

Internal distribution code:

- (A) [-] Publication in OJ
(B) [-] To Chairmen and Members
(C) [-] To Chairmen
(D) [X] No distribution

**Datasheet for the decision
of 21 July 2015**

Case Number: T 2451/11 - 3.3.10
Application Number: 02803083.1
Publication Number: 1443897
IPC: A61K7/42, A61K31/01, A23L1/00
Language of the proceedings: EN

Title of invention:

CAROTENOID COMPOSITION AND METHOD FOR PROTECTING SKIN

Applicant:

Lycored Natural Products Industries Ltd
Zelkha, Morris
Nir, Zohar
Sedlov, Tanya

Headword:

Carotenoid composition / LYCORED

Relevant legal provisions:

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

Keyword:

Amendments - added subject-matter (no)
Appeal decision -
remittal to the department of first instance (yes)

Decisions cited:

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 2451/11 - 3.3.10

D E C I S I O N
of Technical Board of Appeal 3.3.10
of 21 July 2015

Appellant: Lycored Natural Products Industries Ltd
(Applicant 1) P.O. Box 320
84102 Beer-Sheva (IL)

(Applicant 2) Zelkha, Morris
10 Hadar Street
84965 Omer (IL)

(Applicant 3) Nir, Zohar
Ye'elim 27
85025 Meitar (IL)

(Applicant 4) Sedlov, Tanya
25/6 Mivtsah Moshe
84496 Beer Sheva (IL)

Representative: Vossius & Partner
Patentanwälte Rechtsanwälte mbB
Siebertstrasse 3
81675 München (DE)

Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 27 May 2011
refusing European patent application No.
02803083.1 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman P. Gryczka
Members: J.-C. Schmid
F. Blumer

Summary of Facts and Submissions

- I. The appeal lies from the decision of the Examining Division refusing European patent application No. 02803083.1.
- II. The sole ground for the refusal of the application by the Examining Division was that the feature "said natural source being tomato extract", incorporated into the claims of the then pending main, first and second auxiliary requests had no support in the application as filed, and thus contravened the requirement of Article 123(2) EPC.
- III. In response to a communication of the Board dated 17 May 2013, the Appellant withdrew its former requests and filed a new main request with a letter dated 27 December 2013.

Claims 1 and 11 of the main request read as follows:

"1. Use of a composition containing 6% to 25% by weight lycopene from a natural source, said natural source being vegetables, fruits, plant matter, fungus and fungal sources and natural bio-mass, and said composition comprising more than 0,3% by weight of one or more carotenoids selected from among phytoene and phytofluene or mixtures thereof for manufacturing a medicament for protecting skin against damages caused by ultra-violet (uv) radiation from the sun, wherein the composition is to be administered orally to a subject in need of protection in an effective amount, and wherein the composition contains 1% to 4% by weight vitamin E."

"11. A carotenoid composition comprising of 6% to 25% by weight lycopene of a natural source, said natural source being vegetables, fruits, plant matter, fungus and fungal sources and natural bio-mass, and said composition comprising more than 0,3% by weight of one or more carotenoids selected from among phytoene and phytofluene for use in the protection of skin against damages caused by uv radiation by oral administration of said composition, and wherein said composition contains 1% to 4% by weight vitamin E."

- IV. In its communication of 30 March 2015, the Board indicated that the objections under Article 123(2) EPC had been overcome and that the case could be remitted to the department of first instance. With a letter dated 8 June 2015, the Appellant withdrew its request for oral proceedings "provided that the case is remitted to the Examining Division for further prosecution on the basis of claims 1 to 15 filed as the Main Request with a letter dated 27 December 2013".
- V. The Appellant requested that the case be remitted to the examining division for further prosecution on the basis of the Main Request filed with a letter dated 27 December 2013

Reasons for the Decision

1. The appeal is admissible.
2. Claims 1 and 11 of the main request are supported by original claim 1 in combination with page 2, lines 3, 4 and 20 to 29 of the application as filed. The natural sources of lycopene are specified according to the disclosure of page 3, line 21 to 23 of the application

as filed. The percentages of the component are by weight as indicated on page 3, lines 20 and 21 of the application as filed. Dependent claims 2 to 5, 8 to 10 and 12 to 15 are backed up by claims 3 to 6, 9 to 11 and 12 to 15 of the application as filed, respectively. Claims 6 and 7 are based on page 4, lines 23 and 24 of the application as filed.

Accordingly, claims 1 to 15 satisfy the requirement of Article 123(2) EPC.

3. The essential function of an appeal is to review the decision issued by the first-instance department. Hence, a case is normally referred back if essential questions regarding the patentability of the claimed subject-matter have not been decided by the department of first instance. The examination of requirements of patentability not dealt with in the appealed decision is normally left to the examining division to consider after a remittal, so that the Appellant has the opportunity for these to be considered without loss of an instance. In particular, remittal is considered by the boards in cases where the examining division rejects an application solely upon a particular issue, which leaves other essential issues outstanding.
4. The examining division decided that claims 1 and 14 of the then pending main request, claims 1 and 12 of the then pending auxiliary request 1 and claims 1 and 10 of the then pending auxiliary request 2 did not meet the requirements of Article 123 EPC, based solely on the same amendment, which was present in all of these claims, namely the amendment "said natural source being tomato extract" (see points 2.2.2, 3.2, 4.2 and III of the contested decision).

5. The feature "said natural source being tomato extract", which was considered by the examining division to contravene the requirement of Article 123(2) EPC, was replaced by the feature "said natural source being vegetables, fruits, plant matter, fungus and fungal sources and natural bio-mass", which is supported by page 3, lines 21 to 23 of the application as filed, so that the reasons given in the contested decision for refusing the present application no longer apply.

6. Furthermore, in the contested decision the examining division, as a matter of completeness, made observations concerning inventive step (point 5 of the decision). However, the Board considers that the amendments made by the Appellant in the appeal proceedings, in particular by incorporating the subject-matter of dependent claims 2 to 4 of the main request pending before the examining division, are substantial, so that the observations of the examining division with regard to inventive step no longer apply to the set of claims filed with the letter dated 27 December 2013. The subject-matter of claims, which include compositions comprising from 1% to 4% by weight vitamin E, has never been challenged under Article 56 EPC.

7. Thus, under the present circumstances the Board finds it appropriate to remit the case to the examining division for further prosecution on the basis of claims 1 to 15 filed as the main request with a letter dated 27 December 2013.

Order

For these reasons it is decided that:

1. The appeal under appeal is set aside.
2. The case is remitted to the examining division for further prosecution on the basis of the Main Request filed with a letter dated 27 December 2013.

The Registrar:

The Chairman:



C. Rodríguez Rodríguez

P. Gryczka

Decision electronically authenticated



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 2451/11 - 3.3.10

D E C I S I O N
of Technical Board of Appeal 3.3.10
of correcting an error in the decision
of 21 July 2015

Appellant: Lycored Natural Products Industries Ltd
(Applicant 1) P.O. Box 320
84102 Beer-Sheva (IL)

Appellant: Zelkha, Morris
(Applicant 2) 10 Hadar Street
84965 Omer (IL)

Appellant: Nir, Zohar
(Applicant 3) Ye'elim 27
85025 Meitar (IL)

Appellant: Sedlov, Tanya
(Applicant 4) 25/6 Mivtsah Moshe
84496 Beer Sheva (IL)

Representative: Vossius & Partner
Patentanwälte Rechtsanwälte mbB
Siebertstrasse 3
81675 München (DE)

Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 27 May 2011
refusing European patent application No.
02803083.1 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman P. Gryczka
Members: J.-C. Schmid
 F. Blumer

Page 5, first line of the decision should read

"1. The decision under appeal is set aside".

The Registrar:

The Chairman



C. Rodríguez Rodríguez

P. Gryczka

Decision electronically authenticated