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**Datasheet for the decision
of 26 July 2019**

Case Number: T 1042/15 - 3.3.09

Application Number: 07841527.0

Publication Number: 2056680

IPC: A23G4/08, A23G3/50, A23G9/44,
A23G4/06

Language of the proceedings: EN

Title of invention:
INDULGENT GUM BASE AND CHEWING GUM COMPOSITIONS CONTAINING SAME

Patent Proprietor:
Intercontinental Great Brands LLC

Opponent:
Wm. Wrigley Jr. Company

Headword:

Relevant legal provisions:
EPC Art. 100(c), 123(2), 123(3)
EPC R. 80
RPBA Art. 13

Keyword:

Admissibility of late-filed requests (yes)

Amendments occasioned by a ground for opposition (yes)

Added subject-matter (yes): main request and auxiliary requests 2, 4, 6

Extension of the scope of protection (yes): auxiliary requests 1, 3, 5, 7

Decisions cited:

Catchword:



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Case Number: T 1042/15 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 26 July 2019

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 19 March 2015
revoking European patent No. 2056680 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman W. Sieber
Members: N. Perakis
F. Blumer

Summary of Facts and Submissions

- I. This decision concerns the appeal filed by the patent proprietor against the opposition division's decision revoking European patent No. 2 056 680.
- II. In the notice of opposition, the opponent requested revocation of the patent in its entirety on the grounds under Article 100(a) (lack of novelty and lack of inventive step), 100(b) and 100(c) EPC.
- III. Independent claim 2 as granted, the only claim relevant for the purposes of the present decision, read as follows:

"2. A chewing gum composition comprising:

a gum base composition comprising:

- (i) at least one elastomer;
- (ii) at least one gum resin or ester thereof present in amounts of at least about 10% by weight of said gum base composition; and
- (iii) at least one fat having a melting point from 15°C to 60°C;

wherein upon mastication for a period of at least 5 minutes, said chewing gum composition containing from 20% to 50% of the fat by weight of the chewing gum and providing a velvety chew score of at least 2.0 on a scale of 0 to 4 as measured by descriptive analysis and a surface smoothness score of at least 2.0 on a scale of 0 to 4 as measured by descriptive analysis."

- IV. The opposition division took its decision on the basis of a main request and six auxiliary requests. Only the main request is relevant for the purposes of the present case.

Claim 2 of the main request was based on claim 2 as granted and read as follows (amendments are shown in bold):

- "2. A chewing gum composition comprising:
a gum base composition comprising:
(i) at least one elastomer;
(ii) at least one gum resin or ester thereof present in amounts of at least about 10% by weight of said gum base composition; and
(iii) at least one fat having a melting point from 15°C to **40°C**;

wherein the gum base composition constitutes from 60.00% to 90% by weight of the chewing gum composition;
and

wherein upon mastication for a period of at least 5 minutes, said chewing gum composition containing from 20% to 50% of the fat by weight of the chewing gum and providing a velvety chew score of at least 2.0 on a scale of 0 to 4 as measured by descriptive analysis and a surface smoothness score of at least 2.0 on a scale of 0 to 4 as measured by descriptive analysis."

According to the opposition division, claim 2 of the main request contained added matter (Article 100(c) EPC) because the feature:

"wherein upon mastication for a period of at least 5 minutes, said chewing gum composition containing from 20% to 50% of the fat by weight of the chewing gum"

was not disclosed in the application as filed.

- V. With its statement setting out the grounds of appeal dated 29 July 2015, the patent proprietor (in the following "the appellant") requested that the decision under appeal be set aside and that the patent be maintained on the basis of the claims of the main request, alternatively on the basis of the claims of any of the first to seventh auxiliary requests, all of which had been filed requests filed with that letter. The patent proprietor also submitted technical evidence (document D16) to be considered in the context of inventive step.
- VI. By letter dated 14 December 2015, the opponent (in the following "the respondent") requested that the appeal be dismissed and filed a new document (D17) to be considered in the context of inventive step.
- VII. On 5 July 2019, the board, in preparation for the oral proceedings, issued a preliminary non-binding opinion *inter alia* with regard to the objections of added matter under Article 100(c) EPC and amendments extending the protection conferred by the European patent under Article 123(3) EPC.
- VIII. By letter dated 5 June 2019 the appellant submitted D18, a document containing technical evidence to complete the evidence of D16. It also filed a new main request and seven sets of auxiliary requests to replace the current requests on file.
- IX. Claim 1 of the **main request** reads as follows:
- "1. A chewing gum composition comprising:
a gum base composition comprising:
(i) at least one elastomer;

- (ii) at least one gum resin or ester thereof present in amounts of at least about 10% by weight of said gum base composition; and
- (iii) at least one fat having a melting point from 15°C to 60°C;

wherein the gum base composition constitutes from 60.00% to 90% by weight of the chewing gum composition; and

wherein upon mastication for a period of at least 5 minutes, said chewing gum composition containing from 20% to 50% of the fat by weight of the chewing gum and providing a velvety chew score of at least 2.0 on a scale of 0 to 4 as measured by descriptive analysis and a surface smoothness score of at least 2.0 on a scale of 0 to 4 as measured by descriptive analysis."

This claim differs from claim 2 of the main request of the appealed decision only in the temperature range of feature (iii) (was a melting point from 15°C to 40°C).

- X. Claim 1 of the **first auxiliary request** differs from claim 1 of the main request in that the feature of the 20-50 wt.% of fat in the chewing gum composition was rearranged. It reads as follows (rearrangement indicated by strike-through or bold text):

"1. A chewing gum composition comprising:

a gum base composition comprising:

- (i) at least one elastomer;
- (ii) at least one gum resin or ester thereof present in amounts of at least about 10% by weight of said gum base composition; and
- (iii) at least one fat having a melting point from 15°C to 60°C;

wherein the gum base composition constitutes from 60.00% to 90% by weight of the chewing gum composition;

wherein the chewing gum composition contains from 20% to 50% of the at least one fat by weight of the chewing gum; and

wherein upon mastication for a period of at least 5 minutes, said chewing gum composition ~~containing from 20% to 50% of the fat by weight of the chewing gum and providing~~**es** a velvety chew score of at least 2.0 on a scale of 0 to 4 as measured by descriptive analysis and a surface smoothness score of at least 2.0 on a scale of 0 to 4 as measured by descriptive analysis."

XI. The **second to seventh auxiliary requests**, the exact wording of which is not relevant for the purposes of this decision, can be split into two groups:

- claim 1 of the **second, fourth and sixth auxiliary requests** contains the feature of the 20-50 wt.% of fat in the chewing gum composition in the same way as claim 1 of the main request (and granted claim 2), namely "wherein upon mastication for a period of at least 5 minutes, said chewing gum composition containing from 20% to 50% of the fat by weight of the chewing gum"
- in claim 1 of the **third, fifth and seventh auxiliary requests** the feature of the 20-50 wt.% of the fat in the chewing gum composition has been rearranged in the same way as in the first auxiliary request.

- XII. By letter dated 26 June 2019, the respondent contested the admissibility of the appellant's new requests.
- XIII. On 26 July 2019, oral proceedings were held before the board. The respondent clarified that it only objected to the admission of the main request and the first, second and fourth to sixth auxiliary requests.
- XIV. The relevant arguments put forward by the appellant in its written submissions and during the oral proceedings may be summarised as follows:
- The requests filed with its letter dated 5 June 2019 should be admitted into the proceedings. They were filed almost two months before the oral proceedings, their subject-matter was easy to understand and they did not raise any new issues that the board or the respondent could not deal with during the oral proceedings.
 - The subject-matter of claim 1 of the main request did not contain added matter. The feature "wherein upon mastication for a period of at least 5 minutes, said chewing gum composition containing from 20% to 50% of the fat by weight of the chewing gum" actually concerned the chewing gum composition before mastication (consumption). This feature was disclosed in paragraph [0040] of the PCT application as published (corresponding to the application as filed). Furthermore, the fat content did not change during mastication as disclosed in the application as filed (page 5, lines 4-6).
 - Claim 1 of the first auxiliary request was not objectionable under Rule 80 EPC because the

amendments were occasioned by the ground for opposition under Article 100(c) EPC.

- The amendments to the subject-matter of claim 1 of the first auxiliary request did not extend the protection conferred by the European patent. As had already been submitted during the discussion of claim 1 of the main request, the deletion of the objected feature and the reintroduction of the amount of fat as a feature of the chewing gum composition did not change the amount of fat upon mastication for at least 5 minutes, since this amount did not change upon mastication.

XV. The relevant arguments put forward by the respondent in its written submissions and during the oral proceedings may be summarised as follows:

- The appellant's main and first, second, fourth, fifth and sixth auxiliary requests, submitted with its letter dated 5 June 2019, were filed very late and should not be admitted into the appeal proceedings.
- The subject-matter of claim 1 of the main request contained the feature "wherein upon mastication for a period of at least 5 minutes, said chewing gum composition containing from 20% to 50% of the fat by weight of the chewing gum". This feature was included in the subject-matter of the granted independent claim 2, from which claim 1 of the main request derived. As this feature was not directly and unambiguously derivable from the application as filed, the subject-matter of claim 1 of the main request did not meet the requirements of Article 100(c) EPC. Contrary to the appellant's

assertions, the amount of fat related to the amount upon mastication for at least 5 minutes and was different from the fat content of the chewing gum composition before mastication. This was obvious in view of the disclosure that not only fat (page 5, lines 8-9 and page 10, lines 30-32) but also water soluble ingredients of the chewing gum composition, such as the sweeteners and flavours (page 17, line 23 and page 21, lines 19-22) might be released during consumption.

- It was not clear whether the amendments in claim 1 of the first auxiliary request were occasioned by a ground for opposition and thus in conformity with Rule 80 EPC.
- The subject-matter of claim 1 of the first auxiliary request derived from claim 1 of the main request with amendments to overcome the objection of added subject-matter. Consequently, claim 1 did not contain the feature "wherein upon mastication for a period of at least 5 minutes, said chewing gum composition containing from 20% to 50% of the fat by weight of the chewing gum". However, this amendment was not allowable under Article 123(3) EPC because it extended the protection conferred by the European patent as granted (see independent claim 2 as granted).
- Claim 1 of the second, fourth and sixth auxiliary requests was not patentable, for the reasons given for the main request.
- Claim 1 of the third, fifth and seventh auxiliary requests was not patentable, for the reasons given for the first auxiliary request.

XVI. The appellant (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained on the basis of the claims of the main request, or alternatively on the basis of the claims of any of the first to the seventh auxiliary requests, all requests as filed with the appellant's letter dated 5 June 2019.

XVII. The respondent (opponent) requested that the appeal be dismissed.

Reasons for the Decision

1. *Admission of the requests*

1.1 The appellant filed a new main request and new first to seventh auxiliary requests with its letter dated 5 June 2019, almost two months before the oral proceedings.

1.2 First of all, the board notes that none of the new requests corresponds to a request that has been withdrawn before the opposition division. They all try to deal with the issues arising from the decision under appeal or the respondent's objections. The first, third, fifth and seventh auxiliary requests had been filed with the statement setting out the grounds of appeal and were merely renumbered. The main request and the second, fourth and sixth auxiliary requests were new requests. Although they had been filed at a rather late stage in the proceedings, they had been filed in a fair attempt to reply to the objections raised by the respondent. Furthermore, the amendments that they contained were easy to understand and did not raise new

issues that the respondent and the board would not be able to deal with during the oral proceedings.

1.3 In view of the above, the board admitted the requests into the proceedings under Article 13(1) RPBA.

2. **Main request**

2.1 The last part of claim 1 of the main request reads:

"wherein upon mastication for a period of at least 5 minutes, said chewing gum composition containing from 20% to 50% of the fat by weight of the chewing gum and providing a velvety chew score of at least 2.0 on a scale of 0 to 4 as measured by descriptive analysis and a surface smoothness score of at least 2.0 on a scale of 0 to 4 as measured by descriptive analysis".

This wording was already present in independent claim 2 as granted (point III), on which the claim is based.

2.2 The respondent maintained its position as set forth in the opposition proceedings, and agreed with the finding of the opposition division that no basis existed in the application as filed for the feature that, upon mastication for at least 5 minutes, the chewing gum composition contained from 20% to 50% of the fat by weight of the chewing gum. Therefore, claim 1 of the main request contained added matter (Article 100(c) EPC).

2.3 Thus, the decisive question is whether the skilled person would derive this feature directly and unambiguously using common general knowledge and seen objectively and relative to the date of filing from the application as filed.

To assess this point, reference will be made to the disclosure of the published PCT application, which is considered to be identical to the application as filed.

- 2.4 It was not disputed that none of the claims as filed contained this feature. As regards the description as filed, paragraph [0040] discloses:

"Low melting point fats may be employed in the gum base and/or chewing gum composition in amounts from about 5% to about 50%, more specifically from about 20% to about 50%, and even more specifically from about 15% to about 35%, by weight of the gum base and/or chewing gum composition".

It is clear from this paragraph that an amount of fat from 20 to 50 wt.% relates to the amount of fat in the chewing gum composition, i.e the chewing gum composition before consumption and mastication.

- 2.5 The only disclosure with respect to the fat content upon mastication can be found in claim 15 and paragraph [0010] of the application as filed, both describing a chewing gum composition comprising at least one elastomer, at least one gum resin or ester thereof, and at least one fat having a melting point from 15°C to about 60°C,

*"wherein upon mastication for a period of at least about 5 minutes, the chewing gum composition contains **sufficient fat** to provide a velvety chew score of at least about 2.0 on a scale of 0 to 4 as measured by descriptive analysis and a surface smoothness score of at least about 2.0 on a scale of 0 to 4 as measured by descriptive analysis."* [emphasis added]

However, the term "sufficient fat" in this context is nowhere further defined in the application as filed.

2.6 Furthermore contrary to the appellant's assertion, the wording of claim 1 of the main request is clear and does not need to be interpreted. As the respondent correctly put forward, the skilled person would not ignore the plain meaning of the wording of claim 1 of the main request, which is that, upon mastication for at least 5 minutes, the chewing gum composition contains from 20-50 wt.% of fat. It has not been disputed that the chewing gum composition provides the "velvet chew" and "surface smoothness" characteristics upon mastication for at least 5 minutes, i.e. the remaining features of the last part of claim 1. Thus essentially the same verb ("containing" versus "providing") cannot mean something different when it comes to the amount of fat. The only logical meaning of the feature in question is that after at least 5 minutes of mastication, the chewing gum contains an amount and provides certain chew characteristics.

2.7 The appellant cannot call on aspects of the prosecution history explaining the process by which the amendment was made during the examination proceedings as a means of requesting interpretation of the wording of the claim. It may not have been intended by the appellant that the wording of the claim should be understood in the way it appears, but this cannot be used to influence the meaning of the claim by the board, the respondent or the public, who should not be expected to guess what the appellant's intentions were during the examination proceedings.

2.8 Moreover, the application as filed does not disclose that the fat content remains the same during mastication for a period of at least 5 minutes, so that paragraph [0040] could nevertheless support the relevant feature of the claim, as asserted by the appellant. Reference is made to paragraph [0018]:

*"In some embodiments, **little or none of the low melting point fat, may be released** from the gum base and/or chewing gum compositions **during mastication**, which may allow the compositions to retain cohesive integrity. ... In some other embodiments, **a portion of the low melting point fat** may be **released** from the gum base and/or chewing gum compositions **during consumption**, yet a sufficient amount of the low melting point fat may be retained in the gum base and/or chewing gum compositions during consumption to maintain the cohesive integrity thereof" [emphasis added]*

and paragraph [0039]:

*"In addition, in some embodiments, **a portion of the low melting point fat may release** from the gum base and/or chewing gum composition **during consumption**, yet a sufficient amount of the low melting point fat may remain in the gum base and/or chewing gum composition to retain the cohesive integrity thereof" [emphasis added]*

It can be concluded from these disclosures that there is no guarantee that the fat content remains the same during mastication for a period of at least 5 minutes.

2.9 In addition, the open wording used to define the claimed chewing gum composition in view of the term "comprising" allows the presence of water-soluble

ingredients in the claimed composition, such as flavours and sweeteners, which will inevitably be released upon mastication for a period of at least 5 minutes:

"Such flavor emulsions may extend the release of the flavor during consumption"

(page 17, line 23 of the application as filed);

"Also as discussed above with regard to flavors, the release profile of the sweetener can be managed by managing various characteristics of the sweetener"

(page 21, lines 19-20 of the application as filed)

The release of such components necessarily has an impact on the basis for calculating the weight percentage of the fat in the chewing gum composition. Due to the release of components upon mastication, the basis for calculating the weight percentage of the fat is not the same at the beginning and after 5 minutes.

2.10 As claim 1 of the main request contains added subject-matter, the main request is not allowable.

3. ***First auxiliary request***

3.1 Rule 80 EPC

The respondent contested the amendments of claim 1 of the first auxiliary request under Rule 80 EPC. However, as explained by the appellant, the amendments in claim 1 of the first auxiliary request correspond to a rearrangement of features in order to give the claim the meaning it had been intended to have and to overcome the objection under Article 100(c) EPC raised against claim 1 of the main request.

It is evident that the amendments were occasioned by a ground for opposition so that the respondent's objection under Rule 80 EPC must fail.

3.2 Article 123(3) EPC

3.2.1 The respondent contested the compliance of claim 1 of the first auxiliary request with the requirements of Article 123(3) EPC.

3.2.2 According to the appellant, all that was done in claim 1 of the first auxiliary request was "to rearrange the wording of the claim a little to move the feature of the 20-50% of fat in the chewing gum composition, in order to give the claim (more clearly) the meaning that it was actually intended to have, i.e. that the chewing gum composition contains from 20% to 50% by weight of the at least one fat *before* any mastication takes place".

The relevant part of claim 1 of the first auxiliary request reads:

"wherein the chewing gum composition contains from 20% to 50% of the at least one fat by weight of the chewing gum; and

wherein upon mastication for a period of at least 5 minutes, said chewing gum composition provides a velvety chew score of at least 2.0 ...".

3.2.3 The board cannot agree with the appellant that claim 1 of the first auxiliary request has merely been rearranged a little. With the meaning the board has attributed to the feature "wherein upon mastication for

a period of at least 5 minutes, said chewing gum composition containing from 20% to 50% of the fat by weight of the chewing gum" in claim 1 of the main request (and claim 2 as granted), it is self-evident that the claim amendment contravenes Article 123(3) EPC: a limiting feature of claim 2 as granted, namely the amount of fat that is present after chewing for 5 minutes, has been deleted from claim 1 of the first auxiliary request.

- 3.2.4 The deletion of this feature means that claim 1 of the first auxiliary request no longer requires that the chewing gum composition, upon mastication for a period of at least 5 minutes, contains 20-50 wt.% of the fat. Thus, a chewing gum composition initially comprising 50 wt.% fat may contain, after mastication for 5 minutes, more than 50 wt.% of fat due to the release of soluble ingredients during chewing and the consequential change of the basis for calculating the weight percentage of the fat. Such a composition was not within the scope of claim 2 as granted. Or a chewing gum composition may contain less than 20 wt.% of fat when fat is released. Such a composition was also not within the scope of granted claim 2.
- 3.2.5 In view of the above it goes without saying that the deleted feature is not equivalently replaced by the newly added feature (see also point 2.7 above).
- 3.3 In view of the above, the subject-matter of claim 1 of the first auxiliary request extends the protection conferred by the European patent (Article 123(3) EPC). In conclusion, the first auxiliary request is not allowable.

4. ***Second, fourth and sixth auxiliary requests***

As set out in point XI above, claim 1 of these auxiliary requests, like claim 1 of the main request, contains the feature of the 20-50 wt.% of fat in the chewing gum composition in the context of mastication for a period of at least 5 minutes.

Thus, for the same reason as the main request, these auxiliary requests are not allowable (Article 100(c) EPC).

5. ***Third, fifth and seventh auxiliary requests***

In claim 1 of these auxiliary requests the feature of the 20-50 wt.% of fat in the chewing gum composition has been rearranged in the same way as in the first auxiliary request.

Thus, for the same reason as for the first auxiliary request, these auxiliary requests are not allowable (Article 123(3) EPC).

6. In summary, none of the appellant's requests is allowable.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



K. Boelicke

W. Sieber

Decision electronically authenticated