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**Datasheet for the decision
of 5 March 2021**

Case Number: T 1399/17 - 3.3.09

Application Number: 11715092.0

Publication Number: 2538794

IPC: A23D7/00, A23D9/00, A23L33/00,
A23L33/10, A23K20/158,
A23L33/12, A61K31/20, A61K45/06

Language of the proceedings: EN

Title of invention:
BALANCED MYRISTATE- AND LAURATE-CONTAINING EDIBLE OIL

Patent Proprietor:
Brandeis University

Opponents:
UNILEVER N.V. / UNILEVER PLC
N.V. Nutricia

Headword:
Balanced myristate- and laurate-containing edible oils/
BRANDEIS

Relevant legal provisions:
EPC Art. 84, 108 sentence 1
EPC R. 101(2)

Keyword:

Oral proceedings - withdrawal of request for oral proceedings
Admissibility of appeal - notice of appeal - form and content
Adaptation of the description

Decisions cited:

G 0001/99



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Case Number: T 1399/17 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 5 March 2021

Appellant:
(Opponent 1)

UNILEVER N.V.
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3013 AL Rotterdam (NL)

UNILEVER PLC
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Appellant:
(Opponent 2)

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Eerste Stationsstraat 186
2712 HM Zoetermeer (NL)

Representative:

Nederlandsch Octrooibureau
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Respondent:
(Patent Proprietor)

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Waltham, MA 02454-9110 (US)

Representative:

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
19 April 2017 concerning maintenance of the
European Patent No. 2538794 in amended form.**

Composition of the Board:

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

Summary of Facts and Submissions

I. This decision concerns the appeals filed by opponents 1 and 2 (appellants 1 and 2) against the interlocutory decision of the opposition division that European patent No. 2 538 794 as amended met the requirements of the EPC.

II. In the decision under appeal, the opposition division decided that claim 1 of the first auxiliary request, filed during the oral proceedings on 30 November 2016, was allowable and that the description as amended complied with the requirement of Article 84 EPC. Claim 1 of this request (main request on appeal) reads:

"A triglyceride-based dietary fat for use in a method for limiting the level of at least one of triglycerides (TG), total cholesterol (TC) and LDL cholesterol in the plasma of a human or livestock animal, whose fatty acid composition comprises

10 to 35% by weight linoleic acid;

at least 10% by weight monounsaturated fatty acids;
and

15 to 55% by weight saturated fatty acids,
wherein 10 to 45% by weight of said fatty acid composition is myristic acid (14:0) plus lauric acid (12:0) in which at least 3% of said fatty acid composition is myristic acid and at least 3% is lauric acid,
wherein said dietary fat is a blend of natural fats,
and
wherein the total weight percent of fatty acids in said fatty acid composition is 100%."

III. On appeal, appellant 2 filed the following document:

D11-N: H. T. Osborn et al., "Structured lipids - novel fats with medical, nutraceutical, and food applications", Comprehensive reviews in food science and food safety, 3, 2002, 110-120

IV. In its reply to the appellants' respective statement setting out the grounds of appeal, the respondent filed an auxiliary request. Claim 1 of this request is based on claim 1 of the main request (see point II), but the feature "wherein said dietary fat is a blend of natural fats" has been deleted.

V. The board issued a communication under Article 15(1) RPBA in which it informed the parties of its preliminary opinion and the reasoning for it. It concluded that it appeared that the decision under appeal had to be set aside and the patent revoked.

VI. In reply to the board's communication, the respondent did not provide any comment on these issues and withdrew its request for oral proceedings "should the Board maintain its preliminary opinion set out therein". After this, the appellants also withdrew their respective request for oral proceedings if the board maintained its preliminary opinion.

VII. The oral proceedings were cancelled.

VIII. Final requests

Appellant 1 requests

that the decision under appeal be set aside and that the specification of the patent be adapted or that the patent be revoked.

Appellant 2 requests

that the decision under appeal be set aside and that the patent be revoked.

The respondent requests

that opponent 1's appeal be rejected as inadmissible, that the appeal be dismissed or that the patent be maintained on the basis of the auxiliary request filed with the reply to the grounds of appeal.

- IX. The parties' arguments are evident from the Reasons for the Decision below and need not be summarised here.

Reasons for the Decision

1. *Admissibility of the appeal of appellant 1*

1.1 By letter dated 15 June 2017, an appeal on behalf of opponent 1 was filed in the name of Unilever N.V. The opposition had been filed in the name of joint opponents Unilever N.V. and Unilever PLC. By communication dated 27 June 2017, the registrar of the board notified opponent 1 that the name of the appellant did not match the information in the register. By letter dated 8 August 2017, within the time limit set in the communication, opponent 1 requested a correction of the name and address of the appellant.

1.2 According to Rule 101(2) EPC, the appellant may correct in due time the name and the address of the appellant. Appellant 1 made use of its right. The board has no

doubt that, when filing the appeal, the appellant's true intention had been to do so in the name of the joint opponents who filed the opposition.

- 1.3 The respondent objected that the corrected name and address was "indicated as an unclear patchwork" and thus it was unclear who the appellant was.

It appears that the respondent refers here to the fact that the joint opponents and their respective address are separated by slashes rather than by reciting consecutively the name and full address of the first joint opponent and then the name and full address of the second joint opponent.

However, this does not appear to render unclear in whose name the appeal was filed. The board also notes that the opposition division identified the joint opponents in the same way (decision under appeal, page 1).

- 1.4 Thus, the appeal of appellant 1 is admissible (Article 108 EPC, first sentence and Rule 101(2) EPC).

2. *Main request - adaptation of the description*

- 2.1 Claim 1 includes the feature, added from a dependent claim as granted, that the "dietary fat is a blend of natural fats". The parties disagreed as to whether the patent specification had been correctly adapted to reflect the added mandatory feature of claim 1. The respondent argued that it considered the adaptation of the description appropriate. The term "natural fat" neither excluded modified triglyceride molecules nor was relevant for the patentability of the claims.

2.2 This is not convincing. Article 84 EPC requires that the claims be supported by the description. This also applies to claims which have been amended in opposition (Article 101(3)(a) EPC). A mandatory feature of claim 1 is that the dietary fat be a blend of natural fats. However, the specification of the patent as amended in the oral proceedings does not reflect this. Therefore, it casts doubts on the scope of the claim. The following non-exhaustive examples are given:

- According to paragraph [0014], last sentence, it is not a mandatory feature but only a desirable one: "Desirably the balance of fatty acids is achieved using a blend of natural fats...".
- In paragraph [0040], it is still stated that "[p]referably" the dietary fat composition is a blend of natural fats. The entire paragraph and in particular the second sentence, in which it is discussed that the dietary fat composition "is... a structurally modified triglyceride-based dietary fat composition", does not support claim 1.
- In paragraph [0125], it is stated that interesterified fats "may still be used in the present invention". It would be straightforward for the skilled person that interesterified fats are not natural fats. This is confirmed in paragraph [0191] of the patent in suit ("The terms 'natural fat' and 'natural oil' ... does not contain a significant level of triglyceride molecules which have been artificially structurally modified (e.g., by chemical or enzymatic interesterification)...") and also in D11-N (e.g. page 110, left column, third paragraph).
- The section of the patent in suit entitled "Examples" and beginning before paragraph [0208]

suggests that interesterified fats are part of the invention.

2.3 On the basis of this alone, it is manifest that the description of the patent does not comply with the requirement of Article 84 EPC. Consequently, the main request is not allowable.

3. *Auxiliary request*

3.1 Claim 1 of the auxiliary request no longer requires that the dietary fat be a blend of natural fats. Thus, claim 1 is broader in scope than claim 1 of the main request.

3.2 Furthermore, appellant 2 is correct that the auxiliary request places the appealing opponents in a worse position than if they had not appealed. Therefore, this request contravenes the prohibition of *reformatio in peius*. According to G 1/99 (OJ EPO 2001, 381, Headnote) an exception to this principle may be made under specific circumstances. The respondent has not argued that such circumstances apply, nor are such circumstances manifest to the board.

3.3 Therefore, the auxiliary request is not admissible.

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