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**Datasheet for the decision
of 3 February 2012**

Case Number: T 1334/09 - 3.3.09

Application Number: 99903374.9

Publication Number: 1143811

IPC: A23L 1/22, A23L 1/275,
A32P 1/04, A23G 1/00

Language of the proceedings: EN

Title of invention:
Food particulate

Patentee:
CEREAL INGREDIENTS, INC.

Opponent:
Cargill, Inc.

Headword:
-

Relevant legal provisions:
EPC Art. 100(c), 123(2), 123(3)
RPBA Art. 13(3)

Keyword:
"Amendments - added subject-matter (yes, main request, first to fourth auxiliary requests, sixth and seventh auxiliary requests)"
"Amendments - extension of protection (yes, fifth and seventh auxiliary requests)"

Decisions cited:
G 0002/98, G 0001/03, T 0686/99

Catchword:
-



Case Number: T 1334/09 - 3.3.09

DECISION
of the Technical Board of Appeal 3.3.09
of 3 February 2012

Appellant: CEREAL INGREDIENTS, INC.
(Patent Proprietor) 10835 Ambassador Drive
Kansas City
MO 64153 (US)

Representative: Barton, Matthew Thomas
Forrester & Boehmert
Pettenkoferstrasse 20-22
D-80336 München (DE)

Respondent: Cargill, Inc.
(Opponent) 15407 McGinty Road West
Wayzata
Minnesota
MN 55391-5624 (US)

Representative: Wibbelmann, Jobst
Wuesthoff & Wuesthoff
Patent- und Rechtsanwälte
Schweigerstrasse 2
D-81541 München (DE)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 21 April 2009
revoking European patent No. 1143811 pursuant
to Articles 101(2) and 101(3)(b) EPC.

Composition of the Board:

Chairman: W. Sieber
Members: M. O. Müller
R. Menapace

Summary of Facts and Submissions

I. This decision concerns the appeal by the proprietor of European patent No. 1 143 811 against the decision of the opposition division to revoke the patent.

II. The patent was granted with 36 claims, claims 1, 15 and 30 reading as follows:

"1. An extruded fruit particle analog, comprising

a flour;

a sugar- or gum-based bulking agent; and

a coloring agent,

wherein the fruit particle analog is formed at a temperature below the crystallisation temperature of the bulking agent."

"15. A method for preventing color bleeding in a food analog comprising:

providing a premix comprising flour, a sugar or gum-based bulking agent and a coloring agent comprising at least one aluminium lake color; and

extruding the premix at a temperature below the crystallisation temperature of the bulking agent without an addition of heat to make the food analog which is resistant to bleeding."

"30. A method for making an edible color or flavor or flavor and color carrier, comprising:

providing a starch bearing material;

adding a sugar- or gum-based bulking agent to the starch bearing material to form a mixture;
adding oil to the mixture in a quantity effective to convey the mixture through an extruder without generating a substantial quantity of heat;
adding color to the mixture;
extruding the mixture through a die to make an extrudate at a temperature below the crystallisation temperature of the bulking agent; and cutting the extrudate to make the carrier."

Independent claim 18 was directed to an extruded edible carrier for flavour or colour or flavour and colour. Independent claim 35 was directed to a product obtainable by the method of claim 30 and independent claim 36 to a method for controlling colour bleeding in a food analogue. The remaining claims were dependent claims.

- III. The opponent had requested revocation of the patent in its entirety on the grounds that the claimed subject-matter was neither novel nor inventive and that the patent contained subject-matter which extended beyond the content of the application as filed (Article 100(a) and (c) EPC).

The documents submitted during the opposition proceedings included:

D6: "Second declaration of Mr Robert Schuppan", dated 1 May 2009.

- IV. The opposition division's decision, which was announced orally on 11 March 2009 and issued in writing on

21 April 2009, was based on the patent as granted (main request) as well as on the first and second auxiliary requests filed during the oral proceedings before the opposition division.

The opposition division did not allow the main request because there was no support for the combination of the feature "formed at a temperature below the crystallisation temperature of the bulking agent" with the presence of a flavour or flavouring agent in granted claims 18 and 30 (Article 100(c) EPC). Granted claim 35 was not allowable for the same reason. However, granted claims 1, 15 and 36 were found to be supported by the passage on page 6, lines 13-16 of the application as filed.

The subject-matter of the first auxiliary request did not extend beyond the application as filed (contested granted claims 18, 30 and 35 had been deleted), but lacked novelty.

The second auxiliary request was limited to the method for preventing color bleeding in a food analog of granted claim 15. According to the opposition division the method lacked an inventive step.

- V. On 12 June 2009, the appellant (patent proprietor) filed a notice of appeal against the above decision and paid the prescribed fee on the same day. A statement setting out the grounds of appeal was filed on 1 September 2009 together with first to sixth auxiliary requests and

D7: "Third declaration of Mr Robert Schuppan", dated 31 August 2009 and including photographs 1-22 and samples 1-7.

The appellant's main request corresponded to the granted claims (see point II above).

- VI. By letter of 5 February 2010, the respondent (opponent) filed a reply to the appeal.
- VII. In the annex to the summons issued on 26 April 2011, the board communicated its preliminary opinion to the parties. The board set out that all the independent claims of the main request appeared to be objectionable under Article 100(c) EPC due to the feature "formed at a temperature below the crystallisation temperature of the bulking agent". Moreover, claim 1 of the fifth auxiliary request seemed not to meet the requirements of Article 123(3) EPC.
- VIII. A response to this preliminary opinion was filed by the appellant by letter of 23 December 2011 together with new first, second and fourth to seventh auxiliary requests.

Claim 1 of the first, second and third auxiliary requests is identical to claim 1 of the main request, ie granted claim 1. Claim 1 of the fourth auxiliary request is identical to granted claim 30 except that it has been further specified that a single screw extruder is used for extruding the mixture through a die.

Claim 1 of the fifth auxiliary request reads as follows:

"A method for making a particulate food analogue, the method comprising the steps of:

providing flour or other starch bearing material;
providing a sugar or gum-based bulking agent;
providing oil or other fat;
providing a colouring agent and/or flavouring agent
and/or nutraceutical and/or pharmaceutical;

mixing said ingredients in a mixer to form a premix;
transferring the premix to a screw type extruder;
adding water within the extruder to hydrate the mixture
at a concentration effective to create a homogeneous
mixture that may be extruded; and
conveying the hydrated mixture by a screw through the
screw type extruder without an addition of an external
source of heat."

Claim 1 of the sixth auxiliary request is identical to granted claim 15 of the main request.

Claim 1 of the seventh auxiliary is identical to claim 1 of the fifth auxiliary request except that the wording "at a temperature below the crystallisation temperature of the bulking agent" is present at the end of the claim.

IX. On 3 February 2012 oral proceedings were held before the board. The respondent requested that the first, second and fourth to seventh auxiliary requests should not be admitted into the proceedings.

X. The appellant's arguments can be summarized as follows:

Main request (claims as granted)

Claim 1 of the main request contained a combination of two features, namely that the food product was a fruit particle analogue and that this product was formed at a temperature below the crystallisation temperature of the bulking agent (in the following "low extrusion temperature requirement"). Page 6, lines 13-16 of the application as filed provided a clear teaching that for extruded particulate products comprising flour, a sugar or gum-based bulking agent and a colouring agent, extrusion had to be carried out below the crystallisation temperature of the bulking agent. Since the fruit particle analogues disclosed on page 3 comprised exactly the same ingredients, the skilled person would have the common sense to realise that the extruded particulate products disclosed on page 6 could be fruit particle analogues, amongst others. Hence, while the precise combination of fruit particles with the low extrusion temperature requirement was not explicitly disclosed in the application as filed, this would be clearly implied to the skilled person.

Moreover the first two pages of the description already made it clear that the focus of the invention was on fruit particle analogues. The skilled person reading the passage on page 6 would

therefore have immediately realised that this passage referred to fruit particle analogues.

In addition, the purpose of Article 100(c) EPC was to prevent the applicant from obtaining an unfair advantage and this was not the case here because the passage on page 6 was broader than the scope of protection the applicant was trying to secure.

In a similar way, the passage on page 6, lines 13-16 could be read as applying to other embodiments disclosed in the application as filed so that the other independent granted claims were also clearly and unambiguously derivable from the application as filed.

Auxiliary requests

Due to the deletion of numerous claims, the first, second and fourth to seventh auxiliary requests simplified rather than complicated the proceedings. Most of the amendments in the amended requests hinged on the feature relating to the low extrusion temperature requirement, of which the respondent and the board were both well aware. Moreover, given that there were six weeks remaining until oral proceedings, there was sufficient time to consider the amendments in advance of the proceedings. Finally, all of the amendments were occasioned directly by the comments made by the board in its preliminary opinion. Therefore the amendments were a genuine attempt to simplify the issues in advance of oral proceedings and to move the appeal forward. These

requests therefore should be admitted into the proceedings.

With regard to the objection under Article 123(3) EPC to the fifth auxiliary request, it was clear to the skilled person that the patent was talking about the extrusion of products. Therefore the feature of not adding heat during extrusion was equivalent to keeping the extrusion temperature below the crystallisation temperature of the bulking agent.

Substantial procedural violation

The opposition division's decision with regard to novelty in view of D1 contained a substantial procedural violation which justified the reimbursement of the appeal fee.

XI. The respondent's arguments can be summarized as follows:

Main request

The combination in claim 1 of the main request of a fruit particle analogue with the low extrusion temperature requirement was not disclosed in the application as filed. In particular the application as filed referred to a variety of different food products such as chocolate chips, fruit particle analogues, edible arrays of carriers, nutraceutical carriers, pharmaceutical carriers, and edible compositions. The fruit particle analogues were thus only one besides numerous other embodiments and there was no clear

and unambiguous connection between the teaching of the low extrusion temperature requirement on page 6 with this particular embodiment. The same applied to the remaining independent claims of the main request.

Auxiliary requests

The first, second and fourth to seventh auxiliary requests should not be admitted into the proceedings, because these requests had been submitted after the summons to oral proceedings and thus were filed late. Moreover these requests increased the complexity of the case as numerous amendments had been effected which did not meet all the objections raised by the board in the annex to the summons.

In the first to fourth, sixth and seventh auxiliary requests, the same deficiency was present as in the main request, which implied that the subject-matter claimed in these requests extended beyond the content of the application as filed. In the fifth auxiliary request the feature "at a temperature below the crystallization temperature of the bulking agent" had been replaced by another feature which was neither identical to the replaced feature nor further limited the scope of the original feature. Thus, the fifth auxiliary request did not meet the requirements of Article 123(3) EPC.

XIII. During the oral proceedings, the board made the following additional comments:

Concerning the granted claims and their support in the application as filed, there was only one food product disclosed on pages 3-5 of the application as filed which was formed at low extrusion temperature and which contained the same ingredients as mentioned on page 6, lines 13-16, namely Parmesan cheese analogues. The skilled person would therefore have combined the teaching on page 6 of the application as filed with Parmesan cheese analogues rather than fruit particle analogues. Apart from the passage on page 6, there were two further passages in the application as filed which disclosed an extrusion temperature below the crystallisation temperature of the bulking agent, namely page 8, lines 1-3 and page 9, lines 24-29. However contrary to the granted claims, these passages required the bulking agent to be sucrose.

With regard to the allowability of the fifth auxiliary request under Article 123(3) EPC, the feature "without an addition of an external source of heat" in claim 1 of this request did not imply that the extrusion temperature had to be below the crystallisation temperature of the bulking agent. This was confirmed by point 13 of the declaration D6, where it was stated that in order to keep the extrusion temperature below the crystallisation temperature of the bulking agent, it had sometimes to be cooled. Furthermore, contrary to all granted claims, claim 1 of the fifth auxiliary request covered a method for making a particulate food analogue which did not contain any colouring and/or

flavouring agent. This deficiency was equally present in the seventh auxiliary request.

XIII. The appellant (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained as granted (main request) or on the basis of the claims according to the first to seventh auxiliary requests (filed with letter of 23 December 2011, except the third auxiliary request which was filed with letter of 1 September 2009).

XIV. The respondent (opponent) requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.
2. Procedural matters - admissibility of auxiliary requests

The first, second, fourth, fifth, sixth and seventh auxiliary requests were filed by the appellant with its letter of 23 December 2011. During the oral proceedings before the board, the respondent requested that these auxiliary requests should not be admitted into the proceedings.

These requests were filed in response to the preliminary opinion of the board communicated to the parties in the annex to the summons to oral proceedings dated 26 April 2011 and constitute an attempt to overcome the objections raised in the board's

preliminary opinion. Moreover, the major amendment effected in the auxiliary requests was the deletion of numerous claims and most of the remaining amendments hinged on the feature relating to the low extrusion temperature requirement, of which both the respondent and the board were well aware. Therefore, the amendments were a genuine attempt to simplify the issues in advance of the oral proceedings and to move the appeal forward. Given that there were six weeks remaining until oral proceedings there was sufficient time for the respondent and the board to consider the amendments in advance of the proceedings.

Under these circumstances, the board exercised its discretion under Article 13(3) of the Rules of Procedure of the Boards of Appeal and admitted these requests into the proceedings.

Main request (patent as granted)

3. Claim 1

3.1 Claim 1 as granted (point II above) relates to an extruded fruit particle analogue, comprising a flour, a sugar- or gum-based bulking agent, and a colouring agent, wherein the fruit particle analogue is formed at a temperature below the crystallisation temperature of the bulking agent.

With regard to the ground under Article 100(c) EPC, the crucial question is whether the combination of

- (a) the feature that the claimed product is a fruit particle analogue with

(b) the feature that the claimed product is "formed at a temperature below the crystallisation temperature of the bulking agent"

is disclosed in the application as filed.

3.2 As acknowledged by the appellant itself (penultimate paragraph of page 4 of its letter of 23 December 2011), this combination of features (a) and (b) is not explicitly disclosed in the application as filed. The appellant argued however that the skilled person would derive the combination of the two features from the passage on page 6, lines 13-16 in conjunction with the fruit particle analogue referred to on page 3, lines 27-31 of the application as filed.

3.2.1 The passage on page 6, lines 13-16 of the application as filed reads as follows:

"The present invention also includes an extruded particulate product comprising a sugar or gum-based bulking agent, flour, and a coloring agent formed, in one embodiment, at a temperature below the crystallization temperature of the bulking agent" (in the following "low extrusion temperature requirement").

3.2.2 The second passage referred to by the appellant, ie page 3, lines 27-31 of the application as filed, belongs to the chapter "Summary of the Invention", which starts on page 3, line 14 and extends to page 5, line 22. This chapter refers to various "embodiments of the present invention", namely (the preparation of) the following food products:

- edible carriers for colour or for flavour comprising a starch-containing material, a bulking agent, and a colouring agent or a colouring and flavouring agent (page 3, lines 15-20) and a method of making these carriers without generating a substantial quantity of heat (page 4, lines 26-33);
- an edible array of carrier particles, such as confetti comprising flour, sucrose and at least two different colours or colours and flavours (page 3, lines 21-26 and page 4, lines 4-11);
- a fruit particle analogue comprising flour, a bulking agent and a colouring agent or a colouring and a flavouring agent (page 3, lines 27-31);
- a chocolate chip analogue comprising flour and sucrose and a chocolate colour and flavour (page 3, line 32 to page 4, line 3);
- a method for making a chocolate chip analogue where a mixture of a starch-containing material and sucrose is conveyed through an extruder without generating a substantial quantity of heat (page 5, lines 2-9);
- a nutraceutical or pharmaceutical carrier comprising a starch-containing material, a bulking agent and a nutraceutical or pharmaceutical (page 4, lines 12-17);

- an edible composition comprising a starch-containing material, a bulking agent, a colouring agent or a colouring and a flavouring agent and water (page 4, lines 18-25);
- a method for making a Parmesan cheese analogue where a mixture of flour, a bulking agent, and a Parmesan colour and flavouring agent is extruded at low temperature to form an extrudate (page 5, lines 10-15); and
- a method for making bread with a colour carrier in a bread machine (page 5, lines 16-22).

3.3 Hence, the relevant question in the present case is whether a skilled person would make a clear and unambiguous connection between the low extrusion temperature requirement disclosed on page 6 and the fruit particle analogues disclosed on page 3.

3.3.1 In this context, it has been set out in T 686/99 of 22 January 2003 (point 4.3.3; not published in OJ EPO) that the content of the application as filed must not be considered to be a reservoir from which individual features pertaining to separate sections can be combined in order artificially to create a particular combination. In the absence of any pointer to that particular combination, this combined selection of features does not, for the person skilled in the art, emerge clearly and unambiguously from the content of the application as filed.

3.3.2 The appellant argued in this respect that such a pointer was present in the application as filed because

the passages on pages 6 and 3 both referred to the same ingredients, namely flour, a bulking agent and a colouring agent. The skilled person thus would have read the passage on page 6 to apply to the fruit particle analogues on page 3.

However, in the board's view, this argument is not convincing. In fact, there are two products in the list of food products disclosed on pages 3-5 which contain the ingredients disclosed on page 6, namely the fruit particle analogues as disclosed on page 3, lines 27-31 (as referred to by the appellant), and the Parmesan cheese analogues as disclosed on page 5, lines 10-15. From these two passages, however, only the second one additionally refers to a low extrusion temperature (page 5, line 14: "The mixture is extruded at low temperature to form an extrudate"). Therefore, the skilled person would clearly consider the low extrusion temperature requirement disclosed on page 6 to apply to the product mentioned in the second passage, ie the Parmesan cheese analogues on page 5, rather than to the fruit particle analogues on page 3.

3.3.3 Furthermore, if one considers the remaining part of the application as filed, there are only two further passages, apart from the passage on page 6, that refer to an extrusion below the crystallisation temperature of the bulking agent. These two passages can be found on page 8, lines 1-3 and page 9, lines 24-29 and read as follows:

"The temperature of the mixed, dough-like extrudate, within the extruder, in an instance where sucrose is used as the bulking agent, remains below the

crystallization point of the sugar." (page 8, lines 1-3).

By "significant heat" is meant that the extrudate temperature does not exceed about 95 to 100 degrees Fahrenheit for most embodiments. This combination of the 1:1 sucrose-to-flour ratio and low extrusion temperature produces a condition whereby the sucrose remains below its crystallization point." (page 9, lines 24-29).

These two passages of the application as filed do not leave any doubt that the low extrusion temperature requirement applies to embodiments in which the bulking agent is sucrose. Thus, the remaining disclosure even points away from a combination of the passage on page 6 with the fruit particle analogue disclosed on page 3, which does not contain sucrose.

3.3.4 Consequently, the requirement of the extrusion temperature being below the crystallisation temperature of the bulking agent is disclosed in the application as filed only for food products that are Parmesan cheese analogues and/or for food products which contain sucrose as a bulking agent. None of these two characteristics is present in granted claim 1. Granted claim 1 therefore is not based on the application as filed (Article 100(c) EPC).

3.4 The appellant argued that the purpose of Article 123(2) EPC was to prevent the applicant from obtaining an unfair advantage and that this was not the case here because the passage on page 6 was broader than the

scope of protection the applicant (now appellant) had been trying to secure.

In the board's view, the appellant's argument is not convincing. The criterion to be applied with regard to Article 123(2) EPC is whether the amendment is clearly and unambiguously derivable from the application as filed. This criterion has been established in G 2/98 (OJ EPO 2001, 413; point 9) as the relevant one with regard to the concept of "the same invention" referred to in Article 87(1) EPC and has been stated in G 1/03 (OJ EPO 2004, 413; point 4) to apply equally to the requirements of Article 123(2) EPC (and hence also Article 100(c) EPC). As has been pointed out above, this criterion of clear and unambiguous derivability is not met in the present case.

- 3.5 The appellant additionally argued that it was apparent from the first two pages of the description that the focus of the invention was on fruit particle analogues and that therefore the passage on page 6 would be read by the skilled person to refer to these fruit particle analogues. However, in fact the last paragraph on page 2, which continues onto page 3, refers to food particle analogues with a high fat content, which are later exemplified as chocolate chips (see eg page 5, lines 1-9). Hence, already on the second page of the application as filed, reference is made to food products different from fruit particle analogues and in fact, as has been set out above with regard to the disclosure of pages 3-5, the application as filed refers to numerous different food products, of which fruit particle analogues are just one of many examples. Therefore, the appellant's position that the

application as filed focuses on fruit particle analogues is not convincing.

3.6 Since granted claim 1 is not allowable in view of Article 100(c) EPC, the respondent's main request must be refused for this reason alone.

4. Claim 15 (as granted)

4.1 This claim relates to a method for preventing colour bleeding in a food analogue where a premix comprising flour, a sugar or gum-based bulking agent and a colouring agent comprising at least one aluminium lake colour is extruded at a temperature below the crystallisation temperature of the bulking agent without an addition of heat (point II above).

Thus, in the same way as granted claim 1, granted claim 15 requires that the extrusion is carried out below the crystallisation temperature of the bulking agent, and, again, the question arises whether this requirement in combination with the remaining features of granted claim 15 is clearly and unambiguously derivable from the application as filed.

4.2 As has been set out above, there are three passages in the application as filed which disclose that the extrusion has to be carried out below the crystallisation temperature of the bulking agent, namely page 6, lines 13-16 (point 3.2.1 above), page 8, lines 1-3 and page 9, lines 24-29 (both point 3.3.3 above).

The passage on page 6 does not refer to a method for preventing color bleeding in a food analogue, let alone a method for preventing colour bleeding in a food analogue which comprises flour and aluminium lakes as required by granted claim 15. This finding does not change if the passage on page 6 is read in conjunction with the above-discussed disclosure on pages 3-5. In particular, pages 3-5 disclose nowhere a method as required by granted claim 15. More importantly even, as has been set out in point 3.3.2 above, the skilled person would combine the passage on page 6 with the Parmesan cheese analogues disclosed on page 5, lines 10-15 and thereby arrive at a method for preparing Parmesan cheese analogues rather than a method as required by granted claim 15. The passage on page 6, whether taken alone or in conjunction with pages 3-5 as filed, therefore cannot create a basis for granted claim 15.

As to the remaining passages on pages 8 and 9, the same reasoning as set out above (point 3.3.3) applies. In particular, these passages require the bulking agent to be sucrose whereas no such limitation is present in granted claim 15.

Consequently, granted claim 15 is not based on the application as filed.

5. Claim 30 (as granted)

5.1 Claim 30 is directed to a method for making an edible colour or flavour or flavour and colour carrier (point II above). The method comprises an extrusion step and in the same way as the previously discussed

claims, granted claim 30 requires the extrusion to be carried out at a temperature below the crystallisation temperature of the bulking agent. The relevant passages in the application as filed are therefore again page 6, lines 13-16, page 8, lines 1-3 and page 9, lines 24-29.

The passage on page 6 does not refer to any method for making an edible colour or flavour or flavour and colour carrier. Although a method for making an edible colour or flavour and colour carrier is disclosed on page 4, the passage of page 6, lines 13-16 cannot be read as applying to this embodiment. In particular, as has been set out above (point 3.3.2), when read in conjunction with pages 3-5 as filed, the passage on page 6 can only be read as applying to a method of making Parmesan cheese analogues rather than any other embodiment. As to the remaining passages on pages 8 and 9, the same considerations as set out above (point 3.3.3) apply, ie these passages require the bulking agent to be sucrose, and no such limitation is present in granted claim 30.

Consequently, granted claim 30 is not based on the application as filed.

6. In conclusion, the deficiencies under Article 100(c) EPC in at least granted claims 1, 15 and 30 prejudice the maintenance of the opposed patent as granted (main request).
7. Similar objections apply to granted claims 18, 35 and 36. As none of these claims is contained in the auxiliary requests, there is however no need to discuss them any further.

Auxiliary requests

8. First, second and third auxiliary requests

Claim 1 of each of the first, second and third auxiliary requests is identical to claim 1 of the main request, ie granted claim 1. Consequently, the same deficiency under Article 100(c) EPC as in the main request is present in these requests. Therefore, the ground under Article 100(c) EPC prejudices the maintenance of the opposed patent in the form of the first, second and third auxiliary requests.

9. Fourth auxiliary request

Claim 1 of the fourth auxiliary request is identical to granted claim 30 except that it has been further specified that a single screw extruder is used for extruding the mixture through a die ("... extruding the mixture using a single screw extruder through a die ...").

However, this additional feature has no bearing on the finding made with regard to granted claim 30 of the main request that the low extrusion temperature requirement in combination with the remaining features of the claim is not based on the application as filed. Consequently, the ground under Article 100(c) EPC also prejudices the maintenance of the opposed patent in the form of the fourth auxiliary request.

10. Fifth auxiliary request

10.1 Claim 1 of the fifth auxiliary request reads as follows:

"A method for making a particulate food analogue, the method comprising the steps of:

providing flour or other starch bearing material;
providing a sugar or gum-based bulking agent;
providing oil or other fat;
providing a colouring agent and/or flavouring agent
and/or nutraceutical and/or pharmaceutical;

mixing said ingredients in a mixer to form a premix;
transferring the premix to a screw type extruder;
adding water within the extruder to hydrate the mixture
at a concentration effective to create a homogeneous
mixture that may be extruded; and
conveying the hydrated mixture by a screw through the
screw type extruder without an addition of an external
source of heat."

10.2 Claim 1 of the fifth auxiliary request thus refers to a "method for making a particulate food analogue". The granted independent claims refer to an extruded fruit particle analogue (claim 1), a method for preventing colour bleeding in a food analogue (claim 15), an extruded edible carrier for flavour or colour or flavour and colour (claim 18), a method for making an edible colour or flavour or flavour and colour carrier (claim 30), a product obtainable by the method of claim 30 (claim 35) and a method for controlling colour bleeding in a food analogue (claim 36). Hence, none of the granted claims covers the type of method of claim 1

of the fifth auxiliary request. Hence, the requirements of Article 123(3) EPC are not met.

10.3 In addition, due to the formulation "providing a colouring agent and/or flavouring agent and/or nutraceutical and/or pharmaceutical" in claim 1 of the fifth auxiliary request, this claim covers methods for making particulate nutraceutical or pharmaceutical food analogues not containing any colouring or flavouring agent. Contrary thereto, the granted independent claims were all restricted in that the food products contain a colouring and/or flavouring agent. For this reason, too, the requirements of Article 123(3) EPC are violated.

10.4 Finally, in claim 1 of the fifth auxiliary request, the temperature during extrusion is only characterised in that extrusion occurs "without an addition of an external source of heat". According to all granted independent claims, the temperature during extrusion had to be "below the crystallisation temperature of the bulking agent". The fact that no heat is added according to claim 1 of the fifth auxiliary request does, however, not necessarily imply that the temperature during extrusion is below the crystallisation temperature of the bulking agent. This is even confirmed by point 13 of declaration D6, where the expert Mr R. Schuppan states that "in order to extrude a product at a temperature below the crystallisation temperature of the bulking agent, it is sometimes necessary to cool the barrel of the extruder to minimise the heat generated by friction". This statement clearly implies that by simply not adding heat, and hence without any cooling, the extrusion temperature is not necessarily below the

crystallisation temperature of the bulking agent. Consequently, while according to the granted independent claims, the extrusion temperature had to be below the crystallisation temperature of the bulking agent, this is no longer required by claim 1 of the fifth auxiliary request. Hence, the requirements of Article 123(3) EPC are violated for this reason as well.

10.5 Consequently, the fifth auxiliary request is not allowable under Article 123(3) EPC.

11. Sixth auxiliary request

Claim 1 of the sixth auxiliary request is identical to granted claim 15 of the main request. Consequently, the same deficiency under Article 100(c) EPC is present as in claim 15 of the main request. Therefore, the ground under Article 100(c) EPC prejudices the maintenance of the opposed patent in the form of the sixth auxiliary request.

12. Seventh auxiliary request

12.1 Claim 1 of the seventh auxiliary reads as follows:

"A method for making a particulate food analogue, the method comprising the steps of:

providing flour or other starch bearing material;
providing a sugar or gum-based bulking agent;
providing oil or other fat;
providing a colouring agent and/or flavouring agent
and/or nutraceutical and/or pharmaceutical;

mixing said ingredients in a mixer to form a premix;
transferring the premix to a screw type extruder;
adding water within the extruder to hydrate the mixture
at a concentration effective to create a homogeneous
mixture that may be extruded; and
conveying the hydrated mixture by a screw through the
screw type extruder without an addition of an external
source of heat at a temperature below the
crystallisation temperature of the bulking agent."

Consequently, in the same way as granted claim 1,
claim 1 of the seventh auxiliary request requires the
extrusion to be carried out at a temperature below the
crystallisation temperature of the bulking agent. The
relevant passages in the application as filed are
therefore page 6, lines 13-16, page 8, lines 1-3 and
page 9, lines 24-29.

The passage on page 6 does not, however, disclose any
method for making a particulate food analogue
comprising starch bearing materials different from
flour as covered by claim 1 of the seventh auxiliary
request. This finding does not change when the passage
on page 6 is read in conjunction with pages 3-5 as
filed. In particular, as has been set out above
(point 3.3.2), when read in conjunction with pages 3-5
as filed, the passage on page 6 refers to a method of
making Parmesan cheese analogues rather than a
particulate food analogue comprising a starch bearing
material different from flour.

As to the remaining passages on pages 8 and 9, these
passages require the bulking agent to be sucrose (see

point 3.3.3 above) and no such limitation is present in claim 1 of the seventh auxiliary request.

Consequently, claim 1 of the seventh auxiliary request is not based on the application as filed.

- 12.2 In the same way as claim 1 of the fifth auxiliary request, claim 1 of the seventh auxiliary request refers to a "method for making a particulate food analogue" and contains the formulation "providing a colouring agent and/or flavouring agent and/or nutraceutical and/or pharmaceutical". Therefore, for the same reasons as given in points 10.2 and 10.3 above, claim 1 of the seventh auxiliary request violates the requirements of Article 123(3) EPC.

The seventh auxiliary request is consequently not allowable.

13. Substantial procedural violation

The opposition division rejected the present third auxiliary request ("first auxiliary request" before the opposition division) due to lack of novelty of the subject-matter of claims 1 and 18 in view of example 1 of D1. The appellant considered the opposition division's decision in this respect to contain a substantial procedural violation and requested the reimbursement of the appeal fee. The appellant argued *inter alia* that the opposition division's decision was based on "reference handbooks" which were alleged to exist, but which were never introduced into the proceedings and which therefore the proprietor did not have a chance to comment.

According to Rule 103 EPC, a prerequisite for the reimbursement of the appeal fee is that the board deems the appeal to be allowable. As has been set out above, in the present case, none of the appellant's requests is allowable. Consequently the appeal has to be dismissed. This means that the pre-requisite mentioned in Rule 103 EPC for the reimbursement of the appeal fee is not fulfilled in the present case. Therefore, the reimbursement of the appeal fee is not possible, irrespective of whether a substantial procedural violation may have occurred.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Röhn

W. Sieber