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Datasheet for the decision of 24 November 2021

Case Number: T 1499/16 - 3.3.09

Application Number: 09158304.7

Publication Number: 2100520

IPC: A23L33/00, A23L33/10

Language of the proceedings: EN

Title of invention:
Improvement of intestinal barrier integrity

Patent Proprietor:
N.V. Nutricia

Opponents:
Fresenius Kabi Deutschland GmbH
Société des Produits Nestlé S.A.

Headword:
Improvement of intestinal barrier integrity/NUTRICIA

Relevant legal provisions:
EPC Art. 56
RPBA 2020 Art. 13(2)

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It can be changed at any time and without notic

Keyword:
Request for conducting oral proceedings in person - not granted
Holding oral proceedings by vico is justified in view of G 1/21
Request to stay the proceedings in view of G 2/21 - not granted
Inventive step (main request and auxiliary requests 1 to 11) - (no)
Amendment after expiry of period in Rule 100(2) EPC communication - exceptional circumstances (no)
Late filed experimental reports and auxiliary requests 12 and 13 - not admitted

Decisions cited:
G 0001/21, G 0002/21, T 0116/18

Catchword:

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Case Number: T 1499/16 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 24 November 2021

Appellant: (Patent Proprietor)	N.V. Nutricia Eerste Stationsstraat 186 2712 HM Zoetermeer (NL)
Representative:	Nederlandsch Octrooibureau P.O. Box 29720 2502 LS The Hague (NL)
Appellant: (Opponent 1)	Fresenius Kabi Deutschland GmbH Else-Kröner-Stasse 1 61352 Bad-Homburg v.d.H. (DE)
Representative:	Fresenius Kabi Deutschland GmbH Patent Department Borkenberg 14 61440 Oberursel (DE)
Appellant: (Opponent 2)	Société des Produits Nestlé S.A. Entre-deux-Villes 1800 Vevey (CH)
Representative:	Santarelli 49, avenue des Champs-Elysées 75008 Paris (FR)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 25 April 2016 concerning maintenance of the European Patent No. 2100520 in amended form.**

Composition of the Board:

Chairman	A. Haderlein
Members:	M. Ansorge
	F. Blumer

Summary of Facts and Submissions

I. All the parties to the proceedings filed respective appeals against the opposition division's interlocutory decision holding the then-auxiliary request 1 allowable. For simplicity, the board will continue to refer to them as the proprietor and opponents 1 and 2.

II. With their respective notices of opposition, both opponents had requested that the patent be revoked *inter alia* on the grounds for opposition under Article 100(a) EPC (lack of novelty and lack of inventive step).

III. In the present decision, reference is made to the following documents:

D26: NL 1018832
D26a: English translation of D26
D48: experimental report filed by the proprietor (16 December 2014)
D60: experimental report filed by the proprietor (23 August 2018)
D61: experimental report filed by the proprietor (8 February 2021)
D62: experimental report filed by the proprietor (25 May 2021)

IV. The opposition division decided, *inter alia*, that the claimed nutritional composition according to the main request (claims as granted) lacked novelty, but that the claimed subject-matter of the then-auxiliary request 1 met the requirements of the EPC. In particular, the opposition division found that the subject-matter of this request involved an inventive

step when starting from D26a as the closest prior art.

V. The board issued a communication pursuant to Rule 100(2) EPC indicating its preliminary opinion that the main request (claims as granted) and auxiliary requests 1 to 11 were not allowable, in particular as the claimed subject-matter of all the auxiliary requests did not involve an inventive step in view of D26a as the closest prior art.

VI. During the oral proceedings before the board, the proprietor filed auxiliary requests 12 and 13.

VII. Claim 1 of the main request (claim 1 as granted) reads as follows:

"A nutritional composition comprising:
EPA, DHA and ARA, wherein the content of long chain polyunsaturated fatty acid with 20 and 22 carbon atoms does not exceed 15 wt.% of the total fat content; and at least two distinct oligosaccharides (OL1 and OL2), which are not or only partially digested in the intestine by the action of acids or digestive enzymes present in the human upper digestive tract, but which are fermentable by the human intestinal flora, wherein the two distinct oligosaccharides have a homology in monose units below 90%."

Claim 1 of auxiliary request 1 (same as claim 1 of the then-auxiliary request 1 before the opposition division) differs from claim 1 of the main request in that the feature "wherein at least one oligosaccharide comprises at least 66% galactose as monose unit and at least one oligosaccharide comprises at least 66% fructose as monose unit" is added at the end of claim 1.

Claim 1 of auxiliary request 2 differs from claim 1 of the main request as follows (added features indicated by underlining and deletions indicated by striking-through):

"A nutritional composition comprising:
EPA, DHA and ARA, wherein the content of long chain polyunsaturated fatty acid with 20 and 22 carbon atoms does not exceed 15 wt.% of the total fat content; and galactooligosaccharide and fructan selected from the group consisting of fructooligosaccharides and inulin ~~at least two distinct oligosaccharides (OL1 and OL2)~~, which are not or only partially digested in the intestine by the action of acids or digestive enzymes present in the human upper digestive tract, but which are fermentable by the human intestinal flora, wherein the two distinct oligosaccharides have a homology in monose units below 90%."

Claim 1 of auxiliary request 3 differs from claim 1 of the main request in that the following features were added at the end of claim 1:

"wherein either the composition further comprises between 1 and 500 mg nucleosides and/or nucleotides per 100 gram dry formula, or
wherein the EPA content in the composition is at least 0.05 wt% of the total fat, or
wherein the composition is an infant formula and contains 7.5 to 12.5 energy % protein; 40 to 55 energy % carbohydrates; and 35 to 50 energy % fat, or
which composition is for administration to an infant with the age between 0 and 2 years"

Claim 1 of auxiliary request 4 differs from claim 1 of auxiliary request 1 in that the following features were added at the end of claim 1:

"wherein either the composition further comprises between 1 and 500 mg nucleosides and/or nucleotides per 100 gram dry formula, or
wherein the EPA content in the composition is at least 0.05 wt% of the total fat, or
wherein the composition is an infant formula and contains 7.5 to 12.5 energy % protein; 40 to 55 energy % carbohydrates; and 35 to 50 energy % fat, or which composition is for administration to an infant with the age between 0 and 2 years"

Claim 1 of auxiliary request 5 differs from claim 1 of auxiliary request 2 in that the following features were added at the end of claim 1:

"wherein either the composition further comprises between 1 and 500 mg nucleosides and/or nucleotides per 100 gram dry formula, or
wherein the EPA content in the composition is at least 0.05 wt% of the total fat, or
wherein the composition is an infant formula and contains 7.5 to 12.5 energy % protein; 40 to 55 energy % carbohydrates; and 35 to 50 energy % fat, or which composition is for administration to an infant with the age between 0 and 2 years"

Claim 1 of auxiliary request 6 reads as follows:

"Use of a nutritional composition comprising:
EPA, DHA and ARA, wherein the content of long chain polyunsaturated fatty acid with 20 and 22 carbon atoms does not exceed 15 wt.% of the total fat content; and

at least two distinct oligosaccharides (OL1 and OL2), which are not or only partially digested in the intestine by the action of acids or digestive enzymes present in the human upper digestive tract, but which are fermentable by the human intestinal flora, wherein the two distinct oligosaccharides have a homology in monose units below 90%, for manufacture of a composition for administration to an infant with the age between 0 and 2 years."

Claim 1 of auxiliary request 7 differs from claim 1 of auxiliary request 6 in that the feature "for manufacture of a composition for administration to an infant with the age between 0 and 2 years" was amended to "for manufacture of a composition for administration to a human infant with the age between 0 and 2 years" (emphasis added).

Claim 1 of auxiliary request 8 differs from claim 1 of auxiliary request 6 in that the feature "wherein at least one oligosaccharide comprises at least 66% galactose as monose unit and at least one oligosaccharide comprises at least 66% fructose as monose unit" was added.

Claim 1 of auxiliary request 9 differs from claim 1 of auxiliary request 6 as follows (added features indicated by underlining and deletions indicated by striking through):

"Use of a nutritional composition comprising:
EPA, DHA and ARA, wherein the content of long chain polyunsaturated fatty acid with 20 and 22 carbon atoms does not exceed 15 wt.% of the total fat content; and galactooligosaccharide and a fructan selected from the group consisting of fructooligosaccharides and inulin

~~at least two distinct oligosaccharides (OL1 and OL2)~~, which are not or only partially digested in the intestine by the action of acids or digestive enzymes present in the human upper digestive tract, but which are fermentable by the human intestinal flora, wherein the two distinct oligosaccharides have a homology in monose units below 90%, for manufacture of a composition for administration to an infant with the age between 0 and 2 years."

Claim 1 of auxiliary request 10 reads as follows:

"Use of polyunsaturated fatty acids for the manufacture of a composition for use in stimulating intestinal barrier integrity, wherein the composition comprises: EPA, DHA and ARA, wherein the content of long chain polyunsaturated fatty acid with 20 and 22 carbon atoms does not exceed 15 wt.% of the total fat content; and at least two distinct oligosaccharides (OL1 and OL2), which are not or only partially digested in the intestine by the action of acids or digestive enzymes present in the human upper digestive tract, but which are fermentable by the human intestinal flora, wherein the two distinct oligosaccharides have a homology in monose units below 90 %, wherein at least one oligosaccharide comprises at least 66% galactose as monose unit and at least one oligosaccharide comprises at least 66% fructose as monose unit."

Claim 1 of auxiliary request 11 differs from claim 1 of auxiliary request 10 as follows (added features indicated by underlining and deletions indicated by striking through):

"Use of polyunsaturated fatty acids for the manufacture of a composition for use in stimulating intestinal barrier integrity, wherein the composition comprises: EPA, DHA and ARA, wherein the content of long chain polyunsaturated fatty acid with 20 and 22 carbon atoms does not exceed 15 wt.% of the total fat content; and galactooligosaccharide and a fructan selected from the group consisting of fructooligosaccharides and inulin ~~at least two distinct oligosaccharides (OL1 and OL2)~~, which are not or only partially digested in the intestine by the action of acids or digestive enzymes present in the human upper digestive tract, but which are fermentable by the human intestinal flora, wherein the two distinct oligosaccharides have a homology in monose units below 90 %~~, wherein at least one oligosaccharide comprises at least 66% galactose as monose unit and at least one oligosaccharide comprises at least 66% fructose as monose unit~~."

Claim 1 of auxiliary request 12 differs from claim 1 of auxiliary request 2 as follows (deletions indicated by striking through):

"A nutritional composition comprising:
EPA, DHA and ARA, wherein the content of long chain polyunsaturated fatty acid with 20 and 22 carbon atoms does not exceed 15 wt.% of the total fat content; and galactooligosaccharide and ~~fructan selected from the group consisting of fructooligosaccharides and~~ inulin, which are not or only partially digested in the intestine by the action of acids or digestive enzymes

present in the human upper digestive tract, but which are fermentable by the human intestinal flora, wherein the two distinct oligosaccharides have a homology in monose units below 90%."

Claim 1 of auxiliary request 13 differs from claim 1 of auxiliary request 11 as follows (deletions indicated by striking through):

"Use of polyunsaturated fatty acids for the manufacture of a composition for use in stimulating intestinal barrier integrity, wherein the composition comprises: EPA, DHA and ARA, wherein the content of long chain polyunsaturated fatty acid with 20 and 22 carbon atoms does not exceed 15 wt.% of the total fat content; and galactooligosaccharide and ~~fructan selected from the group consisting of fructooligosaccharides and~~ inulin, which are not or only partially digested in the intestine by the action of acids or digestive enzymes present in the human upper digestive tract, but which are fermentable by the human intestinal flora, wherein the two distinct oligosaccharides have a homology in monose units below 90 %."

VIII. The parties' relevant arguments submitted in writing and during the oral proceedings are reflected in the reasoning below.

IX. Requests

The proprietor requested that the decision be set aside and that the patent be maintained as granted (main request), or maintained on the basis of auxiliary request 1 as filed with the grounds of appeal, or on the basis of any one of auxiliary requests 2 to 11, all as filed with the reply to the opponents' grounds of

appeal, or on the basis of one of auxiliary requests 12 and 13, filed during the oral proceedings before the board.

Moreover, it requested that the oral proceedings be held in person and not in the form of a videoconference, and that the proceedings be stayed in view of the pending referral G 2/21.

The opponents requested that the decision be set aside and that the patent be revoked in its entirety.

Reasons for the Decision

1. Oral proceedings by videoconference

1.1 Opponent 2 requested that the oral proceedings be held as a videoconference in view of the "present pandemic situation". In reaction to the board's communication informing the parties that the oral proceedings before the board would be held as a videoconference, the proprietor informed the board that it did not wish them to be held as a videoconference and requested that they be conducted in person at the premises of the boards of appeal. In support of this request, the proprietor argued that in this case its interest "is best served" with a hearing in person. Furthermore, it submitted that to its knowledge there were no travel restrictions which might prevent the parties from attending the oral proceedings in person at the EPO premises.

1.2 The proprietor's request in this respect is to be assessed in view of G 1/21, which deals with oral proceedings by videoconference during a general

emergency impairing the parties' possibility to attend in-person oral proceedings at the EPO premises.

1.3 For the following reasons, the board did not grant the proprietor's request in this respect, and decided that holding the oral proceedings as a videoconference was justified under the present specific circumstances:

1.3.1 The headnote of G 1/21 provides guidance that, during a general emergency impairing the parties' possibilities to attend in-person oral proceedings at the EPO premises, conduct of oral proceedings before the boards of appeal in the form of a videoconference is compatible with the EPC even if not all the parties to the proceedings have given their consent to the oral proceedings being conducted in such form.

Under points 47 to 50 of G 1/21, the following reasons were given that could justify denying a party's wish to have oral proceedings held in person:

- Firstly, a videoconference needs to be a suitable alternative for bringing the appeal case to a conclusion. Put differently, the case must not be unsuitable for a videoconference (point 48 of G 1/21).

- Secondly, there must be circumstances specific to the case that justify the decision not to hold the oral proceedings in person (point 49 of G 1/21).

- Thirdly, the decision whether good reasons justify a deviation from the preference of a party to hold the oral proceedings in person must be a discretionary decision of the board of appeal

summoning them to oral proceedings (point 50 of G 1/21).

1.3.2 In the following, it is assessed whether the present circumstances justify the oral proceedings not being held in person but in the form of a videoconference (G 1/21).

Firstly, no reasons why a videoconference would not be suitable in this particular case were presented by the proprietor. Essentially arguing that in this case the proprietor's interest "is best served" with a hearing in person is not convincing. In particular, the present case is not overly complex and the number of parties is not excessively large. Thus the board concludes that the present case is suitable for a videoconference.

Secondly, as explicitly mentioned in point 49 of G 1/21, "other health-related measures aimed at preventing the spread of the disease" is an example of circumstances relating to limitations and impairments affecting the parties' ability to attend oral proceedings in person at the EPO premises. As outlined by opponent 1, quarantine obligations, every now and then, relating to the representative's young children being at school are a potential threat in the present, still-prevailing, pandemic situation in Germany. In addition, the number of new confirmed Covid-19 infections per day greatly increased over the weeks preceding the oral proceedings. Travelling to Munich or Haar and holding the oral proceedings in person would have increased the risk of infection of the parties involved. Under these circumstances, there is no doubt that there is still a general emergency impairing the parties' possibilities to attend in-person oral proceedings at the EPO premises.

1.3.3 In this context, it is pointed out that the opponents either explicitly requested that the oral proceedings be held as a videoconference (opponent 2) or would have appreciated this format in view of the pandemic situation still prevailing (opponent 1). The opponents also referred to G 1/21 in support of their case.

1.3.4 Another relevant aspect to be considered in the present case is that this appeal case has been pending for a long time, because it was filed in 2016. Thus further delaying settling the present appeal would have been detrimental to legal certainty for third parties and would have seriously impaired the administration of justice.

Under the present circumstances, the board made the discretionary decision that the proprietor's request for oral proceedings to be held in person could not be granted and was thus refused. In the present case, in line with G 1/21, it was justified to overrule the proprietor's wish and to hold oral proceedings by videoconference.

2. Admission of the experimental reports D61 and D62

2.1 The opponents requested that the experimental reports D61 and D62 not be admitted into the proceedings.

2.2 Under Article 13(2) RPBA, any amendment to a party's appeal case made after the expiry of a period specified by the board in a communication under Rule 100(2) EPC or, where such a communication is not issued, after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are

exceptional circumstances, which have been justified with cogent reasons by the party concerned.

2.3 Both experimental reports, D61 and D62, were filed after the period specified in the board's communication under Rule 100(2) EPC, so Article 13(2) RPBA is applicable in this case.

2.4 For the following reasons, there are no exceptional circumstances which might justify admitting D61 and D62 in the present case:

2.4.1 The indication in the board's communication that there is no experiment on file testing the nutritional composition according to the closest prior art D26a cannot be seen as a justification for remedying this lack of evidence later. This conclusion in the board's communication goes back to opponent 2's line of argument already present in its grounds of appeal (see page 17 of opponent 2's grounds of appeal). More precisely, opponent 2 explicitly argued on page 17 of its grounds of appeal that the proprietor had not supplied any comparative data demonstrating an improvement in terms of barrier integrity by the invention of claim 1 with respect to D26/D26a.

2.4.2 The above statement in the board's communication was thus not newly introduced on the board's own motion, but merely assesses the parties' submissions which had already been raised from the very beginning of the present appeal case.

2.4.3 The proprietor further argued that there were also other closest prior art documents used by the opponents and a proprietor could not be expected to submit

detailed experimental data in view of all those documents.

The board is not convinced, since the opposition division had already considered D26a as suitable closest prior art and opponent 2 had focused strongly on D26a as the closest prior art in appeal. Certainly, in the present case there is no situation where the opponents used an excessive number of closest prior art documents which might require numerous different experiments to be necessary to prove an effect over each of these documents. Instead, the distinguishing features over the few closest prior art documents used by the opponents in the present case are quite similar. At least, the proprietor could not be taken by surprise that the board too, in line with the opposition division, considered D26a suitable closest prior art in the present case.

Thus there are no exceptional circumstances supported by cogent reasons to take the experimental reports D61 and D62 into account. Under these circumstances, these reports are not considered in the present case (Article 13(2) RPBA).

3. Staying the oral proceedings in view of G 2/21

3.1 The proprietor requested that the current appeal proceedings be stayed and that the date for the oral proceedings be postponed until a date when the decision in the pending referral G 2/21 (referring case T 116/18) was known. In its view, the outcome of this pending referral might be crucial to the present case.

3.2 For the following reasons, the board saw no reason to stay the proceedings:

3.2.1 As mentioned under point 2 above, the experimental reports D61 and D62 are not admitted to the proceedings (Article 13(2) RPBA).

In this context, reference is made to point 13.3.2 of T 116/18, which is directed at the question of whether post-published evidence can be taken into account on substantive grounds, depending on the plausibility of the technical effect based on the evidence submitted as proof. T 116/18 clarifies that this discussion should not be confused with whether post-published evidence can be taken into account on procedural grounds in particular in view of Articles 12 and 13 RPBA.

D61 and D62, while being "post-published" evidence within the meaning of T 116/18, were not admitted into the procedure on procedural grounds. As can be gathered from point 13.3.2 of T 116/18, the case underlying the pending referral explicitly does not deal with such a situation.

3.2.2 Thus the only remaining "post-published" evidence on file which might possibly still fall within the framework to be decided in the pending referral is the experimental reports D48 and D60. However, even when considering these experimental reports D48 and D60 in the present case, an inventive step of the claimed subject-matter cannot be acknowledged (see points 4 and 5 below). Consequently, the assessment of inventive step in the present case does not depend on the answers to the relevant questions posed in the pending referral G 2/21.

In view of the above, the board saw no reason to stay the proceedings.

MAIN REQUEST (claims as granted)

4. Inventive step

4.1 There was common ground among the parties that D26a was the closest prior art in the present case. The board sees no reason to disagree.

4.2 D26a relates to a milk-replacing food comprising carob flour which is characterised by repetitive oligosaccharide units of the tetramannose type with galactose side chains (see page 1, lines 1 to 3 of D26a). It may be used in formulations for baby and infant foods (see page 1, lines 4 to 7 and page 2, lines 20 to 24 of D26a).

Example 3 of D26a, which is taken as the closest prior art in the present case, relates to a milk-replacing formulation enriched with carob flour, comprising, *inter alia*, galactooligosaccharide (GOS) and eicosapentaenoic acid (EPA), docosahexaenoic acid (DHA) and arachidonic acid (ARA) in a content not exceeding 15 wt.% of the total fat content.

Page 5, lines 24 to 28 of D26a further discloses that prebiotics such as GOS or fructooligosaccharides (FOS) may be included in the formulations.

4.3 Notwithstanding opponent 1's novelty objection in view of D26a, the opponents assumed, for the sake of argument, that the nutritional composition according to claim 1 of the main request differs from example 3 of D26a in the oligosaccharides present in the composition

(this being the proprietor's position).

Claim 1 of the main request requires at least two distinct oligosaccharides (OL1 and OL2), which are not or only partially digested in the intestine by the action of acids or digestive enzymes present in the human upper digestive tract, but which are fermentable by the human intestinal flora, wherein the two distinct oligosaccharides have a homology in monose units below 90%. In contrast, example 3 of D26a utilises GOS and carob flour as the non-digestible or partially digestible oligosaccharides.

4.4 The proprietor argued that the problem to be solved was to provide an alternative nutritional composition providing intestinal barrier integrity in infants, D48 and D60 demonstrating that the claimed composition provided intestinal barrier integrity. The question of whether the problem to be solved was actually merely the provision of a simple alternative nutritional composition, as submitted by the opponents, can remain open, since even taken the problem formulated by the proprietor, the solution was obvious, as set out below.

4.5 As can be gathered from D26a, the milk-replacing food results in favourable intestinal health in infants (see for instance page 1, lines 15 to 22 of D26a). In addition, the polyunsaturated fatty acid ARA, which is used in example 3 of D26a, leads to a wall strengthening effect and, by promoting the synthesis of the metabolites prostaglandin I-2 and E-2 formed therefrom, closing of the so-called tight junctions in the intestinal epithelium (see page 3, line 14 to page 4, line 2 of D26a). This effectively corresponds to the intestinal barrier integrity which is referred to in the patent and which is part of the problem to be

solved as proposed by the proprietor (see point 4.4 above).

4.6 Even in view of the problem proposed by the proprietor it is obvious for a skilled person to add FOS to the milk-replacing formulation according to example 3 of D26a. Page 5, lines 24 to 28 of D26a itself encourages a skilled person to add GOS and FOS to the nutritional composition according to D26a. It was uncontested by the parties that the combination of GOS and FOS meets the requirement of two distinct oligosaccharides (OL1 and OL2) of claim 1 of the main request.

4.7 In this context, the proprietor argued that D26a does not teach that FOS is suitable for achieving intestinal barrier integrity.

The board does not find this argument convincing, because claim 1 of the main request does not require FOS to be capable of achieving this effect. Even when considering the problem to be solved as being to provide alternative nutritional compositions providing intestinal barrier integrity in infants, as proposed by the proprietor, the whole composition is to be assessed for its suitability to lead to the desired effect, and it is not necessary for each individual component to lead to this effect.

In view of the above, the subject-matter of claim 1 of the main request does not involve an inventive step in view of D26a as the closest prior art.

AUXILIARY REQUESTS 1 - 11

5. For the following reasons, the subject-matter of claim 1 of each of auxiliary requests 1 to 11 does not

involve an inventive step in view of D26a as the closest prior art.

5.1 For substantially the same reasons as outlined above for the main request, the subject-matter of claim 1 of auxiliary request 1 does not involve an inventive step in view of D26a as the closest prior art. It was uncontested by the parties that the combination of GOS and FOS also meets the requirement of the two distinct oligosaccharides (OL1 and OL2) of claim 1 of auxiliary request 1. It is obvious to a skilled person to contemplate adding FOS in view of D26a alone (see point 4 above).

5.2 With respect to auxiliary requests 2 to 9, the board gave a preliminary opinion that none of these requests were allowable for lack of inventive step (see points 14 to 19 of the board's communication under Rule 100(2) EPC). No arguments were submitted by the proprietor, either in writing or during the oral proceedings, as to why these claim requests might lead to a different assessment of inventive step in view of D26a from that given for the main request and auxiliary request 1. In the absence of any such arguments, the board cannot see that the amendments to claim 1 of auxiliary requests 2 to 9 might render the claimed subject-matter inventive over D26a.

In view of the above, it is concluded that auxiliary requests 2 to 9 are not allowable due to a lack of inventive step in view of D26a either.

5.3 Claim 1 of auxiliary request 10 relates to the use of polyunsaturated fatty acids for the manufacture of a composition for use in stimulating intestinal barrier integrity. The composition defined in claim 1 of this

claim request corresponds to that of claim 1 of auxiliary request 1.

As already outlined under point 4.5, stimulation of intestinal barrier integrity is achieved by the nutritional composition of D26a. In addition, the use of ARA is disclosed in D26a as being associated with this effect. As outlined for auxiliary request 1, it is obvious to provide the nutritional composition of auxiliary request 1 in view of D26a.

In this context, the proprietor argued again that D26a did not teach that FOS was capable of achieving stimulation of intestinal barrier integrity, but claim 1 does require this effect.

For the reasons outlined under point 4.7, the board does not agree. Claim 1 does not require FOS to be capable of achieving the desired effect. In the board's view, as far as claim 1 of auxiliary request 1 is concerned, it is evident that the claimed composition, i.e. the whole composition, is to be assessed in this respect, not each individual component. In claim 1 of auxiliary request 10, it is even doubtful whether the stimulation of intestinal barrier integrity is intended to be linked to the whole composition or to the polyunsaturated fatty acids only. Regardless of how claim 1 is to be interpreted, it does not require the claimed effect to be achieved by FOS.

For the above reasons, auxiliary request 10 is not allowable due to a lack of inventive step of claim 1 in view of D26a.

5.4 Claim 1 of auxiliary request 11 also relates to the use of polyunsaturated fatty acids for the manufacture of a

composition for use in stimulating intestinal barrier integrity. The composition defined in claim 1 of this claim request corresponds to that of claim 1 of auxiliary request 2.

As already outlined under points 4.5 and 5.3, the stimulation of intestinal barrier integrity is achieved in D26a and claim 1 does not require the claimed effect to be achieved by FOS. As outlined above for auxiliary request 2, it is obvious to provide the nutritional composition of auxiliary request 2 in view of D26a.

Thus auxiliary request 11 is not allowable due to a lack of inventive step of claim 1 in view of D26a.

AUXILIARY REQUESTS 12 AND 13

6. Article 13(2) RPBA

6.1 During the oral proceedings, the proprietor filed auxiliary requests 12 and 13, being substantially based on auxiliary requests 2 and 11, wherein the alternative "FOS" was deleted.

6.2 The opponents requested that these newly-filed auxiliary requests not be admitted into the proceedings.

6.3 For the following reasons, auxiliary requests 12 and 13 were not admitted into the proceedings:

6.3.1 It was uncontested by the parties that the filing of these requests amounted to an amendment of the proprietor's case. The question of whether auxiliary requests 12 and 13 can be admitted into the proceedings is to be judged by taking Article 13(2) RPBA into

account and particularly by assessing whether there are exceptional circumstances supported by cogent reasons which might justify admitting them to the proceedings.

6.3.2 The proprietor argued that these claim requests were filed to further delimit the claimed subject-matter in view of D26a. They should be admitted since they derived from auxiliary requests 2 and 11, with the alternative "FOS" being deleted in claim 1, auxiliary requests 2 and 11 having already been filed with the reply to the opponents' grounds of appeal.

6.3.3 The board is not convinced by the proprietor's line of argument. It does not amount to exceptional circumstances which could speak for admitting these claim requests. D26a was on file from the very beginning of the proceedings and the proprietor had been aware for a long time that it qualified as suitable closest prior art (see for instance the opposition division's decision). Filing auxiliary requests 12 and 13 at the very last possible moment in the present appeal, i.e. during the oral proceedings once all higher-ranking claim requests had been considered not to involve an inventive step in view of D26a, can be considered a surprise to the opponents, who were not able to react properly thereto. Admitting these claim requests at the very last stage of the proceedings would be against the principle of fair and equal treatment of all parties to the proceedings.

6.3.4 In addition, no reasons why these requests were not filed earlier were given by the proprietor.

6.3.5 The board cannot see that there are exceptional circumstances which might justify admitting auxiliary requests 12 and 13 into the proceedings.

Under these circumstances, the board decided not to take auxiliary requests 12 and 13 into account (Article 13(2) RPBA).

7. For the reasons given above, there is no allowable request on file.

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:

A. Nielsen-Hannerup A. Haderlein

Decision electronically authenticated