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**Datasheet for the decision
of 16 March 2020**

Case Number: T 0143/16 - 3.3.09

Application Number: 04789251.8

Publication Number: 1667531

IPC: A23K1/18, A23K1/16

Language of the proceedings: EN

Title of invention:

METHODS AND KITS FOR ENHANCING ABILITY TO LEARN IN A PUPPY OR
KITTEN

Patent Proprietor:

IAMS Europe B.V.

Opponent:

Hill's Pet Nutrition, Inc.

Headword:

Enhancing ability to learn in a puppy/IAMS

Relevant legal provisions:

EPC Art. 53(c), 123(3)

Keyword:

Main request and auxiliary requests I to VII - Extension of protection (yes)

Auxiliary request VIII - Non patentable subject-matter (yes)

Decisions cited:

Catchword:



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Case Number: T 0143/16 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 16 March 2020

Appellant:
(Patent Proprietor)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 6 November 2015
revoking European patent No. 1667531 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman A. Haderlein
Members: A. Veronese
F. Blumer

Summary of Facts and Submissions

- I. The appeal was filed by the proprietor (appellant) against the decision of the opposition division to revoke European patent Nr. EP 1 667 531.
- II. Claim 1 of the granted patent read:
- "1. Use of a composition comprising an essential fatty acid component comprising a therapeutically effective amount of DHA on a dry matter basis from 0.1% to 1% of DHA, by weight of the composition for enhancing ability to learn in a puppy or a kitten."*
- III. With its notice of opposition the opponent had requested revocation of the patent in its entirety on the grounds under Article 100(a) EPC (lack of novelty, lack of inventive step and subject-matter excluded from patentability) and Articles 100(b) and 100(c) EPC.
- IV. The decision of the opposition division was based on a main request and several auxiliary requests.
- V. In its decision the opposition division held that:
- the claims of the main request and of the auxiliary requests encompassed a therapeutic treatment excluded from patentability (Article 53(c) EPC),
 - the subject-matter claimed in the first auxiliary request was not novel over D5.
- VI. With the statement setting out the grounds of appeal the appellant filed a main request and auxiliary requests I to VIII.

Claim 1 of the main request read:

"1. Non-therapeutic use of a composition comprising an essential fatty acid component comprising an amount of DHA on a dry matter basis from 0.1 % to 1.0% of DHA, by weight of the composition for enhancing ability to learn in a puppy or a kitten, wherein the composition is a food or supplement composition."

Claim 1 of auxiliary requests I to VI differs from claim 1 of the main request in that the following features were added at the end of the claim:

- Auxiliary request I: *"...wherein said kitten or puppy refers to a domestic feline or a domestic canine which is 2 year old or less"*
- Auxiliary request II: *"...wherein said kitten or puppy refers to a domestic feline or a domestic canine which is 1 year old or less"*
- Auxiliary request III: *"...wherein said composition is orally administered directly to a puppy or a kitten, or wherein said composition is orally administered during gestation, nursing, weaning or any combination thereof to the biological mother of said puppy or kitten"*
- Auxiliary request IV: *"...wherein said composition is administered at least about 6 weeks"*
- Auxiliary request V: *"...wherein said composition comprises less than about 0.06% theanine, by weight of the composition"*

- Auxiliary request VI: *"...wherein said composition comprises less than about 0.00025% theanine, by weight of the composition"*

Claim 1 of auxiliary request VII differs from claim 1 of the main request in that the definition "a puppy or a kitten" was replaced by "a kitten".

Claim 1 of auxiliary request VIII read:

"1. Use of a composition comprising an essential fatty acid component comprising a therapeutically effective amount of DHA on a dry matter basis from 0.1 % to 1.0% of DHA, by weight of the composition for enhancing ability to learn in a puppy or a kitten, wherein the composition is a food or supplement composition".

VII. The appellant's arguments, where relevant for the present decision, may be summarised as follows.

- Claim 1 of the main request was directed to a non-therapeutic use of the claimed compound and did not extend the scope of protection beyond that conferred by the granted patent, because granted claim 1 encompassed the same non-therapeutic use. The same applied to claim 1 of auxiliary requests I to VII.
- Claim 1 of auxiliary request VIII did not encompass a therapeutic method according to Article 53(c) EPC. Although claim 1 mentioned a "therapeutically effective amount" of the relevant compound, this expression was only used referring to a use for "enhancing ability to learn", which was not therapeutic.

VIII. The respondent's arguments, where relevant for the present decision, may be summarised as follows.

- Claim 1 of the granted patent was directed to a therapeutic method of treatment. The "enhanced ability to learn" was to be interpreted in a therapeutic context. The description of the granted patent confirmed this interpretation. However, claim 1 of the main request was directed to a non-therapeutic use. Thus, this claim extended the scope of protection. The same applied to claim 1 of auxiliary requests I to VII.
- Claim 1 of auxiliary request VIII encompassed, as granted claim 1, a therapeutic method of treatment and therefore offended against Article 53(c) EPC.

IX. *The requests*

The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request, or, alternatively, on the basis of one of auxiliary requests I to VIII, all requests filed with the grounds of appeal.

The respondent requested that the appeal be dismissed.

Reasons for the Decision

Main request

1. *Extension of scope of protection (Article 123(3) EPC)*

1.1 Claim 1 of the granted patent is directed to the use of a composition comprising a fatty acid component

comprising a therapeutic effective amount of DHA for enhancing the ability to learn in a puppy or a kitten. The concept of using a therapeutically effective amount of DHA is reiterated consistently in the description of the granted patent (paragraphs [0001], [0008], [0022], [0024], [0025], [0028], [0036]).

- 1.2 The board considers that, in view of its wording, granted claim 1 defines a method of treatment of the animal body by therapy within the meaning of Article 53(c) EPC.
- 1.3 Claim 1 of the main request has been directed to a "non-therapeutic use" of a composition comprising an amount of DHA for enhancing ability to learn in a puppy or a kitten. The reference to a "therapeutically effective" amount of DHA has also been deleted.
- 1.4 The result of these amendments is that the scope of protection has been shifted from a therapeutic to a non-therapeutic use of the relevant composition.
- 1.5 The appellant argued that, despite its wording, and the explicit reference to a "therapeutically effective amount" of DHA, granted claim 1 defined or at least encompassed a non-therapeutic treatment. This because the expression "therapeutically effective amount" did not relate to a medical condition, or to the cure of a deficit of lack of ability to learn, but rather to the enhancement of the innate ability to learn. This was, as such, not of therapeutic nature.
- 1.6 This argument is not convincing. As mentioned above, not only claim 1, but also other parts of the granted patent consistently refer to a therapeutic effective amount of DHA. These references are not at odds with

the concept of using DHA for enhancing the ability to learn. Furthermore, as noted by the respondent, several passages of the patent support the idea of improving learning in a therapeutic setting: paragraph [0002], stating that the animal's "brain development and cognitive function may not develop successfully despite measures to train the animal", paragraph [0005] mentioning "behaviour problems in dogs and cats", paragraph [0008], mentioning a "puppy or kitten in need of treatment", and paragraph [0036], mentioning a "concurrent therapy".

1.7 For these reasons, the reference in granted claim 1 to a "therapeutically effective amount" of DHA implies that the claimed use has a therapeutic purpose. There are no grounds to interpret that claim in a different manner and to assume that the claimed subject-matter encompasses non-therapeutic uses.

1.8 For these reasons, claim 1 of the main requests extends the scope of protection beyond that conferred by the granted patent (Article 123(3) EPC).

Auxiliary requests I to VII

2. *Extension of scope of protection (Article 123(3) EPC)*

2.1 Since claim 1 of auxiliary requests I to VII is worded in the same manner as claim 1 of the main request, the subject-matter claimed in these requests also offends against Article 123(3) EPC for the same reasons already discussed above (points 1.1 to 1.7).

Auxiliary request VIII

3. *Subject-matter excluded from patentability*

3.1 As already established above (point 1.1), granted claim 1 is directed to a therapeutic use of the claimed composition. Claim 1 of auxiliary request VIII differs from the granted claim only in that it specifies that the composition is a food or a supplement composition. This difference does not change the manner in which the claim is to be interpreted.

3.2 Accordingly, claim 1 of auxiliary request VIII encompasses subject-matter excluded from patentability and offends against Article 53(c) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



K. Exner

A. Haderlein

Decision electronically authenticated