-matter of claim 1 of the main request does not involve an inventive step. Consequently the main request is not allowable.

Auxiliary requests I and II

5. Auxiliary request I comprises twelve claims which correspond to granted claims 5-7 and 18-26 renumbered as claims 1 to 12. Auxiliary request II comprises nine claims which correspond to granted claims 5-7 and 18-23 renumbered as claims 1 to 9. The appellant did not contest the admissibility of these requests and the Board has admitted them into the proceedings.
6. The Board considers that the subject-matter of the auxiliary requests fulfils the requirements of Article 123(2) EPC because it corresponds to the subject-matter of granted claims, against which no objection under Article 100(c) EPC was raised.
7. Novelty

The Board notes that the appellant acknowledged the novelty of the subject-matter of the auxiliary requests. The Board concurs with the appellant because the claims of the auxiliary requests correspond to claims of the main request which have been found to fulfil the novelty requirements (see point 3.2 above).

8. Inventive step

8.1 Auxiliary request I - claim 10

Claim 10 of this request corresponds to claim 24 of the main request. The subject-matter of this claim relates to a retorted, pet treat, comprising a retortable, sealed container and one or more pieces of a formulated food product obtainable by a specific process and having a moisture content of no less than 25% by weight.

8.1.1 Closest state of the art

As set out above (see point 4.1) D1 is considered to represent the closest state of the art. The subject-matter of claim 10 differs from the disclosure of D1 in that the moisture content of the pet treat is higher, namely not less than 25% by weight, and in that the pet treat comprises a retortable container and is retorted. With regard to the latter the Board notes that this feature concerns the means by which commercial sterilization is carried out (patent specification, paragraph [0047]), ie microbial growth is prevented. According to D1 this is achieved by addition of an anti-microbial agent or of a preservative ingredient (column 4, lines 24-27).

8.1.2 The technical problem

In addition to what has been set out above with regard to the main request in relation to the technical problems of texture, appearance and palatability of the pet treats (see point 4.2), the Board further considers that the technical problem of microbial growth

prevention has also been addressed and solved in D1 (column 4, lines 24-27).

The objective technical problem should thus be to provide **an alternative** pet treat with a texture and appearance which simulates that of meat, with excellent palatability and with antimicrobial properties. The Board is satisfied that the technical evidence of the opposed patent (paragraph [0052]) shows that this problem has been credibly solved. This finding was not disputed by the appellant.

8.1.3 Obviousness

The Board, as set out above (see point 4.3), considers that the increase of the moisture content of the pet treat of D1 to the claimed value of not less than 25% by weight is obvious to the skilled person in the art. In addition to this, the Board considers that the use of retortable container and of a retorting process step in order to provide antimicrobial properties to a pet treat through sterilisation is a feature which belongs to the general technical knowledge of the skilled person. This has been acknowledged by the patent proprietor itself in the specification of the opposed patent (see paragraph [0047]). Consequently the combination of a retortable container in retorting step with the preparation of the pet treats of D1 is within the technical capabilities and ordinary duties of the skilled person. Therefore no inventive merit should be acknowledged for this additional technical feature. Furthermore the Board notes that the patent proprietor has not substantiated or even referred to any unexpected technical advantage obtained from the

combination of (i) the moisture content increase and (ii) the use of a retortable container allowing the retorting of the pet treat.

8.1.4 In view of these considerations the Board comes to the conclusion that the subject-matter of claim 10 of auxiliary request I is obvious over the disclosure of D1.

8.2 Auxiliary request II - claim 1

Claim 1 of this request corresponds to claim 5 of the main request. The subject-matter of this claim relates to a retorted, pet treat comprising a retortable, sealed container and one or more pieces of a formulated food product having a moisture content of above 30% by weight.

8.2.1 Closest state of the art

As set out above (see point 4.1) D1 is considered to represent the closest state of the art. The subject-matter of claim 1 differs from the disclosure of D1 in that the moisture content of the pet treat is higher, namely above 30% by weight, and in that the pet treat comprises a retortable container and is retorted.

8.2.2 The technical problem

For the same reasons as set out above with regard to auxiliary request I, also in the case of claim 1 of auxiliary request II the technical problem has to be reformulated. The objective technical problem remains the same as above and concerns the provision of an

alternative pet treat with a texture and appearance which simulates that of meat, with excellent palatability and with antimicrobial properties. The Board is satisfied that the technical evidence of the opposed patent (paragraph [0052]) shows the preparation of the claimed pet foods (final moisture content of 40% by weight).

8.2.3 Obviousness

The Board following the same reasoning as set out above (see points 4.3 and 8.1.3) considers that the increase of the moisture content of the pet treat of D1 to the claimed value of above 30% by weight is obvious to the skilled person in the art. The same applies to the use of retortable container and of the retorting of the pet treat (see point 8.1.3). The Board comes therefore to the conclusion that the subject-matter of claim 1 of auxiliary request II is obvious and that this claim should be rejected.

9. Since none of the requests fulfils the requirements of inventive step, no patentable subject-matter is available and the patent has to be revoked.

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

N. Perakis