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**Datasheet for the decision  
of 12 October 2011**

**Case Number:** T 0716/10 - 3.3.04

**Application Number:** 04012292.1

**Publication Number:** 1454990

**IPC:** C12P7/64, A23K1/16, A23C9/152,  
A23C9/20, A23L1/30

**Language of the proceedings:** EN

**Title of invention:**  
Process for producing unsaturated fatty acid-containing oils

**Patentee:**  
Suntory Holdings Limited

**Opponents:**  
Martek Bioscience Corp.  
DSM IP Assets B.V.

**Headword:**  
Unsaturated fatty acids/SUNTORY

**Relevant legal provisions:**  
EPC Art. 83

**Keyword:**  
"Main request - sufficiency of disclosure (yes)"

**Decisions cited:**

**Catchword:**  
-



Case Number: T 0716/10 - 3.3.04

**DECISION**  
of the Technical Board of Appeal 3.3.04  
of 12 October 2011

**Appellant:** Suntory Holdings Limited  
(Patent Proprietor) 1-40, Dojimahama 2-chome,  
Kita-ku, Osaka-shi,  
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**Representative:** Stoner, Gerard Patrick  
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**Respondent I:** Martek Bioscience Corp.  
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**Representative:** Mercer, Christopher Paul  
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**Respondent II:** DSM IP Assets B.V.  
(Opponent II) Het Overloon 1  
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**Representative:** Elkenbracht, Johan Christiaan  
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**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted 15 January 2010  
revoking European patent No. 1454990 pursuant  
to Article 101(3)(b) EPC.**

**Composition of the Board:**

**Chairman:** C. Rennie-Smith  
**Members:** R. Gramaglia  
G. Alt

## Summary of Facts and Submissions

- I. European patent No. 1 454 990, having the title "Process for producing unsaturated fatty acid-containing oils" was granted on the basis of 5 claims, based on application No. 04012292.1. The latter is a divisional application of 9793781.0 ("parent application") underlying European patent No. 0 957 173, which has been the object of appeal T 1540/08.
- II. This case is related to case T 1540/08. The parent defines the compositional ratio of 24,25-methylenecholest-5-en-3 $\beta$ -ol (hereafter: 24,25-M) relative to the total sterols. This ratio should be lower than 35%. The divisional defines the ratio of 24,25-M relative to the desmosterol compositional ratio. This ratio should be lower than 1.2, and preferably lower than 0.6. This difference in the yardstick for defining the compositional ratio of 24,25-M does not change the substance of appeal T 716/10 in comparison with T 1540/08.
- III. The claims of the main request filed with the statement of grounds of appeal read as follows:
- "1. An arachidonic acid-containing oil which is a microbial oil obtained from a microorganism *Mortierella alpina*, having a 24,25-methylenecholest-5-en- $\beta$ -ol compositional ratio in a proportion of 1.2 or less with respect to the desmosterol compositional ratio, and an arachidonic acid content of 30 to 54%.
2. A nutritive dietary supplement comprising an arachidonic acid-containing oil according to claim 1.

3. An immature infant formula, infant formula, baby food or pregnancy food product comprising an arachidonic acid-containing oil according to claim 1.

4. An animal feed comprising an arachidonic acid containing oil according to claim 1."

IV. Oral proceedings took place on 12 October 2011, i.e. on the same day as oral proceedings in case T 1540/08. At the oral proceedings for the present case respondents I and II said that, in relation to the issue of sufficiency of disclosure, they would not add anything to what they had said in case T 1540/08. Respondent II further stated that it wanted a decision on sufficiency according to the state of the file. The appellant said, that with regard to sufficiency of disclosure, it would make the same submissions as in case T 1540/08.

Thus as far as the arguments of the parties are concerned the board refers to decision T 1540/08, sections VIII and IX.

V. The appellant (patentee) requested that the decision under appeal be set aside and that the case be remitted to the department of first instance for further prosecution on the basis of the main request or auxiliary requests 1 to 4, all filed with the statement of grounds of appeal, or on the basis of auxiliary requests 5 to 7 filed with the submission dated 9 November 2009.

The respondents (opponents) requested that the appeal be dismissed or, if not, that the case be remitted to the department of first instance for further prosecution.

### **Reasons for the Decision**

1. Although expressed in slightly different terms all the parties added nothing to the submissions they had made in the parent case.
2. The claims are slightly different and are limited to products. However, the arguments have the same impact.
3. Thus, the arguments on sufficiency being the same in both cases, the board reaches the same decision on the issue of sufficiency of disclosure as in the parent case. For the reasons for that decision see points 6 to 21 of the decision T 1540/08.

**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 the main request or auxiliary requests 1 to 4, all filed with the statement of the grounds of appeal, or auxiliary requests 5 to 7 filed with the submission dated 9 November 2009.

The Registrar:

The Chairman:

P. Cremona

C. Rennie-Smith