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**Datasheet for the decision  
of 30 April 2014**

**Case Number:** T 0902/09 - 3.3.02

**Application Number:** 98937288.3

**Publication Number:** 996740

**IPC:** C12P7/64, A23D9/013

**Language of the proceedings:** EN

**Title of invention:**  
DHA-CONTAINING NUTRITIONAL COMPOSITIONS AND METHODS FOR THEIR  
PRODUCTION

**Patent Proprietor:**  
DSM IP Assets B.V.

**Opponent:**  
Lonza AG  
Patent & Licensing Department

**Headword:**  
Nutritional compositions/DSM

**Relevant legal provisions:**  
EPC Art. 108  
EPC R. 116(2), 99(2)  
RPBA Art. 12(4)

**Keyword:**  
Admissibility of requests filed with statement of grounds of  
appeal - (no)

**Decisions cited:**

G 0007/93, T 0028/10, T 0936/09

**Catchword:**



**Beschwerdekammern  
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Case Number: T 0902/09 - 3.3.02

**D E C I S I O N  
of Technical Board of Appeal 3.3.02  
of 30 April 2014**

**Appellant:**  
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**Decision under appeal:**

**Decision of the Opposition Division of the  
European Patent Office posted on 9 February 2009  
revoking European patent No. 996740 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman:** U. Oswald  
**Members:** K. Giebeler  
L. Bühler

## Summary of Facts and Submissions

- I. European patent No. 996 740, based on European patent application No. 98937288.3 (published as WO 99/06585) and entitled "DHA-Containing Nutritional Composition and methods for their production", was granted with 21 claims.
- II. Claim 1 as granted reads:

"A dry particulate material consisting substantially of an extract of polar lipids from microbial cells, wherein the extract comprises phospholipids having docosahexaenoic acid (DHA) as at least 10% of the fatty acid residues."
- III. An opposition was filed against the granted patent on the grounds of lack of novelty and lack of inventive step (Article 100(a) EPC), insufficiency of disclosure (Article 100(b) EPC) and added subject-matter (Article 100(c) EPC).
- IV. The opposition division revoked the patent and decided that the claims of the main request before it (claims as granted) did not meet the requirements of Article 123(2) EPC. Moreover, the opposition division decided not to admit into the proceedings auxiliary request 1 filed during the oral proceedings because it was put forward late (Article 114(2) EPC and Rule 116 EPC).
- V. The appellant (patent proprietor) lodged an appeal against the decision of the opposition division. With the statement of grounds of appeal, the appellant filed a new main request and auxiliary requests 1-6 and submitted arguments as to why the claims of these

requests met the requirements of Articles 123(2) and (3) EPC.

Claim 1 of the **main request** reads as follows:

"A dry particulate material consisting essentially of an extract of polar lipids from microbial cells, wherein the extract comprises phospholipids and proteins and has a triglyceride content of not more than 40%; and at least 20% of the fatty acid residues in the polar lipids of the source microbe are DHA."

Claim 1 of **auxiliary request 1** reads as follows:

"A dry particulate material consisting substantially of an extract of polar lipids from microbial cells, wherein the extract comprises phospholipids and proteins and has a triglyceride content of not more than 40%; and at least 20% of the fatty acid residues in the polar lipids of the source microbe are DHA; and the source microbe is an oleaginous fungus, an alga of the class Dinophyceae, Bacillariophyceae, Chlorophyceae, Prymnesiophyceae or Euglenophyceae, Thraustochytrium or Schizochytrium."

Claim 1 of **auxiliary request 2** reads as follows:

"A dry particulate material consisting substantially of an extract of polar lipids from microbial cells, wherein the extract comprises phospholipids and proteins and has a triglyceride content of not more than 40%; and at least 20% of the fatty acid residues in the polar lipids of the source microbe are DHA and wherein the source microbe is Cryptocodinium cohnii, Thraustochytrium or Schizochytrium."

Claim 1 of **auxiliary request 3** reads as follows:

"A dry particulate material consisting substantially of an extract of polar lipids from microbial cells, wherein the extract comprises phospholipids and proteins and has a triglyceride content of not more than 40%; and at least 20% of the fatty acid residues in the polar lipids of the source microbe are DHA and the dry particulate material is substantially free of material which did not originate in the source microbe."

Claim 1 of **auxiliary request 4** reads as follows:

"A dry particulate material consisting substantially of an extract of polar lipids from microbial cells, wherein the extract comprises phospholipids and proteins and has a triglyceride content of not more than 40%; and at least 20% of the fatty acid residues in the polar lipids of the source microbe are DHA and wherein at least two thirds of the dry matter in the polar lipid extract of DHA-containing microbes is material derived from the microbial cells."

Claim 1 of **auxiliary request 5** reads as follows:

"A dry particulate material consisting substantially of an extract of polar lipids from microbial cells, wherein the extract comprises phospholipids and proteins and has a triglyceride content of not more than 40%; and at least 20% of the fatty acid residues in the polar lipids of the source microbe are DHA and less than 25% of the dry matter is non-microbial."

Claim 1 of **auxiliary request 6** reads as follows:

"A dry particulate material consisting substantially of an extract of polar lipids from microbial cells, wherein the extract comprises phospholipids and proteins and has a triglyceride content of not more than 40%; and at least 20% of the fatty acid residues in the polar lipids of the source microbe are DHA and less than 15% of the dry matter is non-microbial."

- VI. The respondent (opponent) responded to the appeal by letter dated 19 October 2009.
- VII. The board summoned the parties to oral proceedings to be held on 30 April 2014 and issued a communication in which it gave its preliminary opinion. In said communication, the board raised questions with respect to the admissibility of the appeal and the admissibility of the amended claim requests.
- VIII. By letter dated 25 February 2014, the respondent announced that it would not attend the scheduled oral proceedings and withdrew all its requests.
- IX. By letter dated 28 April 2014, the appellant announced that it would not be represented at the oral proceedings.
- X. Oral proceedings were held before the board on 30 April 2014 in the absence of the parties.
- XI. The appellant has requested in writing that the decision under appeal be set aside and that the case be remitted to the department of first instance for consideration of the grounds of opposition of lack of sufficiency of disclosure (Article 100(b) EPC), lack of novelty and lack of inventive step (Article 100(a) EPC together with Articles 54 and 56 EPC) on the basis of

the main request or of the first to sixth auxiliary requests, all filed with the statement of grounds of appeal.

## **Reasons for the Decision**

### *1. Admissibility of the appeal (Article 108 EPC)*

In its communication accompanying the summons to oral proceedings, the board raised doubts as to whether the appeal was sufficiently substantiated and admissible under Article 108 EPC together with Rule 99(2) EPC. However, on the basis of the facts of the present case, the board decided to consider the issue of the admissibility of the amended claim requests under Article 12(4) of the Rules of Procedure of the Boards of Appeal (RPBA) without first having decided on the issue of the admissibility of the appeal.

### *2. Admissibility of the amended claim requests (Article 12(4) RPBA)*

#### *2.1 Main Request*

2.1.1 The claims of the main request are almost identical, except for some minor modifications, to the claims of auxiliary request 1 filed during the oral proceedings before the first instance, which request was not admitted into the proceedings by the opposition division. In particular, claim 1 states the feature of "a triglyceride content of not more than 40%", which feature was introduced into the claims for the first time during the oral proceedings before the first instance and gave rise to the opposition division's decision not to admit auxiliary request 1 before it



into the proceedings (see point V.1 of the decision under appeal).

The board thus has to review the discretionary decision of the opposition division based on Rule 116(2) EPC.

- 2.1.2 In cases where a discretionary decision by a first instance department of the EPO is at issue in appeal proceedings, a board should only overrule the way in which the first instance department has exercised its discretion if the board comes to the conclusion either that the first instance department in its decision has not exercised its discretion in accordance with the right principles or that it has exercised its discretion in an unreasonable way, and has thus exceeded the proper limits of its discretion (see G 7/93, point 2.6). These principles have also been applied by the boards in the context of requests which were not admitted by the first instance department in *inter partes* opposition proceedings, see e.g. decision T 28/10, point 2.
  - 2.1.3 In the present case, the appellant has not submitted at any point in time during the appeal proceedings that the opposition division exercised its discretion wrongly in not admitting auxiliary request 1 before it into the proceedings. Nor can the board discern any improper exercise of discretion by the opposition division in that respect.
  - 2.1.4 Therefore, the board, in the exercise of its discretionary power according to Article 12(4) RPBA, has decided not to admit the main request into the proceedings.
- 2.2 *Auxiliary requests 1-6*

2.2.1 Claim 1 of each of auxiliary requests 1-6 includes the feature of "a triglyceride content of not more than 40%", and differs from claim 1 of the main request solely by stating additional features. Auxiliary requests 1-6 are thus variations of the main request before the board and of auxiliary request 1 that was not admitted into the proceedings before the first instance.

None of auxiliary requests 1-6 was presented in the first instance proceedings; hence no decision was taken by the opposition division on any of these requests. Admitting any of auxiliary requests 1-6 into the proceedings would thus oblige the board either to give a first ruling on the critical issues concerning these requests, in particular Article 123(2) and (3) EPC, or to remit the case to the department of first instance.

2.2.2 According to decision T 936/09, headnote, "the patent proprietor is not free to present or complete his case at any time that he wishes during the opposition or opposition appeal proceedings, depending, for example, on his procedural strategy or his financial situation. In view of the judicial nature and purpose of inter partes appeal proceedings (...) and in the interests of an efficient and fair procedure, the board considers it necessary that all parties to opposition proceedings complete their submissions during the first-instance proceedings in so far as this is possible. If a patent proprietor (...) chooses not to complete his submissions at the stage of the first-instance proceedings, but rather presents or completes his case only in the notice of appeal or the statement setting out the grounds of appeal, then he will need to face the prospect of being held to account for such conduct

by the board when, for example, exercising its discretion under Article 12(4) RPBA. (...). This applies in particular if, as in the present case, all the reasons for revocation of the opposed patent were known to the patent proprietor before it received the impugned decision (...)."

- 2.2.3 In the present case, the objections under Article 100(c) EPC on which the opposition division based its decision had already been raised in the opposition filed on 19 June 2006. Furthermore, the opposition division, in its communication dated 1 July 2008 accompanying the summons to oral proceedings, expressed its preliminary opinion that the subject-matter of claim 1 extended beyond the content of the application as filed, contrary to Article 123(2) EPC.

Therefore, the board concludes that the appellant could have filed auxiliary requests 1-6 already well before the oral proceedings before the first instance held on 5 December 2008.

Moreover, during the appeal proceedings, the appellant has not offered any arguments whatsoever as to why auxiliary requests 1-6 were filed only on appeal or why they should be admitted into the proceedings before the board, despite the board's indications with respect to Article 12(4) RPBA in its communication accompanying the summons to oral proceedings.

- 2.2.4 In this situation, the board has decided to make use of its discretionary power according to Article 12(4) RPBA not to admit auxiliary requests 1-6 into the proceedings.

3. Since no further requests have been submitted, the appeal has to be dismissed.

## Order

### For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



N. Maslin

U. Oswald

Decision electronically authenticated