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**Datasheet for the decision
of 17 December 2015**

Case Number: T 1664/13 - 3.3.09

Application Number: 06749279.3

Publication Number: 1868447

IPC: A23K1/16, A23K1/18, A23K1/00

Language of the proceedings: EN

Title of invention:
PET FOOD COMPOSITIONS COMPRISING TWO COMPONENTS

Patent Proprietor:
IAMS Europe B.V.

Opponent:
NESTEC S.A.

Headword:

Relevant legal provisions:
EPC Art. 56

Keyword:
Inventive step - (no)

Decisions cited:

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

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Case Number: T 1664/13 - 3.3.09

**D E C I S I O N
of Technical Board of Appeal 3.3.09
of 17 December 2015**

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
22 May 2013 concerning maintenance of the
European Patent No. 1868447 in amended form.**

Composition of the Board:

Chairman W. Sieber
Members: M. O. Müller
E. Kossonakou

Summary of Facts and Submissions

- I. This decision concerns the appeals filed by both the opponent and the patent proprietor against the decision of the opposition division finding that European patent No. 1 868 447 as amended met the requirements of the EPC.

As the opponent and the patent proprietor are each appellant and respondent in the present appeal proceedings, for simplicity the board will continue to refer to them as the opponent and the proprietor.

- II. With the notice of opposition, the opponent had requested revocation of the patent in its entirety on the grounds of Article 100(a) (lack of novelty and inventive step), (b) and (c) EPC.

The documents submitted during the opposition proceedings included:

D1: EP 1 344 458 A1; and

D2: EP 0 862 863 A2.

- III. The opposition division's decision was based on a main request as well as first to third auxiliary requests. Independent claim 1 of the third auxiliary request, the only claim request relevant to the present decision, read as follows:

"1. A pet food composition characterized by comprising:

a first component comprising a source of protein, a source of fat, and a source of carbohydrate; and a second component, physically distinct from the first

component; and wherein the first component is at least partially extruded, and wherein the second component is not extruded and wherein the second component has a water activity of 0.2 or less, and wherein the second component comprises a biologic selected from a probiotic component having a viable probiotic microorganism count of at least 10^5 CFU / gram of second component; yeast; enzymes; antibodies; immunoglobulins; cytokines; and combinations thereof wherein the first component further comprises a source of supplemental fiber and the second component comprises a sweetener component that comprises a monosaccharide, disaccharide or complex carbohydrate having a melting point of from 80°C to 140°C ."

- IV. The opposition division rejected the main request and the second auxiliary request on the grounds that the subject-matter of claim 1 of these requests lacked inventive step in view of D1 as the closest prior art. The first auxiliary request was rejected as non-compliant with Article 123(2) EPC.
- V. The third auxiliary request was found to be allowable. In particular, it was held that the requirements of Articles 123(2) and (3), 84 and 56 EPC and Rule 80 EPC were met. As regards inventive step, D1 was considered to represent the closest prior art. The problem to be solved by claim 1 of this request over D1 was the provision of a delivery system for sensitive biologics which was suitable for supplementing foods. D1 did not disclose that mono- and disaccharides could play a role in protecting probiotics. In fact, the protection of the probiotics was provided in D1 by a matrix consisting of dried food, which was coated with a barrier compound different from mono- and disaccharides. D2 disclosed disaccharides and

oligosaccharides, but they all had a melting point higher than 140°C, i.e. outside of the claimed range. Thus, the skilled person would not have been led by D1, alone or in combination with D2, to the sweetener compounds required by claim 1.

VI. On 22 July 2013, the opponent filed an appeal. The statement setting out the grounds of appeal was filed on 23 September 2013 together with

D13: "Nutrient data for 11154, Chicory roots, raw",
USDA National Nutrient Database for Standard
Reference, Release 26, software v. 1.3, 2 pages;

D14: US 6,576,270 B2;

D15: US 5,916,622 A;

D16: V. B. Mavumengwana, "Isolation, Purification
and Characterization of Inulin and
Fructooligosaccharides from Chicorium
Intybus and Inulinase from Aspergillus Niger",
Master theses, June 2004, 127 pages;

D17: "Vitality+ Mini Menu Dog Food", Mintel GNPD,
April 2003, 2 pages;

D18: "Nutrient data for 11124, Carrots, raw",
USDA National Nutrient Database for Standard
Reference, Release 26, software v. 1.3, 7 pages;

D19: EP 0 769 914 B1;

D20: "Fructose", Wikipedia, 10 pages;

D21: "Maltose", Wikipedia, 4 pages;

- D22: EP 0 140 691 B1; and
- D23: EP 0 225 774 A2.
- VII. On 26 July 2013, the proprietor filed an appeal. The statement setting out the grounds of appeal was filed on 30 September 2013, together with a main request and a first and second auxiliary request.
- VIII. By its letter dated 17 February 2014, the proprietor requested as a third auxiliary request the dismissal of the opponent's appeal, i.e. maintenance of the patent on the basis of the claims of the third auxiliary request found allowable by the opposition division, and filed fourth to seventh auxiliary requests.
- IX. By its letter dated 17 April 2014, the opponent submitted
- D24: US 5,456,933 A;
- D25: US 2005/0100559 A1;
- D26: A. S. Carvalho et al., Lait, volume 83, 2003, pages 203 to 210; and
- D27: US 2002/0044990 A1.
- X. By its letter dated 5 August 2014, the proprietor filed a new main request and new first, second and fourth to seventh auxiliary requests.
- XI. On 3 July 2015, the board issued its preliminary opinion, in which it commented *inter alia* on inventive step of the subject-matter of claim 1 of the third

auxiliary request in view of D1 as the closest prior art.

XII. By its letter of 20 October 2015, the opponent replied to the preliminary opinion of the board.

XIII. On 17 December 2015, oral proceedings were held before the board. When they started, the proprietor withdrew the main request and first, second and fourth to sixth auxiliary requests. The only claim requests remaining in the proceedings were thus the third and seventh auxiliary requests.

XIV. So far as relevant to the present decision, the opponent's arguments can be summarised as follows:

The third auxiliary request was not allowable since it contained added subject-matter and the invention defined by this request was insufficiently disclosed. Furthermore, it was not inventive. Claim 1 differed from the closest prior art D1 in terms of the number of probiotic micro-organisms in the second component and in terms of the nature of the first component. There was no unexpected technical effect linked to these distinguishing features, and therefore the problem solved in view of D1 was the provision of a mere alternative. The claimed solution was obvious since D1 already suggested a number of probiotic micro-organisms as required in claim 1 and the first component as defined in claim 1 corresponded to traditional pet food and was furthermore already known from D24.

The same arguments as regards inventive step applied to the subject-matter of claim 1 of the seventh auxiliary request.

XV. So far as relevant to the present decision, the proprietor's arguments can be summarised as follows:

The proprietor disputed the opponent's objections as regards added subject-matter and sufficiency of disclosure. It was furthermore of the opinion that the subject-matter of claim 1 of the third auxiliary request was inventive. The proprietor agreed with the opponent as regards the selection of the closest prior art, the distinguishing features and the problem to be solved in view of D1. However, the claimed solution was not obvious. The skilled person would deduce from D1 that the better stability of the probiotic micro-organisms obtained in this document was due to the fact that the pellets were compacted and provided with a coating. The skilled person reading D1 would therefore not have become aware that the stabilisation of the probiotic micro-organisms could also be achieved by the addition of a sweetener. The skilled person looking for an alternative would therefore not have included a sweetener and thus would not have arrived at the subject-matter of claim 1.

The proprietor had no further comments as regards the seventh auxiliary request.

XVI. The opponent requested that the decision under appeal be set aside and that the patent be revoked.

XVII. The proprietor requested that the patent be maintained on the basis of

- the third auxiliary request found allowable by the opposition division, implying the dismissal of the opponent's appeal; or

- the seventh auxiliary request filed with letter dated 5 August 2014.

Reasons for the Decision

Third auxiliary request

1. Inventive step
 - 1.1 The patent concerns a pet food composition comprising a first and second component, the latter comprising a "biologic" selected from a list including probiotic micro-organisms. The patent aims in particular at pet food compositions that are sufficiently stable, so that the probiotic micro-organisms are still present in the compositions at the time of ingestion by a mammal (paragraph [0001]).
 - 1.2 D1 is directed to a probiotic delivery system that is preferably added to a food product (abstract). In the same way as the patent, D1 aims at a prolonged lifespan of the probiotics (paragraphs [0007], [0012] and [0013]). Therefore, in line with both parties, D1 can be considered to represent the closest prior art.
 - 1.2.1 Example 1 of D1 discloses the preparation of pellets for pet food, which contain
 - a bacterial preparation of *Enterococcus faecium*,
 - chicory flour,
 - maltodextrin,
 - glycerol,

- FRISKIES[®] Vitality,
- and a fat-based coating of Witocan[®] 42/44.

The pellets are produced by pressing the pet food preparation by a single-punch hydraulic laboratory press. They have a water activity of 0.084 at 25°C.

The pellets can be added to a food product, such as pet food kibbles (abstract and paragraphs [0001], [0013], [0094], [0114] and [0116] and claim 14).

- 1.2.2 In terms of claim 1 of the third auxiliary request, the pellets of example 1 of D1 correspond to the "second component" and the pet food kibbles to the "first component".

The water activity of the pellets of example 1 of D1 lies within the range required for the second component of claim 1. The *Enterococcus faecium* present in the pellets corresponds to the probiotic micro-organism required by claim 1 to be present in the second component. Chicory flour, as present in the pellets, is made from chicory roots. These contain free fructose (column 5, lines 3 to 4 of D14, column 2, lines 17 to 21 of D15, and page 37, lines 1 to 2 of D16). Fructose is a monosaccharide having a melting point of 102°C (column 2, lines 42 to 43 of D22) or 103°C (D20). Consequently, the pellets of example 1 of D1 contain a sweetener as required for the second component of claim 1. Since the pellets of D1 are formed by a pressing operation, they finally fulfil the requirement of claim 1 of not being extruded. What is however not disclosed in D1 is the actual number of probiotic micro-organisms present in the pellets.

Furthermore, the nature of the pet food kibbles (first component in terms of claim 1) is not disclosed in D1.

As agreed by both parties, the subject-matter of claim 1 therefore differs from example 1 of D1 (i) in terms of the number of probiotic micro-organisms present in the second component and (ii) in that the first component as defined in claim 1 is at least partially extruded and comprises a source of protein, a source of fat, a source of carbohydrate and a source of supplemental fibre.

1.3 There is no evidence on file showing any unexpected technical effect related to these distinguishing features. Therefore, as acknowledged by both parties during the oral proceedings, the problem to be solved in view of D1 is the provision of an alternative pet food composition. It was undisputed that this problem was indeed solved.

1.4 As a solution to this problem, the patent proposes a pet food composition characterised in that the number of probiotic micro-organisms present in the second component is at least 10^5 CFU/gram and in that the first component is extruded and comprises a source of protein, a source of fat, a source of carbohydrate, and a source of supplemental fibre.

1.5 The number of probiotic micro-organisms as required by claim 1 is disclosed in D1 itself as a preferred embodiment:

"In still another embodiment, the pellet according to the present invention comprises 10^5 to 10^{12} viable micro-organisms (cfu)" (paragraph [0048])

"If one pellet is intended to comprise all probiotics of an entire daily serving, or if no other meal comprising probiotics is intended to be consumed than one pellet, the pellet preferably comprises the daily dose of probiotics. In this case, one pellet comprises about 10^5 to 10^{14} , preferably 10^6 to 10^{13} , more preferably 10^7 to 10^{11} cfu/day" (paragraph [0096]).

Furthermore, as not disputed by the proprietor, the first component as defined in claim 1 corresponds to traditional pet food. Hence, the selection of such a component as the pet food kibbles in D1 is part of the skilled person's common general knowledge. Apart from that, such a pet food is already described in D24. More specifically, this document discloses a pet food that is composed of shaped extruded pieces of a dough (column 7, lines 59 to 60) comprising protein, starch (i.e. carbohydrate), fat and an edible fibre source (column 4, lines 3 to 15 in conjunction with column 6, lines 63 to 65 as well as claim 1).

- 1.6 Consequently, the skilled person starting from D1 and looking for an alternative pet food composition would have arrived at the claimed composition in an obvious manner on the basis of D1 itself in combination with common general knowledge or D24.

- 1.7 During the oral proceedings, the proprietor argued that the skilled person would deduce from D1 that the better stability of the probiotic micro-organisms obtained in this document was due to the fact that the pellets were compacted and provided with a coating. The skilled person reading D1 would therefore not have become aware that the stabilisation of the probiotic micro-organisms could also be achieved by the addition of a sweetener.

The skilled person would hence not have included a sweetener and thus would not have arrived at the pet food composition of claim 1.

The board does not agree to this line of argument. As set out above (point 1.2.2), the composition of example 1 of D1 already contains a sweetener as defined in claim 1 (fructose). Therefore, as in fact acknowledged by the proprietor, the presence of a sweetener is not a distinguishing feature. The question whether and why the skilled person would have and actually has included such a sweetener in D1 is thus not relevant to inventive step. On the contrary, as set out above, the decisive point is rather whether the skilled person looking for an alternative would have chosen the number of probiotic micro-organisms in the second component and the type of first component as required by claim 1.

1.8 The proprietor furthermore argued during the written proceedings that fructose was present in the pellets of D1 at very low levels, if at all. This argument is not convincing either, since claim 1 does not restrict the amount of monosaccharide in any way.

2. The third auxiliary request is thus not allowable. In view of this, there is no need to consider the opponent's further objections regarding added subject-matter and sufficiency of disclosure, on which the board had reached a conclusion in the oral proceedings in the proprietor's favour.

Seventh auxiliary request

3. Claim 1 of the seventh auxiliary request is identical to claim 1 of the third auxiliary request, except that

the "biologic" has been restricted to probiotic micro-organisms. Since it has been decided that this alternative of claim 1 of the third auxiliary request lacks inventive step (see point 1 above), claim 1 of the seventh auxiliary request must share the fate of claim 1 of the third auxiliary request. Hence, the seventh auxiliary request is not allowable either.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated