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**Datasheet for the decision
of 12 January 2021**

Case Number: T 0205/17 - 3.3.09

Application Number: 01988317.2

Publication Number: 1331855

IPC: A23K50/00, A23K10/40,
A61K31/34, A61K31/355,
A61K31/385, A23K20/158,
A23K20/174, A23K20/142,
A23K50/40

Language of the proceedings: EN

Title of invention:
AGED COMPANION PET DIET

Patent Proprietor:
Hill's Pet Nutrition, Inc.

Opponents:
Société des Produits Nestlé S.A.
The IAMS Company

Headword:
Improving mental capacity of aged canine pets/HILL'S

Relevant legal provisions:

EPC Art. 54(3), 54(5), 56, 83, 84, 123(2), 123(3)

EPC R. 80

RPBA Art. 12(4)

RPBA 2020 Art. 13(1), 13(2), 25(2)

Keyword:

Auxiliary request 2:

Admission - (yes)

Added subject matter - (no)

Extension of the scope of protection - (no)

Clarity - (yes)

Sufficiency of disclosure - (yes)

Validity of the priority right - (yes)

Novelty - (yes)

Inventive step - (yes)

Decisions cited:

G 0003/14, T 0081/84, T 0024/91

Catchword:



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Case Number: T 0205/17 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 12 January 2021

Appellant: Société des Produits Nestlé S.A.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
5 December 2016 concerning maintenance of the
European Patent No. 1331855 in amended form.**

Composition of the Board:

Chairman A. Haderlein
Members: A. Veronese
 D. Rogers

Summary of Facts and Submissions

I. This decision concerns the appeals filed by the two opponents (appellants 1 and 2) against the opposition division's decision finding that European patent No. EP 1 331 855 B1 as amended according to the main request met the requirements of the EPC.

II. With their notices of opposition the opponents had 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. Claims 1 and 2 of the main request, filed during the oral proceedings before the opposition division and found allowable by the opposition division, read:

"1. An antioxidant for use in inhibiting the deterioration of the mental capacity of an aged companion pet, wherein the antioxidant is in a companion pet diet, wherein the antioxidant is in a sufficient amount for inhibiting the deterioration of the mental capacity of the aged companion pet, wherein the antioxidant is selected from the group consisting of Vitamin C, alpha-lipoic acid, l-carnitine or mixtures thereof, wherein the companion pet diet meets ordinary nutritional requirements of the aged pet, and wherein the pet is a canine."

"2. An antioxidant for use in increasing the mental capacity of an aged companion pet suffering from loss of mental capacity, wherein the antioxidant is in a companion pet diet, wherein the antioxidant is in a sufficient amount for increasing the mental capacity of the aged companion pet, wherein the antioxidant is

selected from the group consisting of Vitamin C, alpha-lipoic acid, l-carnitine or mixtures thereof, the companion pet diet meets ordinary nutritional requirements of the aged pet, and wherein the pet is a canine."

IV. The documents submitted during the opposition proceedings included:

- D1: WO 00/44375 A1
- D3: WO 01/58271 A1
- D8: WO 00/49891 A1
- D10: WO 00/49968 A1
- D11: D.J. Socci et al., Brain Research, 1995, Vol. 693, pp. 88-94
- D16: R.M. Ortega et al., Am. J. Clin. Nutr., 1997, Vol. 66, pp. 803-809.
- D17: B.N. Ames et al., Proc. Natl. Acad. Sci. USA, 1993, Vol. 90, pp. 7915-7922.
- D22: US 5,973,004
- D23: WO 00/33659 A1
- D37*: EP 1 339 292 B1
- D38-D41: Priority documents of D37*
- D43: Letter filed at EPO on 5 February 2018, concerning T 1959/14, and annexed documents

V. In its decision, the opposition division found that:

- the main request was admissible and the claimed subject-matter met the requirements of Articles 123(2) and (3) EPC and Rule 80 EPC
- the claims were directed to a further medical use
- the claimed invention was clearly defined and sufficiently disclosed

- the claimed subject-matter was novel over D1 and D3 and involved an inventive step over the closest prior art D1, whether alone or in combination with the other cited documents

- VI. In their statements setting out the grounds of appeal, appellants 1 and 2 requested that the decision under appeal be set aside and that the patent be revoked in its entirety. The appellants requested oral proceedings.
- VII. In its reply to the grounds of appeal dated 31 August 2017, the patent proprietor (respondent) requested that the patent be maintained on the basis of the main request found allowable by the opposition division or, alternatively, on the basis of one of the first to sixth auxiliary requests, filed with that reply. It also requested oral proceedings.
- VIII. The parties were summoned to oral proceedings. In a written communication issued in preparation for the hearing the board expressed the preliminary opinion that the main request and the first auxiliary request were not allowable, but that the second auxiliary request complied with the requirements of the EPC.
- IX. In its reply to the board's communication the respondent stated that it was withdrawing the main request, the first auxiliary request and its request for oral proceedings, on condition that the patent was maintained on the basis of the second auxiliary request.
- X. In further letters appellant 2 unconditionally withdrew its request for oral proceedings, and appellant 1 withdrew its request on condition that the main request

and the first auxiliary request were not allowed and the patent was maintained as amended according to the second auxiliary request.

XI. The oral proceedings were cancelled.

XII. Claims 1 and 2 of the second auxiliary request read:

"1. An antioxidant for use in inhibiting the deterioration of the mental capacity of an aged companion pet, wherein the antioxidant is in a companion pet diet, wherein the antioxidant is in a sufficient amount for inhibiting the deterioration of the mental capacity of the aged companion pet, wherein the antioxidant consists of Vitamin E, Vitamin C, alpha-lipoic acid, and l-carnitine, wherein the companion pet diet meets ordinary nutritional requirements of the aged pet, wherein the pet is a canine, and wherein the diet comprises at least about 100 ppm of Vitamin E, at least about 50 ppm of Vitamin C, at least about 25 ppm of alpha-lipoic and at least about 50 ppm of l-carnitine in the diet."

"2. An antioxidant present in a companion pet diet in a sufficient amount for use in increasing the mental capacity of an aged companion pet suffering from loss of mental capacity, wherein the antioxidant is in a companion pet diet, wherein the antioxidant is in a sufficient amount for increasing the mental capacity of the aged companion pet, wherein the antioxidant consists of Vitamin E, Vitamin C, alpha-lipoic acid, and l-carnitine, wherein the companion pet diet meets ordinary nutritional requirements of the aged pet, wherein the pet is a canine, and wherein the diet comprises at least about 100 ppm of Vitamin E, at least about 50 ppm of Vitamin C, at least about 25 ppm of

alpha-lipoic and at least about 50 ppm of l-carnitine in the diet".

XIII. The appellants' arguments relevant for the decision were as follows.

The second auxiliary request was inadmissible. It was filed late and violated the principle of no *reformatio in peius*.

The following features added originally undisclosed subject-matter: "An antioxidant for use in ...", "suffering from loss of mental capacity ..." and the use for "increasing the learning ability" in isolation from an improvement of memory.

The amendments did not comply with Rule 80 EPC either. The wording "An antioxidant for use in ..., wherein the antioxidant is in a companion pet diet, ..." in claims 1 and 2 extended the scope of protection.

The expressions "suffering from loss of mental capacity" and "sufficient amount of antioxidant" were unclear. It was also unclear whether the claims were drafted according to Article 54(5) EPC; this obscured the scope of the claimed subject-matter.

The claimed invention was insufficiently disclosed. The tests in the patent were unsuitable to show that the claimed agent increased mental capacity or prevented a deterioration of mental capacity. Furthermore, the effects observed in the tests could be induced by vitamin E, which was present in high amounts in the tested diets.

The claimed invention did not enjoy priority from the earlier applications from which priority was claimed because the earlier applications did not disclose the claimed invention, the applications were not the first for the invention and/or the applicant was not the successor in title for them.

The claims were not formulated under the provisions of Article 54(5) EPC and related to a composition per se, suitable for the uses mentioned in those claims.

The claimed subject-matter was not novel over D1, D3, D8, D22 and D37*.

According to appellant 2 the subject-matter of the auxiliary requests lacked inventive step over any of D3, D10, D16, D17, D22 and D23, which were considered to represent the closest prior art, in combination with other cited documents. In its letter dated 28 July 2020 appellant 1 argued that, starting from D1 or D3 as the closest prior art, the subject-matter of the second auxiliary request lacked an inventive step.

XIV. The respondent's arguments relevant for the present decision were as follows.

The second auxiliary request was a revised version of the second auxiliary request filed in the opposition proceedings and contained the amendments made to the main request, which addressed the objections raised during the oral proceedings before the opposition division. It was filed at the earliest possible stage of the appeal and was thus admissible. The amendments addressed grounds for opposition and complied with Rule 80 EPC.

Deterioration and loss of mental capacity were malfunctioning of the body; inhibiting them was a therapeutic use. The patent taught how to determine mental capacity, so this expression was clear. The objection that the introduction of the wording "suffering from loss of mental capacity" rendered the claims unclear was inadmissible because it was occasioned by an alleged lack of a definition for the term mental capacity, a term which was already used in the claim as granted.

The claims were clearly directed to a therapeutic treatment and drafted according to Article 54(5) EPC. The application as filed contained a basis for the amendments to the claims, e.g. on page 1, lines 21-23, page 2, lines 5-13, page 3, lines 3-6, the passage from page 3, line 9 to page 4, line 22, and example 1. The amendments to the claims did not extend the scope of protection either, in particular because it was clear from the patent as granted that the antioxidant agent was the active component of the composition. The invention was sufficiently disclosed. The tests shown in the patent, which were carried out on seven-year-old beagle dogs, made it entirely plausible that the claimed compositions induced the claimed effects. The appellants had not provided any evidence to the contrary. Furthermore, the claims of the second auxiliary request were limited to a combination of the ingredients used in the examples. The claimed subject-matter was entitled to a priority date of 28 November 2000 and was novel over the documents cited by the opponents, at least because the medical use defined in the claims was not disclosed. The claimed subject-matter also involved an inventive step over the cited documents, and in particular starting from D1 as closest prior art, whether alone or in combination with the other available documents.

XV. The parties' final requests were as follows.

The appellants requested that the decision under appeal be set aside and that the patent be revoked in its entirety.

The respondent requested that the patent be maintained on the basis of the second auxiliary request filed with

the reply to the grounds of appeal dated
31 August 2017.

Reasons for the Decision

The second auxiliary request

The second auxiliary request is the only request relevant for the present decision.

1. *Article 12(4) RPBA 2007, Rule 80 EPC, no reformatio in peius*
- 1.1 The second auxiliary request is a revised version of the second auxiliary request filed on 12 February 2016 during the proceedings before the opposition division. It contains essentially the same amendments made to the claims of the main request to address the objections raised during the oral proceedings before the opposition division. The filing of this request with the statement setting out the grounds of appeal, thus at the earliest stage of the appeal proceedings, is therefore justified and does not raise any new unexpected issues, so there is no reason to hold this request inadmissible pursuant to Article 12(4) RPBA 2007.
- 1.2 During the opposition proceedings the claims were directed to "An antioxidant for use in ..." and the requirement was added that specific antioxidant agents are present in certain amounts. The opposition division decided that these amendments were occasioned by grounds for opposition (e.g. lack of novelty and inventive step) and complied with Rule 80 EPC. Although the board has now concluded that the amendment to "An antioxidant for use in ..." ultimately does not cause a

change in technical teaching (see point 4), this amendment is considered to be occasioned by a ground for opposition, hence this amendment complies with Rule 80 EPC.

1.3 Furthermore, according to the claims found allowable by the opposition division, the antioxidant in the diet "is selected from the group consisting of Vitamin C, alpha-lipoic acid, l-carnitine or mixtures thereof". This wording requires the presence of these antioxidants but does not exclude the presence of further antioxidants like vitamin E. As the claims of the second auxiliary request require the presence of both the aforementioned antioxidants and vitamin E, the subject-matter claimed in the second auxiliary request is encompassed by claim 1 of the request held allowable by the opposition division and does not violate the principle of *reformatio in peius*.

2. *Claim construction*

2.1 The board agrees with the respondent that the claims are formulated in accordance with Article 54(5) EPC.

2.2 As decided by the board in T 81/84 (in particular Reasons 3), the concept of therapy should not be construed narrowly. The term "therapy" covers "any treatment which is designed to cure, alleviate, remove or lessen the symptoms of, or prevent or reduce the possibility of contracting any disorder or malfunction of the human or animal body" (see T 24/91, Reasons 2.7).

2.3 A "deterioration" and a "suffering from loss" of mental capacity imply a pathological decline in mental health. In a pet this may manifest itself in various ways,

including "disorientation, house soiling, altered sleep-wake patterns, etc." as stated in paragraph [0008] of the patent. Thus, a treatment preventing or reversing deterioration and loss of mental capacity is to be seen as a therapeutic treatment. Although ageing as such is not a disease, the treatment or prevention of symptoms which may, but do not necessarily, manifest themselves during the ageing process is a therapeutic intervention. Thus, the board does not accept the appellant's argument that the principles outlined in T 81/84 and T 24/91 do not apply to the case in hand.

2.4 The appellants have not provided any evidence for the assertion that the treatment's only effect is to give the pet proper nutrition, which prevents starvation and conditions associated with malnutrition. The argument that the expression "mental capacity" relates to a "vague concept" which does "not bear a real clinical meaning" and that the patient group is not "sharply defined" cannot be accepted either. The skilled person would be able to recognise when an ageing canine pet is suffering from a decrease in mental capacity and would consider that pet a subject to be treated within the meaning of claim 1.

3. *Clarity*

3.1 The appellants argued that it was unclear whether the claims related to a therapeutic use or to a composition that merely provides proper nutrition. As already decided above, the claims are clearly directed to a therapeutic use and are to be construed under Article 54(5) EPC. Thus, there is no lack of clarity in this respect.

3.2 The expression "suffering from loss of mental capacity" in claim 2 was considered unclear. As mentioned above, however, the skilled person would be able to recognise whether an ageing pet was suffering from this condition. It would also be irrelevant to determine whether that loss can be considered "normal", in so far as it can be reduced or prevented. Furthermore, the term "mental capacity" was present in the claims as granted. Introducing the term "suffering from a loss of" [that mental capacity] does not create a new clarity issue because the objection arises from an alleged lack of a definition for the term "mental capacity" rather than by the amendment itself (G 3/14).

3.3 The expression "sufficient amount of antioxidant" in the claims of the main request was also considered unclear. However, this expression was used in the claims as granted and minimum amounts of these agents are specified in the claims of the second auxiliary request (G 3/14).

3.4 Accordingly, as far as the claims may be examined for compliance with the requirements of Article 84 EPC, the board finds that the second auxiliary request complies with these requirements.

4. *Added subject-matter*

4.1 The expression "An antioxidant for use in inhibiting the deterioration of mental capacity ... wherein the antioxidant is in a companion pet diet ..." in claim 1 does not add subject-matter. Page 1, lines 21-25, page 2, lines 5-13 and page 3, lines 3-6 of the application as filed teach that the antioxidant in the diet inhibits the deterioration of mental capacity in the pet. Although the amendment may at first sight shift

the focus from the diet containing the antioxidant to the antioxidant contained in that diet, the skilled person understands that the difference in wording is not associated with any change to the technical teaching or subject-matter.

4.2 This also applies to claim 2, which refers to a "use for increasing the mental capacity of an aged companion pet suffering from loss of mental capacity". The passage from page 3, line 9 to page 4, line 13 as filed teaches that the increase in mental capacity is to be achieved in a pet "suffering from a loss of mental capacity". It also teaches that this loss occurs in ageing dogs but that the capacity can be increased by the antioxidants mentioned in the application. Since this is the general teaching of the application as filed, the use of the aforementioned expression in claim 2 in combination with the preferred antioxidant agents disclosed in the application as filed does not add subject-matter. The skilled reader would also recognise that according to both the application as filed and the amended claims, all the ingredients in the composition together provide "ordinary nutritional requirements".

4.3 Reading the sentence on page 4, lines 7 and 8 as filed "Problem-solving, as demonstrated by memory and learning ability can be improved" in the context of the invention and taking into account the learning tests of example 1, it is readily apparent that the invention is also aimed at increasing learning ability and that this increase is independent of a memory improvement. Thus, despite not mentioning memory improvement, claim 4 does not add subject-matter.

4.4 For these reasons, the claims of the second auxiliary request do not contain added subject-matter (Article 123(2) EPC).

5. *Extension of the scope of protection*

5.1 As discussed above (point 4), the amended wording in claims 1 and 2 does not result in any change to the technical teaching or the claimed subject-matter, nor does it change the scope of protection. From paragraph [0011] and the wording of the claims as granted ("... sufficient amount of antioxidant agent, for use in ...") the skilled person understands that the antioxidant agents present in the diet are those triggering the desired therapeutic effects, with the other ingredients serving as vehicles for the active agents and to satisfy nutritional requirements. This concept is found in the claims both as granted and as amended. Thus, the scope of protection has not been extended (Article 123(3) EPC).

6. *Sufficiency of disclosure*

6.1 The patent teaches that the deterioration of mental capacity in aged animals is characterised by a decrease in the ability to learn. It also teaches that this decrease and its reversal can be monitored by carrying out problem-solving and learning tests (see paragraphs [0008] and [0010] and examples 1 and 2). This is credible and there is no evidence to the contrary.

6.2 The tests described in the patent show that aged beagle dogs fed with a diet enriched with the four claimed antioxidants vitamin E, vitamin C, alpha-lipoic acid and l-carnitine scored better in learning and discrimination tests than aged beagle dogs fed with a

comparative diet including only vitamin C and vitamin E, in lower amounts (examples 1 and 2). The GSH:GSSG ratio, an indicator of antioxidant defence, was also improved (example 3).

- 6.3 These results make it credible that administering a combination of the four claimed antioxidants with the diet of ageing dogs induces the claimed therapeutic effects. Contrary to the appellants' arguments, there is no evidence that the invention cannot be carried out in specific dogs, or that the skilled person would not be able to adjust the dose of antioxidants to induce beneficial effects without causing side-effects. Furthermore, the claims according to the second auxiliary request define minimum doses, while paragraph [0012] of the patent specifies suitable doses above these minimum doses for carrying out the invention. The appellants argued that Table 2 on page 7 of the patent showed a negative effect on oxidative stress with respect to baseline food. However, the negative value at 0 ppm cannot be considered significant in view of the margin of error shown. The argument that the observed effects were induced by high amounts of vitamin E, which was not present in the diet claimed in the former main request, is no longer applicable since a substantial amount of vitamin E is present in the diet claimed in the second auxiliary request.
- 6.4 Taking into account the results mentioned above, the claimed invention is sufficiently disclosed (Article 83 EPC).

7. *Priority rights*

- 7.1 The patent claims priority from four earlier patent applications: US 244510 P "P1" , US 253447 P "P2", US 922632 "P3" and US 978127 "P4". The board considers that the claimed subject-matter enjoys a priority date of 28 November 2000 from P2. This earlier application contains the same claims and a description which is almost identical to that of the application for the patent. In particular, it contains the passages providing the basis for the amendments discussed above in relation to added subject-matter (point 4).
- 7.2 Relying on D43, which was filed on appeal with the letter dated 19 March 2018, i.e. after the time limit for filing the grounds of appeal, appellant 2 disputed that the patent proprietor was the successor in title for the earlier applications P1, P2 and P4. D43 includes a letter filed at the EPO in appeal proceedings relating to another case, along with extracts from the USPTO public PAIR system concerning the assignments regarding P1 to P4. As grounds for the late filing, appellant 2 argued that D43 had not been made available by the EPO until 5 February 2018.
- 7.3 However, in so far as it relates to P1, P2 and P4, the information in D43 was already available during the proceedings before the opposition division through the US file inspection system. The document which allegedly was not yet available relates to P3 and actually indicates that P3 was assigned to the proprietor before the filing date. Thus, there was no reason to raise new objections relating to P1, P2 and P4 on appeal. The same applies to appellant 2's new objection, raised in its letter of 19 March 2018, that P3 does not qualify as the first invention under Article 87 EPC. As

admitting these issues would have been detrimental to procedural economy, D43 and the aforementioned new objections are not admitted into the proceedings (Article 13(1) RPBA 2020).

7.4 Accordingly, it is concluded that the claimed subject-matter enjoys a priority date of 28 November 2000. As a consequence D3, published on 16 August 2001, is prior art under Article 54(3) EPC.

8. *Novelty*

8.1 D1, D8 and D22 do not disclose the claimed combination of vitamin E, vitamin C, alpha-lipoic acid and l-carnitine, and example 3 of D3 does not disclose the amounts of vitamin C and vitamin E mentioned in claims 1 and 2.

8.2 D37* and the corresponding priority documents D38 to D41 were filed for the first time by appellant 2 with its statement of grounds of appeal. Admission of these documents was requested on the ground that D37* "*prima facie*" prejudiced the novelty of the claimed invention. It was, however, undisputed that D37* could have been filed during the opposition proceedings. The attack based on D37* raises complex new issues, e.g. as to whether the relevant use is disclosed and whether the priority from the earlier applications D38* to D41* is validly claimed. As this attack raises complex issues, D37* cannot be considered *prima facie* relevant for the outcome of the proceedings. Thus, D37* and the earlier applications D38* to D41* are not to be admitted (Article 12(4) RPBA 2007 and Article 25(2) RPBA 2020).

8.3 Accordingly, the subject-matter claimed in the second auxiliary request is novel over the cited prior art.

9. *Inventive step*

Admission of appellant 1's submissions

9.1 In its letter dated 13 December 2017, addressing the respondent's reply to the appellants' statements of appeal, appellant 1 provided arguments as to why the subject-matter of the main request did not involve an inventive step. However, as far as inventive step is concerned, appellant 1 did not even mention the auxiliary requests enclosed with the respondent's reply, as noted by the board in its communication issued in preparation for the oral proceedings. It was only after receiving this communication that appellant 1 formulated two attacks against the second auxiliary request, in its submissions dated 28 July 2020. Only then did it identify the features characterising the claims. It discussed whether the presence of all four claimed antioxidants in the specified amounts was associated with an effect and whether this effect could be generalised and render the claimed invention inventive over D1, which was considered the closest prior art either alone or in combination with other available documents. It also raised a second objection starting from D3 as the closest prior art.

9.2 These submissions involve an amendment to appellant 1's case. According to Article 13(2) RPBA 2020 any amendment to a party's appeal case made after notification of a summons to oral proceedings will, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned. Appellant 1 has not mentioned any such exceptional circumstance or

given a cogent reason for amending the case at this very late stage of the proceedings. For these reasons, appellant 1's inventive-step attacks against the subject-matter of the second auxiliary request are not admitted into the appeal proceedings.

The closest prior art

- 9.3 The claimed invention relates to a method for increasing the mental capacity and/or inhibiting the deterioration of mental capacity of an ageing canine pet. The method involves the administration, with the pet diet, of antioxidant agents capable of quenching free radicals (paragraphs [0003]-[0005] and [0011] of the patent).
- 9.4 D1 discloses a diet for reducing oxidative stress caused by free radicals, in particular, ageing and neurodegenerative disorders in domestic dogs (page 1, lines 1-16 and page 2, lines 24-25). The diet includes antioxidants, and preferably vitamin C and vitamin E (see claims and examples).
- 9.5 The board concurs with the opposition division that D1 is the closest prior art. The document selected as the closest prior art should indeed be one focusing on the treatment of ageing canine pets affected by the same or a related condition associated with free-radical and oxidative damage, through the administration of antioxidant agents with the diet. None of the documents proposed by appellant 2 for its inventive-step attacks (D3, D10, D11, D16, D17, D22 and D23) represents the closest prior art because:
- D3 is prior art under Article 54(3) EPC and thus not relevant for assessing inventive step

- D10 and D17 do not mention aged dogs and, as far as the diseases are concerned, their teaching does not go beyond that of D1
- D11 only mentions rats and the administration of the antioxidants by intraperitoneal injection or in water, not in a diet
- D16 relates to cognitive impairment of humans, not dogs, and to the use of a number of different ingredients, making it impossible to assess whether the relevant antioxidants are beneficial
- D22 discloses the administration of l-carnitine to a dog affected by anxiety, tremor and psychosis but does not focus on the treatment of oxidative stress and damage induced by free radicals. Furthermore, the l-carnitine was not administered in a diet
- D23 discloses plant derivatives, optionally combined with antioxidants for treating Alzheimer's, amyloidosis and cognitive functions, but focuses on humans. Passing reference is made to animals, including dogs, but these are not necessarily aged and no mention is made of a diet for dogs.

The difference and the technical effect

- 9.6 The diet in D1 includes combinations of vitamins C and E (paragraph bridging pages 6 and 7) and is used for preventing or treating conditions such as ageing and neurodegenerative diseases (page 13, lines 7-14). D1 does not mention alpha-lipoic acid or l-carnitine, let alone in the claimed amounts. It does not mention increasing the mental capacity and/or inhibiting the decrease in mental capacity of aged dogs either. It is noted that neurodegenerative disorders may, but do not necessarily, involve a decrease in mental capacity. The

amounts of vitamins C and E in the diet are indicated in terms of IU/Kcal, not in weight amounts.

9.7 As already discussed above in relation to sufficiency of disclosure (point 6), the results shown in the patent render it credible that the administration of the claimed antioxidants in a diet induces the claimed therapeutic effects. Furthermore, example 1 shows that the effect of administering the combination of the four relevant antioxidants is stronger than when only vitamins C and E are administered, in lower amounts, with the comparative diet.

9.8 It was argued that high amounts of antioxidants may promote oxidative damage rather than benefits. This argument is not persuasive. All medicaments induce side-effects above a certain dosage. This is well known to the skilled person who, for this reason, avoids exceeding that dosage. The description and the claims do not point at exceeding safe dosages either. This argument is a mere attempt to tear down the invention by focusing deliberately on embodiments devoid of technical sense. As such, it is unconvincing.

The underlying technical problem

9.9 Starting from D1, and taking into account the technical effect discussed above, the technical problem can be considered the provision of a further composition for preventing or improving a condition associated with free-radical and oxidative damage in an aged companion canine pet.

Non-obviousness of the claimed solution

- 9.10 The appellants have not explained why, starting from D1, the skilled person would have selected the amounts of vitamins C and E specified in claim 1 and added l-carnitine and alpha-lipoic acid in the claimed amounts for a dog diet, let alone in order to obtain the relevant effects in aged dogs. The board does not see any pointer to the claimed solution in D1 or the other cited documents either.
- 9.11 Notwithstanding the admissibility of appellant 1's submissions dated 28 July 2020 (see 9.1 above), the appellants did not provide a convincing argument that the prior art hints at selecting the claimed amounts of antioxidant agents. Appellant 1 merely stated that a skilled person would "expect that higher amounts of individual antioxidants may lead to improved effects ...". However, it did not provide a shred of evidence as to the amounts (in weight) of the relevant antioxidant agents used according to the prior art to induce beneficial effects in canine pets. In the absence of any information as to whether that amount is even close to the one claimed, appellant 1's statement is not convincing.
- 9.12 Therefore, it is concluded that the claimed subject-matter involves an inventive step (Article 56 EPC).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent as amended according to the claims of the second auxiliary request filed with the reply to the grounds of appeal dated 31 August 2017, and a description to be adapted accordingly.

The Registrar:

The Chairman:



A. Nielsen-Hannerup

A. Haderlein

Decision electronically authenticated