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**Datasheet for the decision
of 17 December 2008**

Case Number: T 1255/07 - 3.3.04

Application Number: 02767907.5

Publication Number: 1440978

IPC: C07K14/00

Language of the proceedings: EN

Title of invention:

Food allergens, method of detecting food allergens and method of detecting food allergy-inducing foods

Applicant:

NIPPON MEAT PACKERS, INC.

Opponent:

-

Headword:

Food allergy/NIPPON MEAT PACKERS

Relevant legal provisions:

EPC Art. 54, 84, 111(1), 123(2)

Relevant legal provisions (EPC 1973):

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Keyword:

"Main request - novelty (no)"

"Auxiliary request - added matter (no), novelty, clarity (yes)"

"Remittal to department of first instance"

Decisions cited:

T 1091/00

Catchword:

-



Case Number: T 1255/07 - 3.3.04

D E C I S I O N
of the Technical Board of Appeal 3.3.04
of 17 December 2008

Appellant:

NIPPON MEAT PACKERS, INC.
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Osaka 541-0054 (JP)

Representative:

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Decision under appeal:

Decision of the Examining Division of the
European Patent Office posted 16 January 2007
refusing European patent application
No. 02767907.5 pursuant to Article 97(1) EPC
1973.

Composition of the Board:

Chair: U. Kinkeldey
Members: B. Claes
R. Moufang

Summary of Facts and Submissions

- I. European patent application 02767907.5 was published as EP-A-1 440 978 (which will be referred to in the present decision as the "application" or the "application as published") and is based on international patent application PCT/JP02/009066 which was published as WO03/022876. The application has the title: "*Food allergens, method of detecting food allergens and method of detecting food allergy-inducing foods*".
- II. The examining division refused the application based on the grounds that the subject-matter of the claims before it was not novel (Article 54 EPC) and at least claims 1, 3 and 4 were not clear within the meaning of Article 84 EPC.
- III. The appellant (applicant) lodged an appeal against the decision and filed a main request with the statement setting out the grounds of appeal. Claims 1 and 2 of this main request read:
- "1. An allergen mixture consisting of multiple native and denatured food allergens that are recognized by IgE antibodies of food-allergy patients and that cause food allergy by ingestion, wherein a food-allergy patient has a RAST score of 2 or more."
- "2. An antibody mixture comprising antibodies recognizing (*sic*) the native and denatured food allergens of claim 1."

IV. In a communication dated 2 December 2008, the board expressed its preliminary opinion on the main request, *inter alia* that the subject-matter of claim 2 lacked novelty.

V. Oral proceedings took place on 17 December 2008. At these oral proceedings, the appellant filed an auxiliary request comprising claims 1 to 4 which read:

"1. An antibody mixture comprising antibodies recognizing the following native and denatured food allergens that are recognized by IgE antibodies of food allergy patients and that cause food allergy by ingestion, wherein a food-allergy patient has a RAST score of 2 or more: ovoalbumin, ovomucoid, lysozyme and ovotransferrin of egg; casein, beta-lactoglobulin and alpha-lacotalbumin [*sic*] of milk; gliadin and alpha-amylase inhibitor of wheat; 132-, 84-, 27-, and 11-kDa substances of buckwheat; and 107-, 72-, 35-, and 28-kDa substances of peanut."

"2. A method for detecting food allergens that uses the antibody mixture of claim 1."

"3. A method for detecting food allergy-inducing food that uses the antibody mixture of claim 1."

"4. The method of claim 3, wherein the food allergy-inducing food is eggs, milk, wheat, buckwheat and peanut, or food containing one or more of these items."

VI. The following documents are referred to in the present decision:

D1: EP-A-0 981 050

D2: Becker and Reese (2001), Journal of Chromatography B, 756, pages 131-140.

D3: Besler et al. (2001), Journal of Chromatography B, 756, pages 207-228.

VII. The appellant has argued in essence as follows:

Main request

- The main request complied with requirements of the EPC.

Auxiliary request

Added matter

- New claim 1 found support in the application *inter alia* in paragraph [0055], Fig. 1 and its legend in paragraph [0011].

Clarity

- The claims had been amended so as to remedy all the clarity deficiencies objected to by the examining division.

Novelty

- None of the cited prior art disclosed mixtures of antibodies which recognised all the natural and denatured allergens as referred to in claim 1.

VIII. The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the main request filed with letter dated 15 May 2007 or, in the alternative, the auxiliary request filed at the oral proceedings. The appellant furthermore requested that, should the board consider the claims of the auxiliary request to comply with the requirements of Articles 84, 123(2) and 54 EPC, the case be remitted to the department of first instance for further prosecution.

Reasons for the Decision

Main request - Claim 2

1. Document (D3), a scientific review article addressing the stability of food allergens and the allergenicity of processed food, refers on page 216, left-hand column lines 36 to 42 to Burks *et al.* where no reduction of IgE binding was observed after heating (100°C up to 60 minutes) of isolated peanut protein extracts and Ara h 1 and Ara h 2 in RAST inhibition experiments with pooled serum of ten patients with peanut allergy. It follows that the pooled serum of these patients constitutes an antibody mixture which comprises antibodies recognising at least two allergens (Ara h 1 and Ara h 2) in their natural and denatured state. Accordingly, the subject-matter of claim 2 of the main request was known in the prior art and is thus not novel.

Auxiliary request

Claim 1

Added matter

2. In paragraph [0010] of the application it is stated in general that the purpose of the invention is to supply, besides allergen mixtures, antibodies prepared by immunizing an animal with these mixtures comprising multiple known and/or unknown as well as native and/or denatured food allergens that can be recognized by IgE antibodies of food-allergy patients. Similarly, in paragraph [0014] the description defines the invention to constitute animal antibodies against food allergens prepared by immunizing an animal with the multiple food allergens (including those processed and/or not processed) and that can be recognized by IgE antibodies of food-allergy patients. In example 1, the application describes the preparation of standard antigens of various foods in their natural and denatured state. Rabbit antibodies against these standard allergens are produced in example 3. In paragraph [0050] of example 4 the application describes the preparation of pooled serum by mixing serum from 20 patients with RAST scores of two or more against egg, milk or wheat which is to be used in the immunostaining experiments in paragraph [0052]. In paragraph [0055] the application states that the substances that both sera (i.e. the produced rabbit serum and the pooled human serum) recognized were as follows: ovoalbumin, ovomucoid, lysozyme and ovotransferrin of egg; casein, beta-lactoglobulin and alpha-lactoalbumin of milk; gliadin and alpha-amylase inhibitor of wheat; 132-, 84-, 27-, and 11-kDa

substances of buckwheat; and 107-, 72-, 35-, and 28-kDa substances of peanut.

3. The above disclosure of the specific sera in example 4 read in the context of the general disclosure of animal antibodies in the application satisfies the board that claim 1 complies with the requirements of Article 123(2) EPC.

Clarity

4. Claim 1 has now been amended so as to define the food-allergy patients to have a RAST score of 2 or more. The board considers this amendment to remedy the deficiency objected to by the examining division for lack of clarity of the definition of the food allergens. The board is therefore satisfied that claim 1 satisfies the requirements of Article 84 EPC.

Novelty

5. None of the documents (D1) to (D3) cited during the examination procedure discloses a combination mixture of antibodies as presently defined by the subject-matter of claim 1, nor food allergen detection methods using such combination mixtures. The board therefore concludes that the disclosures of these documents are not detrimental to the novelty of the subject-matter of claim 1.

Claims 2 to 4

Added subject-matter

6. Methods claims 2 and 3 find support in claims 3 and 4 of the application as filed. Furthermore, the specification of the food allergy-inducing foods in new claim 4 is based on paragraph [0020] of the application as filed. Claims 2 to 4 of the auxiliary request therefore comply with the requirements of Article 123(2) EPC.

Clarity

7. The board is satisfied that, in view of its finding in point 4, above, also claims 2 to 4 comply with the requirements of Article 84 EPC.

Novelty

8. Claims 2 and 3 are methods based on the use of the antibody mixture as subject-matter of claim 1. Claim 4 is dependent on claim 3. Claim 1 was found novel in point 5, above. As a consequence the board is satisfied that the subject-matter of claims 2 to 4 is likewise novel.

*Remittal of the case to the department of first instance
Article 111(1) EPC*

9. Remittal to the department of first instance is at the discretion of the board. Although Article 111(1) EPC does not guarantee an absolute right to have all the issues in the case considered by two instances, it is

well recognised that any party should preferably be given the opportunity to have two readings of the important elements of the case (see decision T 1091/00, 2 July 2002; point 4 of the reasons).

10. The essential function of appeal proceedings is to consider whether the decision which has been issued by the first instance department is correct. Hence, a case is normally remitted, if essential questions regarding the patentability of the claimed subject-matter have not yet been examined and decided by the department of first instance. Remittal is in particular taken into consideration by the boards in cases where a first instance department issues a decision solely upon one particular issue which is decisive for the case against a party and leaves other essential issues outstanding. If, following appeal proceedings, the appeal on the particular issue is allowed, the case is normally remitted to the first instance department for consideration of the undecided issues (see decision T 1091/00, *supra*).

11. In the decision under appeal the examining division has only dealt with the questions of novelty and clarity, without comprehensively touching any other substantial requirements of the EPC. Thus, fundamental requirements for the grant of a patent, *inter alia* inventive step (Article 56 EPC), have not yet been examined by the department of first instance. In the present case the board considers it therefore to be appropriate to remit the case to the department of first instance for further prosecution.

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 on the basis of claims 1 to 4 of the auxiliary request filed at the oral proceedings.

The Registrar

The Chair

P. Cremona

U. Kinkeldey