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**Datasheet for the decision
of 21 February 2022**

Case Number: T 0481/19 - 3.3.01

Application Number: 11815718.9

Publication Number: 2648528

IPC: A21D13/00, A21D13/08, A23C9/13

Language of the proceedings: EN

Title of invention:
COMPOSITION AND METHOD FOR IMPROVING STABILITY AND EXTENDING
SHELF LIFE OF PROBIOTIC BACTERIA AND FOOD PRODUCTS THEREOF

Patent Proprietor:
Degama Berrier Ltd.

Opponent:
Joachim Stürken Patentanwaltsgesellschaft mbH

Headword:
Multilayer probiotic particles/DEGAMA

Relevant legal provisions:
EPC Art. 84

Keyword:
Claims - clarity (no)

Decisions cited:

G 0003/14, T 0003/90



Beschwerdekammern

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Case Number: T 0481/19 - 3.3.01

D E C I S I O N
of Technical Board of Appeal 3.3.01
of 21 February 2022

Appellant: Joachim Stürken Patentanwaltsgesellschaft mbH
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Decision under appeal: **Interlocutory decision of the Opposition**
Division of the European Patent Office posted on
6 December 2018 concerning maintenance of the
European Patent No. 2648528 in amended form

Composition of the Board:

Chairman A. Lindner
Members: J. Molina de Alba
P. de Heij

Summary of Facts and Submissions

I. The opponent (appellant) filed an appeal against the opposition division's interlocutory decision that European patent No. 2 648 528 in the version of the main request pending before it, and the invention to which it relates, met the requirements of the EPC.

Claim 1 of the request held allowable by the opposition division reads as follows.

"1. A composition comprising probiotic bacteria, the composition comprising:

(a) a core composition containing the probiotic bacteria and a stabilizer, wherein the total amount of probiotics in the mixture is from about 10% to about 90% by weight of the core composition;

(b) an innermost coating layer, layered on said core composition, comprising at least one hydrophobic solid fat or fatty acid having a melting point lower than 50 °C, or a combination thereof;

(c) an intermediate coating layer layered on said innermost coating layer, which when present in an aqueous solution in the amount of 0.1% weight/weight over the weight of the solution, has a surface tension lower than 60 mN/m, when measured at 25°C; and

(d) an outer coating layer, layered on said intermediate coating layer comprising low molecular weight carboxy methyl cellulose including 7LF or 7L2P;

wherein the composition is in the form of particles."

II. The following document is cited in this decision.

D21 Aqualon[®] Sodium Carboxymethylcellulose,
Hercules Inc., 1999

III. The patent had been opposed on the grounds of Article 100(a), for lack of novelty and inventive step, and 100(b) EPC.

In the decision under appeal, the opposition division concluded, among other things, that the phrase "comprising low molecular weight carboxy methyl cellulose including 7LF or 7L2P", which had been taken from the description and incorporated into claim 1 during the opposition proceedings, was clear.

IV. The appellant filed a statement of grounds of appeal. The patent proprietor (respondent) replied to it.

V. The board scheduled oral proceedings in line with the parties' requests. In preparation for the oral proceedings, the board issued a preliminary opinion calling into question (point 9.3), among other things, the clarity of the terms 7LF and 7L2P.

VI. With a letter dated 3 February 2022, the respondent informed the board that it would not be attending the oral proceedings and that it relied on its written submissions.

VII. Subsequently, the appellant requested that the oral proceedings be cancelled and the patent be revoked.

VIII. The board cancelled the oral proceedings and continued the procedure in writing.

IX. The appellant's arguments relevant to the present decision can be summarised as follows.

The terms 7LF and 7L2P rendered claim 1 unclear. D21 did not prove that these terms were generally recognised in the art on the priority date.

X. The respondent's arguments relevant to the present decision can be summarised as follows.

Claim 1 was clear. 7LF and 7L2P were abbreviations generally known for carboxy methyl cellulose products. Their meaning was explained in D21.

XI. The parties' requests relevant to the present decision are the following.

- The appellant requested that the opposition division's decision be set aside and that the patent be revoked.
- The respondent requested that the appeal be dismissed, implying that the patent be maintained in the version held allowable by the opposition division (main and sole request).

Reasons for the Decision

1. The appeal is admissible. It meets the requirements of Articles 106 to 108 and Rule 99(2) EPC.
2. In the reply to the statement of grounds of appeal (point 1), the respondent requested oral proceedings as

an auxiliary measure. After having received a negative preliminary opinion from the board, the respondent announced that it would not be attending the scheduled oral proceedings and requested that a decision be taken on the basis of its written submissions. This request is equivalent to a withdrawal of the conditional request for oral proceedings (see T 3/90, Reasons 1).

Having regard to the parties' submissions in the written proceedings and the preliminary opinion dated 5 November 2020, the board is in a position to take a final decision without holding oral proceedings (Articles 113(1) and 116(1) EPC).

3. *Clarity (Article 84 EPC)*

3.1 Claim 1 of the main and sole request is directed to a composition comprising probiotic bacteria which contains elements (a), (b), (c) and (d). In claim 1 as granted, element (d) was defined as "an outer coating layer, layered on said intermediate coating layer". During the opposition proceedings, this element was further limited by the phrase taken from the description "comprising low molecular weight carboxy methyl cellulose including 7LF or 7L2P".

Thus, in accordance with the decision of the Enlarged Board of Appeal G 3/14 (Order), the clarity of that phrase in claim 1 in hand is to be assessed by the board.

3.2 The appellant raised several objections in relation to the clarity of the phrase (statement of grounds of appeal, section III, points 2 to 5). In this decision, the board will focus on one of them, namely whether the

terms 7LF and 7L2P had a generally recognised meaning in the art on the priority date.

The respondent argued (reply to the statement of grounds of appeal, page 8) that 7LF and 7L2P were abbreviations generally known in the field of carboxy methyl cellulose products. This was allegedly shown by D21, which explained their meanings in the tables listing different grades and degrees of substitution of carboxymethyl cellulose products (page 6) together with the product codings (page 7).

- 3.3 D21 is a booklet from the company Hercules Inc. describing the properties of its palette of carboxy methyl cellulose products Aqualon[®] CMC. On pages 5 to 7, D21 explains how these products are coded based on their viscosity (L, M, H), grade (F, P, PH) and degree of substitution (7, 9, 12). However, nothing in D21 suggests that this coding system was generally recognised in the art. To the contrary, D21 looks like a guide for customers which explains the system conceived by Hercules Inc. for naming its Aqualon[®] CMC products, e.g. Aqualon[®] CMC 7LF and Aqualon[®] CMC 7L2P. This view was outlined by the board in its preliminary opinion (point 9.3). Nevertheless, the respondent neither reacted in writing nor took the opportunity to reply at oral proceedings.

Therefore, the board confirms its view that the respondent has not proved that, on the priority date, the terms 7LF and 7L2P were generally recognised in the art. Consequently, the terms render claim 1 unclear.

- 3.4 It follows that claim 1 does not meet the requirements of Article 84 EPC.

Order

For these reasons it is decided that:

The decision under appeal is set aside. The patent is revoked.

The Registrar:

The Chairman:



M. Schalow

A. Lindner

Decision electronically authenticated