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**Datasheet for the decision
of 7 October 2009**

Case Number: T 1871/06 - 3.3.09

Application Number: 98951573.9

Publication Number: 1026958

IPC: A23K 1/14

Language of the proceedings: EN

Title of invention:

Pet food containing chicory pulp

Patentee:

MARS UK LIMITED

Opponent:

NESTEC S.A.

Headword:

-

Relevant legal provisions:

EPC Art. 56, 83, 123(2)

RPBA Art. 13

Relevant legal provisions (EPC 1973):

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Keyword:

"Admittance of late-filed documents (no)"

"Main request (rejected - added subject-matter)"

"First and second auxiliary requests (not admitted in the procedure - not overcoming the objection raised with regard to the main request)"

"Third auxiliary request (inventive step - yes)"

Decisions cited:

-

Catchword:

-



Case Number: T 1871/06 - 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 7 October 2009

(Opponent)

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Decision under appeal:

Interlocutory decision of the Opposition
Division of the European Patent Office posted
9 October 2006 concerning maintenance of
European patent No. 1026958 in amended form.

Composition of the Board:

Chairman: P. Kitzmantel

Members: N. Perakis

K. Garnett

Summary of Facts and Submissions

I. Mention of the grant of European patent No 1 026 958 in respect of European patent application No 98951573.9 in the name of Mars UK Limited, which had been filed as International application No PCT/GB1998/03256 on 30 October 1998 claiming a GB priority of 31 October 1997 (GB 9723059), was announced on 16 June 2004 (Bulletin 2004/25). The patent entitled "Pet food containing chicory pulp" was granted with fourteen claims. Independent Claims 1, 2, 8, 12, 13 and 14 read as follows:

"1. A pet food product which comprises chicory pulp, which has had at least some of the inulin removed by extraction, the chicory pulp providing the pet food product with an inulin content of less than or equal to 2% on a dry matter basis of the total pet food product, the inulin being the remaining inulin provided as part of chicory pulp after inulin extraction, the chicory pulp being in an amount which: i) maintains good faeces quality or improves the faeces quality of a pet and/or ii) maintains good gastrointestinal tract health and/or improves the gastrointestinal tract health of a pet."

"2. A pet food product which comprises chicory pulp, which has had at least some of the inulin removed by extraction, the chicory pulp being in an amount which: i) maintains good faeces quality or improves the faeces quality of a pet and/or ii) maintains good gastrointestinal tract health and/or improves the gastrointestinal tract health of a pet; the pet food product having an inulin content of less than 0.25% on a dry matter basis of the total pet food product."

"8. The use of chicory pulp, which has had at least some of the inulin removed by extraction to result in chicory pulp comprising 5-10% inulin, in the manufacture of pet food product for use in i) maintaining good faeces quality or improving the faeces quality of a pet and/or ii) maintaining good gastrointestinal tract health and/or improving the gastrointestinal tract health of a pet."

"12. Chicory pulp, which has had at least some of the inulin removed by extraction to result in chicory pulp comprising 5-10% inulin for use in i) maintaining good faeces quality or improving the faeces quality of a pet and/or ii) maintaining good gastrointestinal tract health and/or improving the gastrointestinal tract health of a pet."

"13. A process for the preparation of a pet food product as claimed in any of claims 1 to 7, the process comprising mixing chicory pulp, which has had at least some of the inulin removed by extraction, with one or more ingredients of a pet food product, the chicory pulp providing the pet food product with an inulin content of less than or equal to 2% on a dry matter basis of the total pet food product, the inulin being the remaining inulin provided as part of chicory pulp after inulin extraction."

"14. A process for the preparation of a pet food product as claimed in any one of claims 1 to 7, the process comprising mixing chicory pulp, which has had at least some of the inulin removed by extraction, with one or more ingredients of a pet food product, the pet

food product having an inulin content of less than 0.25% on a dry matter basis of the total pet food product."

- II. A Notice of Opposition was filed against the patent by NESTEC S.A. on 16 March 2005. The Opponent requested the revocation of the patent in its entirety, relying on Articles 100(a), 100(b) and 100(c) EPC.

The following documents were *inter alia* filed during the opposition proceedings:

D9 : Summary and Abstract of "Cigarant[®] as a substitution for concentrates in grass silage rations for dairy cattle (2003)", A. Klop *et al*, Animal Science Group, division Applied Research, PV-Applied Research Report Cattle, ISSN 1570-1816

D10: "Timely Topics in Nutrition", D. S. Dimsky and C. A. Buffington, JAVMA, vol. 199 (No 9), 1991, pp 1142-45

- III. By an interlocutory decision orally announced on 7 September 2006 and issued in writing on 9 October 2006 the Opposition Division maintained the patent on the basis of Claims 1 to 14 of the sole request filed with letter dated 21 October 2005.

This request of the Patent Proprietor (called the **main request** in this decision) corresponded to the claims as granted in which the independent Claims 1 and 13 were amended and read as follows:

"1. A pet food product which comprises chicory pulp, which has had at least some of the inulin removed by extraction, the chicory pulp providing the pet food product with an inulin content of **from 0.025%** to 2% on a dry matter basis of the total pet food product, the inulin being the remaining inulin provided as part of chicory pulp after inulin extraction, the chicory pulp being in an amount which: i) maintains good faeces quality or improves the faeces quality of a pet and/or ii) maintains good gastrointestinal tract health and/or improves the gastrointestinal tract health of a pet."
[emphasis by the Board in order to indicate the amended feature].

"13. A process for the preparation of a pet food product as claimed in any of claims 1 to 7, the process comprising mixing chicory pulp, which has had at least some of the inulin removed by extraction, with one or more ingredients of a pet food product, the chicory pulp providing the pet food product with an inulin content of **from 0.025%** to 2% on a dry matter basis of the total pet food product, the inulin being the remaining inulin provided as part of chicory pulp after inulin extraction."
[emphasis by the Board in order to indicate the amended feature].

IV. With regard to the grounds of opposition invoked by the Opponent under Article 100 EPC, the Opposition Division decided as follows:

The lower and upper limits of 0.025% and 2% of inulin content in independent Claims 1 and 13 and the expression "is an amount of" in dependent Claims 3 and

4 find support in the application as originally filed. Hence the subject-matters of these claims fulfil the requirements of Article 123(2) EPC.

In the absence of any evidence submitted by the Opponent, the specification of the opposed patent provides sufficient directions to the skilled person how to reproduce the claimed invention. Consequently the requirements of Article 83 EPC are also fulfilled.

With regard to the issue of inventive step, the Opposition Division held that the skilled person would not combine D9 with D10. Despite the fact that D9 was published after the priority date of the opposed patent, it was not disputed that it provided the information that the chicory pulp product Cigarant[®] was available to the public before the priority date of the opposed patent. D9, however, did not disclose whether inulin was extracted from it and what the inulin content was. Nor did it disclose any benefits related to pet animals. D9 was only concerned with a feed substitute for milk-producing cattle. These animals had a very different gastrointestinal system from that of pets.

V. On 7 December 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 February 2007.

VI. The Appellant disputed the conclusions of the Opposition Division and requested the revocation of the patent in its entirety. It also filed the following documents

D9a: Dutch internet publication, dated 22 August 2006, entitled "Gedroogde Cichoreipulp" and taken from http://content.cosun.nl/Suikerunie/nl/66_Gedr-Cigarant.htm (accompanied by an English translation)

D11: Letter from Mr David Goulet to Ms Gail Czarnecki, dated 7 August 1998 including a product information sheet

D12: Technical Statement of Ms Gail Czarnecki-Maulden, dated 4 September 2009

It reiterated the objections under Articles 100(a), (b) and (c) EPC. Its argument with regard to the issue of insufficiency of disclosure was further based on calculations submitted with the statement of grounds of appeal.

VII. With letters dated 29 June 2007 and 7 August 2009 the Respondent contested the arguments of the Appellant. It argued (i) that the claimed subject matter found support in the originally filed application; (ii) that the specification as a whole provided the skilled person with guidance as to how the amount of chicory pulp could be varied in order to achieve the desired result without undue burden; and (iii) that the claimed subject-matter was not obvious in view of D10 considered alone or in combination with D9. The Respondent requested that D9a and D11 be not admitted in the proceedings.

VIII. On 7 October 2009 oral proceedings were held before the Board. At these oral proceedings the Board raised a further objection within the legal framework of Article 100(c). This objection concerned the upper limit of 2% inulin in the subject-matter of independent Claims 1 and 13, which according to the preliminary opinion of the Board found no support in the application as filed.

In reaction to that objection the Patent Proprietor (Respondent) submitted three auxiliary requests (see Minutes of the oral proceedings). For the purpose of this decision only the full text of independent Claims 1 and 13 of the third auxiliary request is relevant.

Claims 1 and 13 of the third auxiliary request read as follows:

"1. A pet food product which comprises chicory pulp, which has had at least some of the inulin removed by extraction, the chicory pulp providing the pet food product with an inulin content of **from 0.5% to 1% or from 0.3% to 0.8%** on a dry matter basis of the total pet food product, the inulin being the remaining inulin provided as part of chicory pulp after inulin extraction, the chicory pulp being in an amount which:
i) maintains good faeces quality or improves the faeces quality of a pet and/or ii) maintains good gastrointestinal tract health and/or improves the gastrointestinal tract health of a pet."

[emphasis by the Board in order to indicate the amended feature in comparison with granted Claim 1].

"13. A process for the preparation of a pet food product as claimed in any of claims 1 to 7, the process comprising mixing chicory pulp, which has had at least some of the inulin removed by extraction, with one or more ingredients of a pet food product, the chicory pulp providing the pet food product with an inulin content of **from 0.5% to 1% or from 0.3% to 0.8%** on a dry matter basis of the total pet food product, the inulin being the remaining inulin provided as part of chicory pulp after inulin extraction."

[emphasis by the Board in order to indicate the amended feature in comparison with granted Claim 13].

- IX. The Appellant (Opponent) requested that the decision under appeal be set aside and that the European patent No. 1 026 958 be revoked.
- X. The Respondent (Patent Proprietor) requested that the appeal be dismissed, alternatively that the decision under appeal be set aside and the patent be maintained on the basis of the first, second or third auxiliary requests filed during the oral proceedings.
- XI. The arguments put forward by the Appellant (Opponent) in its written submissions and at the oral proceedings can be summarized as follows:
- Documents D9a, D11 and D12 should be admitted in the proceedings. Although they are post-published they disclosed technical information publicly available before the priority date of the opposed patent.
 - The Main Request contravened the requirements of Article 123(2) EPC. The content of inulin in independent Claims 1 and 13 was not directly and

unambiguously derivable from the originally filed application.

- The three auxiliary requests should not be admitted since they were only filed at the oral proceedings, thus very late, and the Article 123(2) EPC objection had been raised long before in the grounds of appeal. Hence the Respondent should have reacted earlier. Moreover, the subject-matter of independent Claim 1 of these requests comprised feature(s) taken from the description. This was not in accordance with common practice.
- The subject-matter of Claims 1 and 13 of the first and the second auxiliary request found no support in the application as originally published.
- The third auxiliary request, though not contravening the requirements of Articles 84 and 123(2) EPC still contained Claims 3 and 4 which, in view of their dependency on Claim 2, did not fulfil the requirements of sufficiency. As was shown by the calculation submitted with the Grounds of Appeal with regard to this Claim 2 - which set a maximum of less than 0.25% for the inulin content - the invention was workable only with an amount of chicory pulp varying between 0.5 and 5% based on dry weight of pet food according to Claim 3 and between 2 and 5% according to Claim 4. Thus a large portion of the subject-matter of Claims 3 and 4 was outside the subject-matter of Claim 2.
- The subject-matter of all independent claims of the third auxiliary request lacked an inventive step in view of the disclosure of D10 in combination with that of D9.

- D10, which disclosed the use of beet pulp for pet food, should be considered to represent the closest state of the art.
- The technical problem underlying the claimed invention was therefore to provide an alternative to beet pulp in pet food.
- Contrary to what the Patent Proprietor alleged there was no unexpected effect derivable from the experimental evidence of the opposed patent. This contained two series of tests: the first carried out on a specific dog species (beagles) and the second on a variety of species. Though some results showed an improvement when chicory-containing food was used, no general improvement has been demonstrated.
- Therefore the skilled person looking for an alternative to beet pulp would find in D9 a hint to consider chicory pulp of the claimed inulin content.
- D9 disclosed a chicory pulp, under the trade name Cigarant[®], which was known since 1992. The skilled person would realize that chicory pulp fibres were similar to beet pulp fibres - the similarity of the two pulps was also admitted in the patent, paragraph [0011], first sentence. Thus the skilled person would envisage the use of chicory pulp as a replacement for the known applications of beet pulp.
- The skilled person would not limit the applications of Cigarant[®] to cattle. Its fibres had no effect on milk production, but only influenced the gastrointestinal function of the animals. Therefore, the skilled person in the field of animal food would also use it to feed pets for maintaining faeces quality and gastrointestinal health.

XIII. The arguments put forward by the Respondent (Patent Proprietor) in its written submissions and at the oral proceedings can be summarized as follows:

- Documents D9a, D11 and D12 should not be admitted in the proceedings. They were post-published and not relevant.
- The inulin content of Claims 1 and 13 of the main request was directly and unambiguously derivable from the content of the originally filed application (see WO publication), especially from the disclosure on page 4, first paragraph. The use of the word "may" supported this interpretation.
- The auxiliary requests should be allowed because they were filed as a reaction to the specific objection under Article 123(2) EPC expressed for the first time at the oral proceedings.
- The subject-matters of these requests should not be surprising to the Appellant because they corresponded to amendments requested by it previously.
- The subject-matter of Claims 1 and 13 of the auxiliary requests was supported by the originally published application - the content of inulin of 5-10% was specifically disclosed on page 4, lines 11-12.
- The objection under Article 83 EPC concerning the combination of the subject-matter of Claim 2 with the specific features of Claims 3 and 4 was unfounded. The patent specification taught the skilled person how to carry out the claimed invention.
- The subject-matter of the independent claims of the third auxiliary request was not obvious over the

disclosure of D10 considered alone or in combination with D9.

- D10 dealt with the same problem as the one underlying the patent in suit. It disclosed sugar beet pulp having an advantageous effect on pets (faeces; gastrointestinal health). It did not disclose chicory pulp.
- The technical problem was to find an alternative which provided a better performance.
- The state of the art did not provide any hint that a better performance could be obtained by using chicory pulp.
- D9 only disclosed Cigarant[®], a wet by-product of chicory roots processing known since 1992. D9 did not provide any information about the use of chicory pulp in pet food or its beneficial effect on pets' gastrointestinal health and faeces before the priority date of the opposed patent.
- D11 was dated later than the opposed patent. There was no evidence filed which showed that the sheets attached to it had were available to the public at the relevant time.
- D12 (last paragraph) merely expressed an opinion. Since it was not accompanied by any evidence, it should be considered as a mere allegation.
- The argument of the Appellant that the beet pulp of D9 and the claimed chicory pulp were equivalent had no technical foundation. D9 simply disclosed that the two pulps were "fairly" similar. In fact these pulps differed among other things in their colour, the method of extraction of sugars, the nature of the sugars, the pH and the length of the fibres.

- Considering that Cigarant[®] was known at the priority date of the opposed patent as a foodstuff for livestock, its use in a foodstuff for pets could not be obvious.
- Furthermore the beneficial effect of chicory pulp having the specified low inulin content could not be derived from the state of the art nor would it be obvious to the skilled person on the basis of his general technical knowledge.
- Moreover, that the claimed chicory pulp indeed had the desired advantageous properties was clearly demonstrated in the experimental part of the opposed patent. The Appellant's criticism of this data was unfounded.

Reasons for the Decision

1. The appeal is admissible.
2. ***Admittance of late filed documents***

Documents D9a, D11 and D12 were filed by the Appellant (Opponent) in the appeal proceedings (cf. statement of the grounds of appeal and letter dated 7 September 2009). D9a is an internet publication with an update date of 21 June 2004. In view of this date it is uncertain whether a publication existed before the priority date of the opposed patent and what its content was. Therefore this document is not admitted. D11 is a letter dated 7 August 1998 referring to dried chicory pulp as an additive "currently being used by major pet food companies", with an appended information sheet relating to chicory pulp, the public availability

of which was not established. Since (i) the letter itself is not a public document, (ii) the attached information sheet must be disregarded because of its non-established public status, and (iii) no other evidence was submitted concerning the chicory-pulp containing pet food referred to in the letter, this document is also not admitted. D12 is a technical statement dated 4 September 2009 which analyses document D10 and provides arguments attacking inventive step of the claimed subject-matter. The statement in D12 that "[a]t the priority date of the opposed patent, chicory pulp from which the majority of inulin had been extracted, has been known to have applicability in the field of animal nutrition" is rather vague and does not identify precisely any product available at the relevant time. It does not therefore add any essential new information to what is known from D9 and D10, which are already in the appeal proceedings. In view thereof D12 is also not admitted in the proceedings.

Main request

3. *Added subject-matter*

3.1 The claims of the main request were found by the Opposition Division to meet the requirements of the EPC including Article 123(2) EPC.

Independent Claims 1 and 13 comprise the feature of the inulin content of the pet food product. This is defined to be from 0.025% to 2% on a dry matter basis of the total pet food product. However, the only disclosure concerning the inulin content in the application as filed is found on page 4, lines 1 to 3. There it is

stated that "[t]he inulin content may be anything from less than 0.25%, less than 0.5%, from 0.5% to 1%, preferably from about 0.3% to about 0.8%". Consequently the above identified feature does not as such find support in the originally published PCT application.

3.2 The Board does not concur with the Respondent in its argument that the range of "0.025% to 2%" can be derived from a combination of the end points of the range of 0.5 to 20% of the chicory pulp content in the pet food (page 7, lines 2 and 3) with the inulin content range of "around 5 to 10%" of a chicory pulp resulting from typical extraction conditions (page 4, lines 12-14). In the Board's judgment these two ranges are independent from one another and only define the area within which each of the two different ranges can vary without any information as to the dimension of the respective other range at any given value of the first range. Combining the limiting values of these two ranges, as this was done in order to generate the upper limiting value of 2% during examination and similarly in order to generate the lower limit of 0.025% before the Opposition Division therefore transgresses the boundaries of the disclosure of the application as filed and creates new subject-matter, contrary to Article 123(2) EPC.

3.3 The argument of the Respondent that the use of the word "may" on page 4, line 1 of the application as filed would allow for an unlimited interpretation of the inulin content is considered a misinterpretation; in the context of the sentence comprising this word it is merely said that the inulin content may assume any value encompassed by the subsequent percentage values.

- 3.4 The Board thus considers that the contested feature "from 0.025% to 2% on a dry matter basis of the total pet food product" of Claims 1 and 13 results from a combination of two ranges which is not directly and unambiguously derivable from the originally filed documents. By making this arbitrary combination the Respondent contravened the requirements of Article 123(2) EPC.

First auxiliary request

4. The first auxiliary request comprises independent Claims 1 and 12, the subject-matter of which has been modified in the following a manner: (i) the feature of the inulin content "of from 0.025% to 2%" has been deleted, (ii) the feature of previous dependent Claim 3 "that the chicory pulp is in an amount of from 0.5 to 20% dry weight of the pet food product" has been added as has also (iii) the feature "the chicory pulp contains 5 to 10% inulin" (cf. application as filed: page 4, lines 12-13).

While both of the two features mentioned under (ii) and (iii) above are undisputedly disclosed in the application as filed, their combination is not disclosed. Linking these two statements with the word "and" therefore establishes a disclosure which is equivalent to the one whose support in the application as filed is denied in the previous paragraph. No conclusion different from the one drawn with regard to the main request can therefore be arrived with regard to the compliance of this amended Claim 1 with the requirements of Article 123(2) EPC.

Thus, since the first auxiliary request *prima facie* does not overcome the objection raised with regard to the main request it is not admitted into the appeal procedure.

Second auxiliary request

5. The second auxiliary request comprises independent Claims 1 and 12, the subject-matter of which still contains the contested feature of the inulin content of from 0.025% to 2% on a dry matter basis of the total pet food product, which was part of Claim 1 of the main request considered to contravene the requirements of Article 123(2) EPC (cf. point 3 above). The fact that, in addition thereto, Claim 1 of this request also comprises the two ranges introduced into Claim 1 of auxiliary request 1 (see preceding paragraph) cannot alter the conclusion of lack of support in the application as filed.

For the reasons set out above with regard to Claim 1 of the main and first auxiliary requests this request therefore likewise does not overcome the Article 123(2) EPC objection raised against Claim 1 of the main request.

Because of its *prima facie* non allowability this request is thus also not admitted into the appeal procedure.

Third auxiliary request

6. *Admittance*

The third auxiliary request was filed in order to overcome the objections under Article 123(2) EPC raised by the Board at the oral proceedings against the subject-matter of Claims 1 and 13 of the main request. Since this request *prima facie* overcomes these objections (cf. point 7.1 below) and since it does not introduce any other substantive amendment, it is admitted into the appeal proceedings in view of Article 13 RPBA.

7. *Amendments - Article 123(2) EPC*

7.1 Independent Claims 1 and 13 correspond to the granted Claims 1 and 13 and comprise a limitation concerning the inulin content of the pet food product. This is claimed now to be from 0.5% to 1% or from 0.3% to 0.8% on a dry matter basis of the total pet food product. This feature finds support on page 4, lines 1-3 of the originally published PCT application.

7.2 For reasons of consistency the dependency of independent Claim 14 was also amended to "as in any one of claims 2 to 7" in lieu of "as in any one of claims 1 to 7".

7.3 Consequently the subject-matter of the third auxiliary request fulfils the requirements of Article 123(2) EPC.

8. *Sufficiency of disclosure - Article 83 EPC*

8.1 The Appellant objected to the sufficiency of disclosure of the subject-matter of dependent Claims 3 and 4 in view of their dependency on independent Claim 2.

8.2 It argued that the skilled person could not rework the claimed subject-matter across its entire breadth taking into consideration the inulin content of Claim 2, ie of less than 0.25% on a dry matter basis of the total pet food product, and the amount of chicory pulp in the pet food product, which varies between 0.5 and 20% on a dry weight of pet food product according to Claim 3 and between 2 and 10% on a dry weight of pet food product according to Claim 4.

8.3 The Appellant submitted calculations which showed that an inulin content of less than 0.25% requires a chicory pulp in an amount of up to 5%, if it contained 5% inulin, or in an amount of up to 2.5%, if it contained 10% inulin. The conclusion of the Appellant was that the invention claimed in dependent Claims 3 and 4 was not workable for chicory pulp in amounts greater than 2.5% or greater than 5% - depending on its inulin content.

However, since Claim 3 is dependent on Claims 1 or 2 and Claim 4 is dependent on Claims 1 to 3, their scope is by definition governed by the higher ranking claims from which they depend. From that, it follows that the amounts of chicory pulp specified therein are subordinate to the limitations imposed by these higher ranking claims. The argument of the Appellant is therefore ill-conceived. Moreover, as shown by the

Appellant's calculations it is extremely easy to find out the range of the chicory pulp amount that meets the limitations set by Claims 1 and/or 2 and there is no undue burden involved in this basic mathematical exercise.

8.4 Hence, the claimed subject-matter fulfils the requirements of Article 83 EPC also with regard to Claims 3 and 4.

9. *Inventive step - Article 56 EPC*

9.1 The closest state of the art

9.1.1 The Board in agreement with the parties considers D10 (page 1142, right hand column, last paragraph to page 1143, left hand column, first paragraph; page 1143, Table 1; page 1144, right hand column, first paragraph under the title "Therapeutic Uses of Fiber") to represent the closest state of the art. This is the only one of the cited documents which discloses pet food products exhibiting a beneficial effect on the gastrointestinal tract of the pet.

9.1.2 However, D10 discloses the use of beet pulp instead of the claimed chicory pulp. Consequently the use of chicory pulp with at least some of the inulin removed by extraction constitutes the differentiating feature of the subject-matter of all independent claims of the opposed patent which provides novelty over D10.

9.2 The technical problem

9.2.1 The patent specification [005] discloses that the claimed invention provides a fibre source, the use of which results in : (i) significantly improved (or maintenance of good) faeces quality and/or (ii) significantly improved (or maintenance of good) gastrointestinal tract health, in pet animals over the fibre sources of the prior art.

9.2.2 The Board is satisfied that the experimental part of the patent specification (Examples 1 and 2) provides the necessary evidence of the solution of this technical problem, ie the provision of a pet food meeting the needs referred to above.

Thus in Example 1 the quality of the faeces of a group of six adult dogs of the same breed (beagle) was screened using three different food products. From the overall faeces quality (cf. [0039]) it is unambiguously deducible that the faeces quality for the food product with chicory fibre is good and significantly better than that of the food product with SBP (sugar beet pulp), which corresponds to the closest prior art food, and also significantly better than the cellulose fibre product "Arbocel" used as further comparison.

In Example 2 the quality of the faeces of adult dogs of various different breeds was screened using as food products the SBP product and the chicory pulp product used in Example 1 and also using a "Standard" product without fibres. As in Example 1, the results of the overall faeces quality (cf. [0057]) demonstrate a significant improvement when chicory fibres were used

compared to sugar beet fibres and also when compared to the "Standard" product.

9.2.3 The Appellant contested the correctness of the conclusion drawn by the Respondent basing its argument on the comparison of individual results within each example. The Board, however, does not consider the approach of the Appellant appropriate because in the circumstances of the present experiments concerning a food for dogs in general, it is not the performance achieved with an individual tested dog which is decisive for success or failure of the pet food but the overall results achieved with all tested dogs. The fact that some of the comparative results are equal to or even marginally better than single "inventive" results cannot detract from the fact that there is a clear and convincing trend in favour of a significant superiority of the "inventive" chicory pulp containing food.

9.3 The issue of obviousness

9.3.1 D10 is considered the most promising springboard for the assessment of inventive step of the claimed subject-matter because, as with the claimed invention, it deals with the beneficial influence of fibres on the gastrointestinal tract health of pets. However, as set out above, it discloses the use of beet pulp fibres, not chicory pulp fibres.

When considering the issue of inventive step, the question to be answered is thus whether it would have been obvious to the skilled person looking for a solution of the technical problem underlying the

claimed invention (cf. point 9.2) to replace the beet pulp fibres by chicory pulp fibres.

In the Board's judgment, the claimed solution of this problem is not obvious over the cited prior art because there is no disclosure therein suggesting the considerable improvement of the pets' intestinal health by substituting chicory pulp fibres for the beet pulp fibres of D10.

- 9.3.2 The Board does not concur with the Appellant that D9 provides any hint at the advantages to be gained by the use of chicory pulp in pet food. This document does not itself belong to the state of the art but simply points to the public availability of the product Cigarant[®] prior to the priority date of the patent in suit. The Board acknowledges that D9 discloses that Cigarant[®] was a wet by-product of chicory roots processing, and had been known since 1992. It notes, however, that the Appellant has not provided any convincing evidence that Cigarant[®] was known before the priority date of the opposed patent for having improved beneficial properties in the faeces quality and/or the gastrointestinal tract health of animals, be it cattle or otherwise, compared to other fibre-containing animal foodstuffs, in particular beet pulp fibres. In the absence of such evidence the Board considers that the obviousness argument of the Appellant must fail. It is emphasized in this respect that the Board does not accept the Appellant's assertion that the information in the first paragraph of D9 that Cigarant[®] "is fairly similar to pressed sugar beet pulp in terms of composition, energy value, external characteristics and possible applications" was within the public knowledge

in the year 1992 indicated in D9 as the time horizon for this "relatively new product". The language of this statement does not allow such a conclusion; the same applies to the use of Cigarant[®] as a substitute for concentrates in grass silage rations for dairy cattle because the article whose abstract is reported in D9 dates from 2003, ie considerably after the present priority date in 1997. Thus, as said above, the only disclosure considered by the Board to be part of the disclosure of Cigarant[®] publicly available at that time is that it was a new product in 1992 and was a wet by-product of chicory roots processing.

- 9.4 Under these circumstances the Board comes to the conclusion that the use of chicory pulp, which has had at least some of the inulin removed by extraction in order to solve the technical problem of providing fibres with improved beneficial properties in the faeces quality and/or the gastrointestinal tract health of pets would not have been obvious to the skilled person in the art.
- 9.5 As a consequence the subject-matter claimed in the third auxiliary request involves an inventive step.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the Opposition Division with the order to maintain the patent on the basis of Claims 1 to 14 of the third auxiliary request filed during the oral proceedings after any necessary consequential adaptation of the description.

The Registrar:

The Chairman:

G. Röhn

P. Kitzmantel