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**Datasheet for the decision
of 22 September 2011**

Case Number: T 1188/10 - 3.3.09

Application Number: 01994617.7

Publication Number: 1437946

IPC: A23L 3/3526

Language of the proceedings: EN

Title of invention:

Use of cationic preservative in food products

Applicant:

Laboratorios Miret, S.A.

Opponent:

-

Headword:

-

Relevant legal provisions:

EPC Art. 123(2)

Relevant legal provisions (EPC 1973):

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Keyword:

"New range by taking single values from examples: Compliance with Article 123(2) - (yes)"

Decisions cited:

T 0201/83

Catchword:

-



Case Number: T 1188/10 - 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 22 September 2011

Appellant: Laboratorios Miret, S.A.
(Applicant) Pol. Industrial Can Parellada
c/ Geminis, no. 4
ES-08228 Les Fonts de Terrassa, Barcelona (ES)

Representative: Gille Hrabal Struck Neidlein Prop Roos
Patentanwälte
Brucknerstrasse 20
D-40593 Düsseldorf (DE)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 29 December 2009
refusing European patent application
No. 01994617.7 pursuant to Article 97(2) EPC.

Composition of the Board:

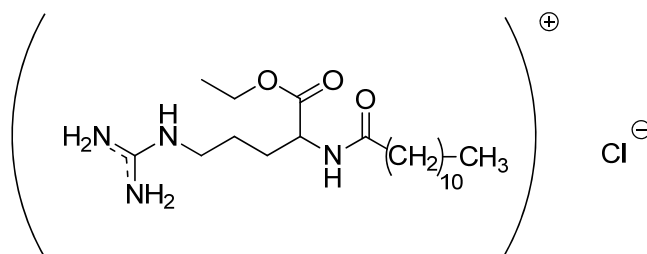
Chairman: W. Sieber
Members: W. Ehrenreich
R. Menapace

Summary of Facts and Submissions

I. European patent application No. 01 994 617.7, filed as International application No. PCT/EP01/12358 on 25 October 2001 in the name of *Lamirsa S.A.* (now *Laboratorios Miret, S.A.*), was refused by the examining division with its decision announced orally on 15 December 2009 and issued in writing on 29 December 2009.

II. The decision was based on amended claims 1 to 11 submitted by the applicant with the letter dated 10 September 2008. Claim 1 reads as follows:

"1. Use of a cationic preservative derived from the condensation of a fatty acid and an esterified dibasic amino acid, according to the following formula:



as a preservative in food preparations,
wherein the preservative is added to such food products
at a concentration from 0,006% to 0.015%."

Independent claims 2 and 3 are directed to food products comprising the preservative (claim 2) and a method of preservation of food products by adding the preservative (claim 3), wherein the preservative and the concentration of the preservative are as defined in claim 1. Claims 4 to 11 are dependent on claim 3.

III. The examining division held that the amended concentration range from 0,006% to 0,015% in claim 1 was not originally disclosed and that its upper and lower limit was formed by a generalisation of single values taken from the examples. In its view, the concentration of the cationic preservative (hereinafter: LAE) would be influenced by the nature of the food product and it was thus not admissible to isolate features from a set of features which have been disclosed in a specific combination in the examples. The amendment was therefore not in compliance with Article 123(2) EPC.

IV. On 25 February 2010 the applicant (hereinafter: appellant) filed a notice of appeal against the decision and paid the prescribed fee on the same day. The statement of the grounds of appeal was received on 5 May 2010.

The appellant requested that the decision of the examining division be set aside and a patent be granted on the basis of the set of claims filed with the letter dated 10 September 2008.

V. Oral proceedings before the board were held on 22 September 2011 in which the amendment to claim 1 was discussed under the provisions of Article 123(2) EPC.

VI. The appellant's arguments may be summarized as follows:

In the present case, a generalisation of the single values taken from example 4 (lower limit of the new

range) and example 2 (upper limit of the new range) was admissible under Article 123(2) EPC because

- all preservative concentration values of the embodiments exemplified in examples 1 to 8 were within the range of claim 1;
- all examples exclusively used LAE as preservative in various food products and no further components were present;
- a certain trend for the preservative effect, i.e. the protection against growth of bacteria and fungi/yeast in various food products at different growth temperatures was observed in a series of examples (1, 3, 5, 7) with identical LAE concentrations (100 ppm), independently from the nature of the food products and the temperature;
- this trend was continued in examples with a different LAE concentration, in particular examples 2 and 4 using LAE in the concentration of 150 ppm and 60 ppm, respectively, which form the end points of the new range in claim 1.

VII. The final request established by the appellant in the oral proceedings was that the decision under appeal be set aside and the case be remitted to the examining division for further prosecution on the basis of claims 1 to 11 filed with the letter dated 10 September 2008.

Reasons for the Decision

1. The appeal is admissible.
2. Compliance of the LAE-concentration range of from 0,006% to 0,015% in claim 1 with Article 123(2) EPC

The Board notes that, in the application as filed, the broadest general range relating to the concentration of LAE in food products is from 0,0001% to 1% as disclosed in claim 5. The new range of 0,006% to 0,015% fully lies within this broadest range and therefore constitutes a limitation.

This new range, however, was formed by taking, as end points, single values from examples 2 and 4 relating to the use of LAE as preservative in two different specific food products at different growth temperatures, namely 150 ppm for a chicken product at 10°C in example 2 and 60 ppm for a blackberry juice at 34°C in example 4.

- 2.1 In order to assess whether this new range complies with Article 123(2) EPC it has to be considered whether a skilled person, in analogy to T 201/83, would generalise these values in the sense that he would recognise them as not only associated with the specific food products and temperatures used in the examples.

In this context, it emerges from table 1 of the application as filed that LAE as preservative is active against a number of gram-positive and gram-negative bacteria as well as fungi and yeast. It is furthermore stated on page 1, lines 4 to 5 from the bottom that

"LAE and related compounds are particularly suitable to be used in the preservation of all perishable food products". From this the skilled person would therefore recognise that the preservative effect of LAE is universal and not limited to specific bacteria and food products.

This is confirmed by the results presented in tables 2 to 9 of the experimental part of the application depicting for different food products the growth of bacteria and/or mould & yeast (expressed in the number of colony forming units, cfu/g,) preserved with various LAE concentrations in comparison with the respective control samples without LAE.

The following can be deduced

- (a) all examples of the application as filed lie within the new range formed by the end values of 0,006% (60 ppm) and 0,015% (150 ppm) LAE taken from examples 2 and 4;
- (b) at the beginning of the test (0 days) the food-specific number of colony forming units (cfu/g), is similar in the respective food samples with and without LAE (control);
- (c) with progressing time (after 3, 5, 14 and 43 days) the increase of the number of cfu/g in the control samples is considerably higher than in the samples preserved with LAE in various concentrations and at various growth temperatures;

(d) the observations under (b) and (c) not only apply for the series of examples 1, 3, 5, 7 and 8 with LAE concentrations of 100 ppm, but also for the examples with LAE concentrations higher or lower than 100 ppm, including the two samples with the LAE concentrations of 60 ppm and 150 ppm in examples 2 and 4 forming the end values of the claimed range;

(e) the trend observed under (b) to (d) is common to all examples, regardless of the kind of preserved food products and the bacterial growth temperatures.

2.2 From the above, the skilled person would conclude that, at least within the new concentration range of 0,006% to 0,015%, the LAE activity is not bound to a specific concentration, food product or bacterial growth temperature. The skilled person would therefore unambiguously extract from the application as filed that, within the broadest general LAE concentration range of from 0,0001 to 1%, the narrow range formed by taking the LAE concentrations of 60 ppm (0,006%) and 150 ppm (0.015%) of examples 4 and 2 as end values can also be generalized.

The range claimed in claim 1 therefore complies with Article 123(2) EPC. This also applies for the identical range indicated in claims 2 and 3.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the examining division for further prosecution on the basis of claims 1 to 11, filed with the letter dated 10 September 2008.

The Registrar

The Chairman

G. Röhn

W. Sieber