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Datasheet for the decision of 5 February 2009

Case Number: T 0087/07 - 3.2.04

Application Number: 98202062.0

Publication Number: 0885557

IPC: A01K 1/015

Language of the proceedings: EN

Title of invention:
Composition which is absorbent and inhibitive of the formation of bad smells in animal litter, method for the preparation thereof and use in hygienic litter for cats

Patentee:
TOLSA S.A.

Opponent:
H. von Gimborn GmbH

Headword:
-

Relevant legal provisions:
EPC Art. 100(b), 83

Relevant legal provisions (EPC 1973):
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Keyword:
"Disclosure - Sufficiency (yes)"

Decisions cited:
-

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0087/07 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 5 February 2009

Appellant: TOLSA S.A.
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 10 November 2006 revoking European patent No. 0885557 pursuant to Article 102(1) EPC.**

Composition of the Board:

Chairman: M. Ceyte
Members: A. de Vries
C. Heath

Summary of Facts and Submissions

I. The Appellant (Proprietor) lodged an appeal, received 10 January 2007, against the decision of the Opposition Division posted 10 November 2006 to revoke European patent No. 0885557, and simultaneously paid the appeal fee. The statement setting out the grounds was received 14 March 2007.

II. Opposition was filed against the patent as a whole and based on Article 100(b) EPC for insufficient disclosure of the invention, as well as Article 100(a) EPC in combination with Articles 52, 54 and 56 for lack of novelty and inventive step.

The Opposition Division held that the invention was not disclosed in a manner sufficiently clear and complete for it to be carried out by the skilled person. The following documents were cited amongst others:

P1: Rouquerol et al.: "Recommendations for the characterization of porous solids", Technical Report of the IUPAC, Pure & Appl.Chem., Vol.66, No.8, GB, 1994, 1739-1758;

P4: Santarén : "Sepiolite, The Spanish special clay", Industrial Clays, 1996, 27-35

III. With letter received 29 January 2009 the respondent-opponent informed the EPO that he withdrew his opposition. He thereby ceased to be a party to the proceedings.

IV. Oral proceedings in appeal were duly held before this Board on 5 February 2009.

V. The Appellant requests that the decision under appeal be set aside and a patent be granted on the basis of claims 1 - 43 of a sole request filed during the oral proceedings before the Board.

VI. The wording of claim 1 of the sole request is as follows:

1. "Composition which is absorbent and inhibitive of the formation of bad smells in animal litter that comprises a deodorizing molecular complex and a granular carrier,
characterized in that
the molecular complex is at least a compound with inhibitive properties of the formation of bad smells coming from the bacterial degradation of felinine;
the carrier is sepiolite with a porosity higher than 0.1 cm^3/g and a specific surface larger than 50 m^2/g;
the molecular complex is absorbed inside the granules of the carrier."

Reasons for the Decision

1. The appeal is admissible.

2. Following established jurisprudence, see e.g. Case Law of the Boards of Appeal of the EPO, 5th edition, December 2006, VII.D.11.2, penultimate paragraph and the decisions cited therein, withdrawal of the opposition during appeal proceedings, where the opponent is respondent, has no effect on the appeal proceedings per se. The subject and the factual and legal framework of the appeal thus remain unchanged.

3. *Background*

The invention concerns an animal litter composition which combines in a single, easy to use product the advantages of cat litters comprised of conventional minerals and clays with the inhibitive effects of a molecular complex countering formation of bad smells from bacterial degradation of felinine. As indicated in paragraph [0021] by choosing a carrier mineral with optimal porosity properties absorption and homogenous distribution are surprisingly enhanced so that the inhibitive effect is facilitated. In particular, the porosity should be higher than $0.1cm^3/g$ and specific surface should larger than $50m^2/g$.

4. *Allowability of Amendments*

Claim 1 of the sole request combines the features of as filed claims 1 and 33. Thus, whereas claim 1 as filed included a range of possible minerals with the desired properties, claim 1 as amended focuses on the specific mineral (sepiolite) mentioned in original claim 33.

The Board is satisfied that the amendments to claim 1 are unobjectionable under Article 123(2) EPC.

5. *Sufficiency of Disclosure*

5.1 The decision under appeal found that the disclosure was silent on the particular method of measurement used to determine the specific surface or porosity limits mentioned in the claims. P1 showed that various methods existed which gave widely differing results. Absent any

specific method the values were technically nigh meaningless and it would be difficult if at all possible to establish whether a product fell within the area covered by the claim.

5.2 The general teaching of the patent, as may be inferred from paragraph [0021] cited earlier, is that the higher the specific surface and porosity of the carrier the more pronounced the inhibitive effect, due to better absorption and homogenous distribution of the complex. The threshold values attempt to quantify this teaching. Bearing in mind that specific surface and porosity are intrinsic properties of porous materials (see for example P1, section II.4), these lower limits may then be seen to characterize a subclass of suitable carrier minerals. Put otherwise, they represent suitability criteria for selecting candidate minerals.

5.3 Claim 1 now focuses on one particular carrier mineral - *sepiolite* - from within this subclass. This naturally occurring mineral, which is well-known, in particular in the pet litter industry, see P4, plays a central role in the description. It is discussed in detail in paragraphs [0024] to [0031] and figures in most of the examples described in the final section of the description, from paragraph [0051] onwards.

5.4 From paragraph [0027] it is clear that the description regards sepiolite as generally meeting the selection criteria for porosity and specific surface, whatever measurement method the limit values may refer to. Its mention represents a clear and unambiguous instruction to the skilled person as to which mineral carrier to use in the claimed composition. It in fact obviates the

need for the selection criteria, which before served to guide selection. Once a particular selection is made, as is the case here, these criteria no longer serve any purpose; within the claim they are now without limiting character.

5.5 As noted above various explicit examples of sepiolite based compositions are given. These examples specify sepiolite type and grade, and describe preparation and amounts in detail. This information is undoubtedly so clear and complete as to allow the skilled person to reproduce the composition with little or no extra effort. Any specific surface (or porosity) values are given only to compare the effects with other compositions (and so correlate with effectiveness), but in no way compromise the enabling character of these examples.

5.6 In conclusion, by specifically choosing sepiolite, which is amply illustrated with clear and complete examples, any uncertainty in the selection criteria that might before have hampered or even prevented the skilled person in finding a suitable mineral carrier for the claimed composition, is resolved. The invention as now claimed is thus disclosed in a sufficiently clear and complete manner to be carried out by the skilled person. Claim 1 as amended meets the requirements of Article 83 EPC.

6. *Remittal*

6.1 The decision does not address the grounds of novelty and inventive step raised in opposition. So as not to deprive the appellant of a consideration of these

remaining issues by two instances the Board remits the case for further prosecution on the basis of claim 1 as amended. The Appellant does not object to this course of action.

6.2 In considering the remaining issues, the opposition division will need to examine whether the evidence provided during opposition is prejudicial to novelty or inventive step of the central idea now expressed in claim 1. This can be summarized as pertaining to a composition comprising sepiolite carrier and an inhibitive complex (with properties as claimed) absorbed inside the carrier granules.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the department of first instance for further prosecution.

The Registrar The Chairman

G. Magouliotis M. Ceyte