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**Datasheet for the decision
of 8 March 2018**

Case Number: T 0604/15 - 3.3.07

Application Number: 05810004.1

Publication Number: 1830802

IPC: A61K9/46, A23G4/06, A61K9/00,
A23G4/02, A61Q11/00

Language of the proceedings: EN

Title of invention:
EFFERVESCENT PRESSED CHEWING GUM TABLET COMPOSITIONS

Patent Proprietor:
Intercontinental Great Brands LLC

Opponent:
Gumlink A/S

Headword:
EFFERVESCENT PRESSED CHEWING GUM TABLET COMPOSITIONS/
Intercontinental Great Brands LLC

Relevant legal provisions:
EPC Art. 56

Keyword:
Main request - Inventive step (no)

Decisions cited:

Catchword:



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Case Number: T 0604/15 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 8 March 2018

Appellant: Gumlink A/S
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Respondent: Intercontinental Great Brands LLC
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
28 January 2015 concerning maintenance of the
European Patent No. 1830802 in amended form.

Composition of the Board:

Chairman J. Riolo
Members: D. Boulois
Y. Podbielski

Summary of Facts and Submissions

- I. European patent No. 1 830 802 was granted on the basis of a set of 30 claims.
- II. An opposition was filed under Article 100 (a), (b) and (c) EPC on the grounds that its subject-matter lacked novelty and inventive step, was not sufficiently disclosed and extended beyond the content of the application as filed.
- III. The appeal by the opponent lies from the decision of the opposition division finding that the patent in amended form met the requirements of the EPC. The decision was based on one set of claims filed with letter of 3 July 2014 as main request.

Independent claim 1 of the main request read as follows:

"1. A chewing gum composition comprising:
a particulate chewing gum base;
a tableting powder; and
an effervescent system,
wherein said chewing gum base and said tableting powder
comprise a tableted gum layer and
said effervescent system comprises at least one
effervescent layer in contact with said tableted gum
layer;
wherein said composition has a total water content of
greater than 0% to 5% by weight of said chewing gum
composition."

- IV. The documents cited during the opposition proceedings included the following:
D1: WO 2004/006686

D2: WO 2004/068964

D3: US 6235318

D4: US 4639368

D5: US 4127645

D6: US 5922347

- V. According to the decision under appeal, the subject-matter of claims 1-29 of the main request met the requirements of Article 123(2) EPC. The opposition division also considered that the claimed invention was sufficiently disclosed.

Claims 1-29 of the main request were also novel over D1-D3. D3 did in particular not disclose a particulate chewing gum base, a total water content of more than 0% to 5%, and the base and acid components of the effervescent system were located in separate and distinct layers of the gum composition.

As regards inventive step, D3 was considered as the closest prior art. This document taught a molten chewing gum containing a level of moisture which inevitably would have caused a premature reaction of the base and the acid component of the effervescent system. To avoid such reaction, the acid and the base were located in separate and distinct layers of the gum composition. The technical effect achieved by the subject-matter of claim 1 was that the shelf life of the claimed chewing gum was improved, which translated into the technical problem to provide an improved chewing gum composition. The solution was to provide a "generally dry" chewing gum composition, in which both components of the effervescent system were co-located in one single distinct effervescent layer adjacent the tabletted gum layer. Said solution was not obvious in

view of documents D1-D6. The claimed subject-matter involved thus an inventive step.

- VI. The opponent (hereafter the appellant) filed an appeal against said decision.
With the statement setting out the grounds of appeal dated 29 May 2015, the appellant submitted documents D7-D10.
- VII. With a letter dated 5 October 2015, the patent proprietor (hereafter the respondent) requested that documents D7-D10 not be admitted into the proceedings.
- VIII. A communication from the Board was sent to the parties.
- IX. Oral proceedings took place on 8 March 2018 in the absence of the respondent.
- X. The arguments of the appellant, as far as relevant for the decision, may be summarised as follows:

D3 was seen as a possible closest prior art. The distinguishing features were the particular nature of the chewing gum base, the water content and the presence of both components of the effervescent system in the effervescent layer. An effect of better release associated with the particular nature was not credible, and there was no information as to an effect accomplished by providing both effervescent components in the same layer. The water content contributed to the avoidance of premature reaction between the effervescent components. The problem was seen as the provision of an alternative chewing gum composition having effervescent properties, which exhibited superior stability and shelf life. The solution was

known from D1, D2 and D5 and could not be considered as inventive.

XI. The written arguments of the respondent, as far as relevant for the decision, may be summarised as follows:

When D3 was used as the closest prior art, there were three differences between the claimed subject-matter and example 4 of D3, namely that example IV did not disclose that the gum base was particulate, that there was no layer containing both the acid and base components, and the water content was not disclosed. The use of a particulate gum base led to a better release, while the layered system avoided a premature reaction of the components when in the same layer, especially when the moisture was near the 5% upper limit.

The advantage of the particulate gum system was gained when the gum composition was chewed and the separate layers were mixed, the particulate nature of the gum base then allowing for a better release of the effervescent system when compared with chewing gums where one or both of the effervescent systems were contained within a gum base.

The fact that there were three separate distinguishing features was an indicator of the presence of inventive step. Given the three separate distinguishing features, the skilled person would not have been able to make the necessary modifications to arrive at claim 1 and the claimed subject-matter was inventive.

XII. Requests

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

The respondent had requested in writing that the appeal be dismissed and that documents D7-D10 not be admitted into the proceedings.

Reasons for the Decision

Absence of a party at oral proceedings

As announced by letter dated 25 September 2017, the respondent did not attend the oral proceedings and did not submit any comment to the Board's preliminary opinion set out in the communication.

In accordance with Rule 115(2) EPC and Article 15(3) RPBA, the oral proceedings were held without the respondent. By deciding not to attend the oral proceedings and not to file substantive arguments in reply to the Board's communication, the respondent has chosen not to take the opportunity to comment on the Board's opinion, either in writing or orally at the oral proceedings. In the present case, the duly summoned respondent has to be treated as relying only on its written case.

Main request - Inventive step

1. The invention relates to pressed gum tablets that effervesces when chewed.
2. D3 was considered as the closest prior art by the opposition division in its decision. This document discloses *inter alia* in example IV a simple effervescent chewing gum tablet without separated

layers, wherein both effervescent components and gum base are mixed in the chewing-gum; the acid component of the effervescent system is coated.

This document does thus not show a multi-layer system, and does not disclose the total water content of the composition and the particular nature of the chewing gum base.

The acid or base component may also be coated in the claimed invention of the main request, as disclosed in dependent claims 8 and 10, and therefore cannot constitute a further technical difference.

3. In view of the problem as defined by the opposition division and the arguments provided by the respondent in the written proceedings, the problem is the provision of an improved chewing-gum, providing better release of the effervescent system and having an improved shelf-life.
4. The solution is a chewing gum composition comprising a particulate tableted chewing gum base present in a tableted gum layer, an effervescent system present in a distinct effervescent layer, and a total water content of 0-5% by weight of the chewing gum composition.
5. It has to be investigated whether there is sufficient evidence supporting the alleged effects.

The patent in suit provides two examples of bi-layered effervescent pressed gum tablets, namely example 2 (see Table 2 and par. [0075] and [0076]) showing a bi-layer tablet with an effervescent gum layer and an effervescent tablet layer, and example 3 (see Table 3

and par. [0077] and [0078]) showing a non-effervescent gum layer and a effervescent tablet layer.

Said examples do not provide any information as to the final water content and do not show any advantage associated with the disclosed bi-layered tablets, the particulate nature of the gum layer and the final water content as relating to a better release of the effervescent system or an improved shelf-life.

Example 2 also shows that the effervescent components might be present in all layers of the bi-layer tablets. Accordingly, the simultaneous possible presence of an effervescent system in both the gum layer and the effervescent layer, as shown in said example 2 of the contested patent, contradicts the argumentation of the respondent, that the better release of the effervescent system was in particular due to the fact that the two-layer tablet with the particulate gum base and the effervescent system were in separate layers, and the effervescent system was free of gum base and that there was no contact between them.

None of the examples of the contested patent or the general teaching thereof offer thus sufficient evidence to support the assumptions of the existence of an improvement over the teaching of document D3 as regards a better release of the effervescent system and an improved shelf-life. It is thus not possible to establish the existence of an improvement over the prior art. Consequently, in the absence of any experimental evidence or arguments establishing a minimum plausibility, the presence of an improvement of the claimed chewing gum composition over the chewing gum composition of D3 has not been credibly demonstrated and the technical problem must be

reformulated as the provision of alternative chewing gum compositions.

In view of the information found in the examples of the contested patent, the Board is convinced that the problem has been plausibly solved.

6. It remains to be determined whether the solution was obvious to the person skilled in the art.

A bi-layered chewing-gum system was already known from *inter alia* D2. D2 discloses indeed bi-layer chewing-gum tablets with a particulate gum layer and a second layer comprising compressed chewing-gum ingredients (see Figures, claim 1, and pages 28-31).

Thus, starting out from example IV of document D3, providing a multi-layer system with a particulate gum layer and a second layer devoid of gum particulates without any demonstration that this causes an unexpected technical effect amounts to an arbitrary measure within the ordinary routine of a skilled practitioner and cannot contribute to an inventive step.

As to the claimed water content of greater than 0% to 5% by weight of the composition, it appears obvious and logical to a skilled person that an effervescent composition must have a level of water as low as possible. The opposite is simply inconceivable.

The solution of claim 1 is therefore known from document D3 in combination with D2.

7. The subject-matter of claim 1 of the main request is not inventive and this request does not meet the requirements of Article 56 EPC.

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:



S. Fabiani

J. Riolo

Decision electronically authenticated