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**Datasheet for the decision
of 17 December 2019**

Case Number: T 0151/16 - 3.3.09

Application Number: 07864591.8

Publication Number: 2124631

IPC: A23L1/236

Language of the proceedings: EN

Title of invention:

CONFECTIONERY COMPOSITIONS INCLUDING AN ELASTOMERIC COMPONENT
AND A SACCHARIDE COMPONENT

Patent Proprietor:

Intercontinental Great Brands LLC

Opponent:

Wm. Wrigley Jr. Company

Headword:

Relevant legal provisions:

RPBA Art. 12(4), 13

EPC Art. 84, 123(2)

Keyword:

Late-filed requests: admitted (no) - none

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 0151/16 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 17 December 2019

Appellant: Intercontinental Great Brands LLC
(Patent Proprietor) 100 Deforest Avenue
East Hanover, NJ 07936 (US)

Representative: Wilson Gunn
Charles House
148/9 Great Charles Street
Birmingham B3 3HT (GB)

Respondent: Wm. Wrigley Jr. Company
(Opponent) 1132 W Blackhawk Street
Chicago IL 60642 (US)

Representative: Haseltine Lake Kempner LLP
Redcliff Quay
120 Redcliff Street
Bristol BS1 6HU (GB)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 27 October 2015
revoking European patent No. 2124631 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman D. Rogers
Members: N. Perakis
F. Rinaldi

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. 2 124 631.
- II. With its notice of opposition the opponent requested revocation of the patent in its entirety on the grounds under Articles 100(a) (lack of novelty and inventive step), 100(b) and 100(c) EPC.

The opposed patent contained three independent claims, two independent product claims, claims 1 and 2, and an independent process claim, claim 11. Claims 1 and 2 read as follows:

"1. An edible composition, comprising a first portion comprising a saccharide component and having a first initial hardness intensity as measured by sensory evaluation methods and a second portion comprising an elastomeric component and having a second initial hardness intensity as measured by sensory evaluation methods; wherein at least a portion of the saccharide component is cooked isomalt; and wherein the first portion and the second portion form a homogeneous mixture."

"2. An edible composition comprising:
a first portion comprising a saccharide component and having a first initial hardness intensity as measured by sensory evaluation methods homogeneously mixed with a second portion comprising an elastomeric component and having a second initial hardness intensity as measured by sensory evaluation methods;
wherein the edible composition has a third hardness intensity as measured by sensory evaluation methods,

and and (*sic*) wherein at least a portion of the first portion is a cooked saccharide comprising isomalt."

III. The opposition division revoked the patent because it considered that none of the patent proprietor's requests submitted with letter of 4 September 2015, namely a main request and five (first to fifth) auxiliary requests, fulfilled the requirements of Article 123(2) EPC. With regard to the clarity objections of the opponent, the opposition division considered that the subject matter of the claims of the main request fulfilled the requirements of Article 84 EPC.

Independent claims 1 and 2 of the main request read as follows (the board highlights the differences in comparison with the corresponding claims as granted):

"1. An edible composition, comprising a first portion comprising a saccharide component and having a first initial hardness intensity as measured by sensory evaluation methods and a second portion comprising an elastomeric component and having a second initial hardness intensity as measured by sensory evaluation methods; wherein at least a portion of the saccharide component is cooked isomalt; and wherein the first portion and the second portion form a homogeneous mixture

wherein the composition comprises 5% - 95% w/w of a saccharide component together with 5% - 95% w/w of an elastomeric component; and

wherein the first and second portions are combined at a temperature at which the first and second portions are wholly in a molten state."

"2. An edible composition comprising:
a first portion comprising a saccharide component and having a first initial hardness intensity as measured by sensory evaluation methods homogeneously mixed with a second portion comprising an elastomeric component and having a second initial hardness intensity as measured by sensory evaluation methods;

wherein the edible composition has a third hardness intensity as measured by sensory evaluation methods, ~~and~~ and wherein at least a portion of the first portion is a cooked saccharide comprising isomalt;

wherein the composition comprises 5% - 95% w/w of a saccharide component together with 5% - 95% w/w of an elastomeric component; and

wherein the first and second portions are combined at a temperature at which the first and second portions are wholly in a molten state."

- IV. The patent proprietor (the appellant) appealed against the opposition division's decision and requested that this decision be set aside and that the patent be maintained in the form of the main request or the first auxiliary request both appended to the statement setting out the grounds of appeal. The main request was the same as the main request of the appealed decision. The appellant also requested that if the board found that either the main request or first auxiliary request fulfilled the requirements of Article 123(2) EPC, the case be remitted back to the opposition division so that novelty and inventive step be considered.

The first auxiliary request differed from the main request in that it defined in claims 1 and 2 that

"the composition comprises 5% - 95% w/w of a saccharide component together with 5% - 45 w/w of an elastomeric component".

- V. By letter dated 19 July 2016, the opponent (the respondent) filed observations on the appeal. The respondent requested that the appeal be dismissed. It also requested that, if the board found that the main request or the first auxiliary request complied with the requirements of Articles 84 and 123(2) EPC, the case be remitted back to the opposition division to discuss sufficiency, novelty and inventive step.
- VI. On 23 September 2019, the board issued a provisional opinion on the outstanding issues of clarity and added subject-matter in preparation for the oral proceedings.
- VII. By letter dated 23 October 2019, the appellant replaced the previous requests by a new main request and three auxiliary requests. It also filed the following documents:

D17: WO 2018/140798 A1

D18: WO 90/12512 A1

D19: R. Hadjikinova *et al.*, "Thermal behaviour of confectionary sweeteners' blends", *Bulgarian Chemical Communications*, volume 48, special issue E, 2016, 446-450

The independent claims of the new requests read as follows (the board highlights the differences in comparison with the corresponding claims as granted):

Main request

"1. An edible composition, comprising a first portion **comprising a candy composition** comprising a saccharide component and having a first initial hardness intensity as measured by sensory evaluation methods;

and a second portion **comprising a chewing gum composition, the chewing gum composition comprising gum base ingredients, including**~~comprising~~ an elastomeric component, **and chewing gum ingredients**, and having a second initial hardness intensity as measured by sensory evaluation methods;

wherein the initial first hardness intensity is different from the second initial hardness intensity; and wherein the hardness intensity difference is at least about one point on a 15 point sensory evaluation methods scale;

wherein at least a portion of the saccharide component is cooked isomalt; ~~and~~ wherein the first portion and the second portion form a homogeneous mixture;

wherein the composition comprises 5% - 95% w/w of the saccharide component together with 5% - 45% w/w of the elastomeric component; and

wherein the first and second portions are combined at a temperature at which the first and second portions are wholly in a molten state."

"2. An edible composition comprising:
a first portion **comprising a candy composition**
comprising a saccharide component and having a first
initial hardness intensity as measured by sensory
evaluation methods homogeneously mixed with a second
portion **comprising a chewing gum composition, the
chewing gum composition comprising gum base
ingredients, including** ~~comprising~~ an elastomeric
component, and having a second initial hardness
intensity as measured by sensory evaluation methods;

**wherein the first hardness intensity is different from
the second hardness intensity by least (*sic*) about one
point on a 15 point sensory evaluation methods scale;**

wherein the edible composition has a third hardness
intensity as measured by sensory evaluation methods;

**wherein the first portion is present in an amount that
determines the third initial hardness intensity;**

~~and~~ and wherein at least a portion of the first portion
is a cooked saccharide comprising isomalt;

**wherein the composition comprises 5% - 95% w/w of the
saccharide component together with 5% - 45% w/w of the
elastomeric component; and**

**wherein the first and second portions are combined at a
temperature at which the first and second portions are
wholly in a molten state."**

First auxiliary request

The first auxiliary request derives from the main request with the difference that in independent claims 1 and 2 the following feature has been deleted:

"wherein the composition comprises 5% - 95% w/w of the saccharide component together with 5% - 45% w/w of the elastomeric component".

Second auxiliary request

The second auxiliary request derives from the main request with the difference that the process claims have been deleted.

Third auxiliary request

The third auxiliary request derives from the first auxiliary request with the difference that the process claims have been deleted.

VIII. By letter dated 14 November 2019, the respondent requested that the appellant's late-filed documents and requests not be admitted into the proceedings. Furthermore, it argued that none of the appellant's requests fulfilled the requirements of Articles 84 and 123(2) EPC.

IX. Oral proceedings were held before the board on 17 December 2019. During these proceedings and in reply to the respondent's request, the appellant asked that documents D17 to D19 be admitted into the proceedings. The only issue that was discussed concerned the admissibility of the appellant's new requests. In this context, the board objected to the clarity of

independent claims 1 and 2 of the main request and by extension to the clarity of claims 1 and 2 of the second auxiliary requests. The board also inquired as to why the late-filed requests had not been filed earlier.

- X. The appellant argued that the new requests should be admitted into the proceedings because they reflected the appellant's efforts to overcome the objections raised in the opposition division's decision and reiterated in the board's preliminary opinion. They had not been filed earlier because, the appellant was of the opinion that the previous requests which had been filed with the statement setting out the grounds of appeal satisfied the requirements of Article 123(2)EPC, the only ground on which the appealed decision had been based.
- XI. The respondent argued that the new requests should not be admitted into the proceedings because they were late-filed, they did not remove the deficiencies under Article 123(2) EPC indicated in the appealed decision and introduced new deficiencies.
- XII. The appellant requested that the decision under appeal be set aside, that the board acknowledges conformity of the claims of the main request or any of the first to third auxiliary requests (all filed under cover of a letter of 23 October 2019) with the requirements of Articles 84 and 123(2) EPC, and that the board remits the case to the first instance for the assessment of sufficiency of disclosure, novelty and inventive step. It also requested that D17 to D19 be admitted into the proceedings.

XIII. The respondent requested that the appeal be dismissed and that the new requests (filed under cover of a letter of 23 October 2019) not be admitted into the proceedings or, if any of the requests is admitted and considered to comply with the requirements of Articles 84 and 123(2) EPC, the case be remitted to the first instance for the assessment of sufficiency of disclosure, novelty and inventive step. Furthermore it requested that documents D17 to D19 not be admitted into the proceedings.

Reasons for the Decision

1. Main request

1.1 The procedural framework

The appellant's main request, as filed with the statement setting out the grounds of appeal, was the same as the main request of the opposition division's decision. The appellant's new main request was filed with letter dated 23 October 2019, after the summons to oral proceedings had been issued (22 May 2019) and after the board had communicated its preliminary opinion (23 September 2019). The only reason provided by the appellant for the late filing of this request was that it replied to objections raised in the board's communication. As to why this request had not been filed earlier, the appellant argued that, contrary to the opposition division, it considered that the main request satisfied the requirements of Article 123(2) EPC.

1.2 The legal framework

The board refers to Article 12(4) RPBA according to which the board has the discretion to hold inadmissible requests which could have been presented in the first instance proceedings. The board also refers to Article 13(1) RPBA according to which any amendments to a party's case after it has filed its grounds of appeal may be admitted and considered at the board's discretion.

1.3 The factual framework

Independent claims 1 and 2 of the main request relate to an edible composition which comprises 5% - 95% w/w of the saccharide component together with 5% - 45% w/w of the elastomeric component. Consequently, when the saccharide component is present at 95% w/w, the elastomeric component is present at 5% w/w. Under these specific circumstances there is no room for any further component in the claimed edible composition.

Claims 1 and 2 require, however, that the chewing gum composition includes not only an elastomeric component but also chewing gum ingredients. This is clearly impossible in the situation highlighted above, which leads to the conclusion that the subject-matter of these claims lacks clarity and by consequence that these claims are not clearly allowable.

1.4 Conclusion

As the claims of the main request are not clearly allowable, the board in exercising its discretion power

under Articles 12(4) and 13(1) RPBA decided not to admit the main request into the proceedings.

2. First auxiliary request

Independent claims 1 and 2 of the first auxiliary request result from the corresponding claims of the main request after deletion of the feature:

"wherein the composition comprises 5% - 95% w/w of the saccharide component together with 5% - 45% w/w of the elastomeric component".

The subject-matter of these claims, despite the above mentioned amendment, still differs from the subject-matter of the corresponding claims of the appealed decision and the claims filed with the statement setting out the grounds of appeal. In view of these differences, it is not straightforward that the subject-matter of these claims does not give rise to new objections and that it overcomes all outstanding objections under Article 123(2) EPC raised before the opposition division and reiterated in the board's communication. Under these circumstances, claims 1 and 2 of the first auxiliary request are not clearly allowable.

Thus, the board in exercising its discretion power under Articles 12(4) and 13(1) RPBA decided not to admit this request into the proceedings.

3. Second auxiliary request

The second auxiliary request consists of claims 1 to 6 which are identical to claims 1 to 6 of the main request. For the reasons given above (see point 1),

this request is also not admitted into the proceedings.

4. Third auxiliary request

The third auxiliary request consists of claims 1 to 6 which are identical to claims 1 to 6 of the first auxiliary request. For the reasons given above (see point 2), this request is also not admitted into the proceedings.

5. In summary, none of the appellant's requests is admitted into the proceedings. In the absence of any request, the appeal has to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



D. Magliano

D. Rogers

Decision electronically authenticated