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**Datasheet for the decision
of 4 May 2023**

Case Number: T 2351/19 - 3.3.09

Application Number: 12891430.6

Publication Number: 2934173

IPC: A23K40/00, A23K10/26,
A23K20/174, A23K20/147,
A23K20/158, A23K50/48,
A23K20/163

Language of the proceedings: EN

Title of invention:
ANIMAL FOOD COMPOSITION AND PROCESS FOR PRODUCTION

Patent Proprietor:
Hill's Pet Nutrition, Inc.

Opponent:
Mars, Incorporated

Headword:
Animal food/HILL'S PET NUTRITION

Relevant legal provisions:
EPC Art. 100(b), 100(c), 100(a), 54, 56
RPBA Art. 12(4)
RPBA 2020 Art. 13(2)

Keyword:

Grounds for opposition - added subject-matter (no)

Novelty - (yes)

Inventive step - (yes)

Decisions cited:

G 0007/93, T 2603/18



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Case Number: T 2351/19 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 4 May 2023

Appellant: Mars, Incorporated
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 26 June 2019
rejecting the opposition filed against European
patent No. 2934173 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman A. Haderlein
Members: F. Rinaldi
N. Obrovski

Summary of Facts and Submissions

- I. This decision concerns the opponent's appeal against the opposition division's decision to reject the opposition.
- II. In its notice of opposition, the opponent requested the revocation of the patent under Article 100(a) (lack of novelty and inventive step), 100(b) and 100(c) EPC.
- III. The documents cited during the opposition proceedings included:
- D1: US 6,455,083 B1
 - D2: N.N., "Corn Starch", 11th edn., Washington: Corn Refiner's Association, 2006
 - D3: US 7,678,406 B2
 - D4: US 4,251,556
 - D5: EP 0 154 039 A1
 - D10: US 4,044,158
 - D13: Product information: AmyloGel 03001I (Cargill)
 - D18: Declaration by Ms Garzino (filed by letter dated 12 April 2019)
 - D19: N. J. Cave, "*Hydrolyzed protein diets for dogs and cats*", Veterinary Clinics Small Animal Practice, 2006, 1251-1268
 - D20: Technidog blog: "*Hill's Z/D : croquette contre les allergies alimentaires du chien*", <https://www.technidog.com/actualites/hills-zd-chien.html>
 - D21: Product information accessible via hyperlink in D20

D23: R. Kumar et al., "Enzymatically modified soy protein", Journal of Thermal Analysis and Calorimetry, 75, 2004, 727-738

D24: Declaration by Gary Semjenow dated 23 May 2019

IV. Claims 1 and 8 of the patent as granted (main request) read as follows:

"1. An animal food composition comprising a protein source and corn starch, wherein native high-amylose corn starch comprises at least 50% by weight of the corn starch, wherein the composition comprises corn starch in an amount of from 40 to 70 wt% based on the total weight of the composition on a dry matter basis, wherein the protein source is hydrolysed protein, and wherein the native high-amylose corn starch has an amylose content of from 50 wt% to 70 wt% on a dry matter basis."

"8. A process for the preparation of an animal food composition, the process comprising (i) mixing a protein source, corn starch and water to form a mixture and (ii) heating the mixture; wherein native high-amylose corn starch comprises at least 50% by weight of the corn starch, and wherein the composition comprises corn starch in an amount of from 40 to 70 wt% based on the total weight of the composition on a dry matter basis, wherein the protein source is hydrolysed protein, and wherein the native high-amylose corn starch has an amylose content of from 50 wt% to 70 wt% on a dry matter basis."

V. With its statement setting out the grounds of appeal, the appellant filed the following document:

D26: Second technical note by Ms Garzino (not dated)

VI. With the reply to the statement setting out the grounds of appeal, the patent proprietor (respondent) filed the following document:

D27: Declaration by Nicholas Rozzi, dated
3 March 2020

VII. The appellant's arguments, where relevant to the present decision, can be summarised as follows:

- Claims 1 and 8 contained added subject-matter.
- The invention was not sufficiently disclosed.
- Claims 1 and 8 lacked novelty over the product Hill's z/d Ultra Allergen Free and the implicit disclosures of D1 and D3.
- For the assessment of inventive step, D3, D4, D10 and Hill's z/d Ultra Allergen Free constituted the closest prior art. Considering the experimental results in D18 and D26, the technical problem was to modify the viscosity of the animal food composition. The solution would have been obvious to the skilled person in view of D2 or D5, for example.

VIII. The respondent's arguments, where relevant to the present decision, can be summarised as follows:

- None of the objections under Articles 123(2), 83, 54 and 56 EPC prejudiced the maintenance of the patent as granted.
- Documents D18 to D21, D23 and D26 should not be taken into consideration on appeal.

IX. Final requests

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

The respondent requested that the appeal be dismissed (main request) or, as an auxiliary measure, that the case be remitted to the opposition division for further prosecution on the basis of one of auxiliary requests 1 to 4 filed by letter dated 7 September 2018 or auxiliary requests 5 and 6 filed by letter dated 12 April 2019.

Reasons for the Decision

1. *Patent*

1.1 The patent relates to animal food compositions. The process for producing the compositions involves mixing the ingredients and heating (i.e. cooking) them. The heating step gives rise to changes in the viscosity of the composition that may be difficult to control and lead to product variability. When the ingredients comprise a protein source such as poultry liver hydrolysate and a conventional starch, highly viscous material may be produced during the heating step (paragraphs [0001], [0002] and [0014]).

1.2 The patent further sets out that when at least 50% by weight of the corn starch is replaced by native high-amylose corn starch, the sensitivity of the product to

elevated temperatures is reduced or eliminated (paragraph [0015]).

2. *Use of documents on appeal*

2.1 It was contentious whether documents D18 to D21, D23 and D26 were to be taken into consideration on appeal.

2.2 Documents D18 to D21

2.2.1 The respondent argued that the opposition division admitted documents D18 to D21 into the proceedings without properly exercising its discretion. It explained that the opponent had filed D18 late in the opposition proceedings, and that the document had been admitted but had then been found to support inventive step. Such a document could not be *prima facie* relevant.

2.2.2 The departments of first instance have a certain degree of freedom when exercising their discretion. The Boards of Appeal usually only overrule the way in which a department of first instance exercised its discretion if that department did not do so in accordance with the right principles or in an unreasonable way (cf. G 7/93, Reasons 2.6).

2.2.3 Moreover, reviewing the decision under appeal in a judicial manner according to Article 12(2) RPBA 2020 requires that documents which were admitted by a department of first instance and which form part of the evidence on which the decision under appeal is based are taken into account in the appeal proceedings as well (see T 2603/18, Reasons 1.1.1).

- 2.2.4 In any case, the *prima facie* relevance of D18 is, in the board's view, immediately apparent. This document has the potential to clarify the technical problem that is solved. The respondent's argument that the opposition division's substantive conclusion on inventive step means that the *prima facie* relevance of this document would not have been acknowledged is based on the understanding that a *prima facie* and an in-depth assessment of a document must necessarily lead to the same conclusion. This is not the case. What might look promising at first sight may not in fact be tenable after substantive in-depth scrutiny.
- 2.2.5 It also follows from the minutes of the oral proceedings (see points 5.1 to 5.3, for example) that D18 was discussed and that the patent proprietor had the opportunity to comment on this document (see the decision under appeal, page 10, and the respondent's reply, page 3). In sum, the opposition division considered D18 to be (*prima facie*) relevant and no apparent error in the opposition division's exercise of discretion can be identified.
- 2.2.6 Similar considerations apply to D19 to D21, which may *prima facie* be considered documents potentially demonstrating a lack of novelty. The patent proprietor was heard on these documents (see the decision under appeal, page 8, and the respondent's reply, page 4). No apparent error in the opposition division's exercise of discretion can be identified.
- 2.2.7 It follows from this that documents D18 to D21 are admitted into the appeal proceedings and can be taken into consideration in these proceedings.

2.3 Document D23 and the objections based thereon

2.3.1 The opposition division also admitted document D23 into the proceedings. D23 was not mentioned in the statement setting out the grounds of appeal. It was not until the oral proceedings before the board that the appellant explained why it considered D23 relevant. In its view, D23 demonstrated that the protein used in D1 had to be regarded, implicitly, as hydrolysed protein.

2.3.2 The appellant's submission represents an amendment of its case. The amendment was made only after the notification of the summons to oral proceedings. The board is not aware of any exceptional circumstances, let alone cogent reasons, that would speak in favour of allowing this amendment (Article 13(2) RPBA 2020). Therefore, D23 and the objections based thereon are disregarded.

2.3.3 In view of this, it is not necessary to address the respondent's request that D23 not be considered under Article 12(4) RPBA 2007.

2.4 Admittance of document D26

2.4.1 The respondent requested that D26, filed with the statement setting out the grounds of appeal, not be admitted on appeal. In its view, this document could and should have been filed at the same time as D18. There was no justification for filing experimental evidence late in the opposition proceedings (as the opponent did with D18), let alone for supplementing this evidence on appeal (by filing D26).

2.4.2 D26 concerns experimental data prepared by a technical expert of the appellant. The experiments investigate the viscosity over time upon heating of compositions comprising a protein hydrolysate (chicken liver or soy or pork collagen) and corn starch. In the experiments, the corn starch used is either conventional corn starch or blends of conventional corn starch and high-amylose starch in varying ratios. One of the blends investigated corresponds to the feature stipulated in claim 1, namely that the high-amylose corn starch comprises at least 50% by weight of the corn starch.

2.4.3 The appellant explained that D26 was filed in reaction to the opposition division's view (as set out in the decision under appeal, page 12) that

- pork collagen and soybean proteins concerned the borders of the scope of the claims (i.e. the outer limits of the scope of claim 1)
- the technical problem was "at least partially solved even at the border of the invention"

2.4.4 It is manifest that D26 was filed to experimentally support the appellant's argument that there is no inventive step over the entire scope of claim 1, in particular where the hydrolysed protein is not chicken liver.

2.4.5 No reason to exclude D26 from the proceedings under Article 12(4) RPBA 2007 can be identified. Therefore, this document is admitted into the proceedings.

2.5 In conclusion, D18 to D21 and D26 can be taken into consideration on appeal. However, the objections based on D23 are disregarded.

3. *Ground for opposition under Article 100(c) EPC*

3.1 The opposition division decided that claims 1 and 8 of the patent as granted did not contain added subject-matter.

3.2 The appellant contested this decision and argued as follows:

- The amendments involved features that had been added to product claim 1 and process claim 24 of the application as filed. However, in the description of the application as filed the added features were disclosed in the context of the product, not in the context of the process.
- The amendment according to which the high-amylose corn starch has an amylose content of 50 wt% to 70 wt% on a dry matter basis constituted added subject-matter. From the application as filed, paragraph [0006], the skilled person would derive diverging definitions of what high-amylose starch is.
- The application as filed focused on poultry liver hydrolysate. The amendment according to which the protein source was "hydrolysed protein" was an unallowable intermediate generalisation. Moreover, there was no basis for omitting the restriction that the protein source was free of amino acids.
- The amendments constituted an unallowable combination of features.

3.3 Were the added features disclosed only in the context of the product?

3.3.1 The disclosure in the application as filed does not distinguish between features that exclusively concern

the product and features that exclusively concern the process. What the skilled person would infer from this is that definitions and restrictions in the application as filed apply to both the product and the process disclosed.

3.3.2 The appellant made generic allegations that features of the application as filed disclosed in the context of a specific claim category led to the presence of added subject-matter when combined with subject-matter relating to a different claim category. However, the appellant did not explain in a conclusive way in what, precisely, the added subject-matter consisted in the claims under scrutiny.

3.3.3 Therefore, this objection has failed to convince the board.

3.4 The amylose content of high-amylose corn starch

3.4.1 High-amylose corn starch is discussed in paragraph [0006] of the application as filed, as the appellant agrees.

3.4.2 The first sentence of this paragraph sets out that amylose and amylopectin are the constituents of starch. In the rest of the paragraph, corn starch is discussed. First, it is explained that conventional corn starch has an amylose content of 25% by weight, and amylopectin makes up the balance of the weight. Then, the following is disclosed:

"High-amylose corn starch typically has an amylose content of from about 50 to about 70 wt% based on the total weight of the composition on a dry matter basis. The corresponding amylopectin content is from about 30

to about 50 wt% based on the total weight of the composition on a dry matter basis."

- 3.4.3 The skilled person reading the cited passage would directly and unambiguously understand that the invention's high-amylose corn starch has an amylose content of (about) 50 wt% to (about) 70 wt%. Amylopectin makes up the balance of the weight of the high-amylose corn starch. There is no other definition for the term "high-amylose corn starch".
- 3.4.4 In the context of this range, the skilled person would also understand that "based on the total weight of the composition on a dry matter basis" in this paragraph does not refer to the food composition. Instead, this can only refer to the composition of the high-amylose corn starch and the content of its two constituents: amylose and amylopectin.
- 3.4.5 Contrary to the appellant's view, deleting the term "about" does not add subject-matter. The skilled person would know that "about 50%" denotes both the precise value 50% and an unspecified deviation from that precise value. The same applies to the term "about 70%".
- 3.4.6 Therefore, the amendments which define and restrict the amylose content do not add subject-matter.
- 3.5 The protein source
- 3.5.1 The last two sentences of paragraph [0009] directly and unambiguously disclose to the skilled person that the protein source may either comprise intact protein or protein that has been hydrolysed. The wide range going from "partially hydrolysed protein" to "completely or

almost completely hydrolysed protein" convey to them that any range of hydrolysed protein can be used.

3.5.2 Thus, the amendment that the protein is hydrolysed is directly and unambiguously disclosed.

3.5.3 Contrary to the appellant's interpretation, the last sentence of paragraph [0009] does not provide the additional, mandatory definition that the protein source (i.e. the hydrolysed protein) does not include amino acids. Upon careful reading, this passage discloses that the protein source does not include supplementary amino acids.

3.5.4 This sentence says nothing about the degree of hydrolysis of the protein hydrolysate or its composition. In particular, there is no disclosure that the protein hydrolysate itself may not include amino acids. The sentence simply implies that if the food composition is supplemented with amino acids, then the amino acids do not count towards the protein source.

3.5.5 Therefore, the amendment relating to the protein source does not add subject-matter.

3.6 Combination of features

3.6.1 The appellant argued that the combination of features in claims 1 and 8 constituted added subject-matter. This related to the selection of the protein source on the one hand, and the amount and type of high-amylose corn starch on the other.

3.6.2 However, the skilled person would directly and unambiguously understand from the application as filed that the amount of amylose is simply the most generic

amount of amylose disclosed in the application as filed. The type of high-amylose corn starch (i.e. the amylose content of 50 wt% to 70 wt% on a dry matter basis) is the sole definition of high-amylose corn starch given in the patent. The only possible selection or restriction that may be seen is the stipulation of hydrolysed proteins. This, however, is a preferred feature of the application as filed.

3.6.3 Thus, the combination of features in claims 1 and 8 does not constitute added subject-matter either.

3.7 To conclude, the ground for opposition under Article 100(c) EPC does not prejudice the maintenance of the patent as granted.

4. *Ground for opposition under Article 100(b) EPC*

4.1 The opposition division decided that the invention was sufficiently disclosed. The appellant contested this finding. It argued that the skilled person would not know how to obtain the native high-amylose corn starch of claim 1.

4.2 However, the skilled person would have had no problem carrying out the invention, i.e. preparing the animal food compositions of the claims. In fact, the appellant's technical expert carried out experiments corresponding to those of claim 1. This is a clear indication that the skilled person would have been able to prepare or purchase the native high-amylose corn starch of claim 1.

4.3 For example, such a native high-amylose corn starch is commercially available, as product information D13 shows. There is no reason to believe that such a

product would not have been available on the filing date of the patent.

4.4 To conclude, the ground for opposition under Article 100(b) EPC does not prejudice the maintenance of the patent as granted.

5. *Ground for opposition - novelty*

5.1 The appellant contested the opposition division's decision that the subject-matter of claim 1 and 8 was novel. In the following, claim 1 is addressed, which is broader in scope than claim 8. It is uncontested that the conclusions drawn for claim 1 also apply to claim 8.

5.2 Novelty over D1

5.2.1 The appellant argued that claims 1 and 8 lacked novelty over D1. The composition of Example 1 shown in Table 1 includes soy protein (PROFAM® 648) in the presence of water. The appellant alleged that the protein source of this composition had to be qualified as encompassing a hydrolysed protein.

5.2.2 However, the appellant did not provide (experimental) evidence to support its allegation that in the compositions of D1 and under the conditions specified in D1, PROFAM® 648 reacts with water such that a hydrolysed protein is formed. Moreover, there is no evidence that the skilled person would directly and unambiguously understand that the specific compositions of D1 comprise hydrolysed proteins.

5.2.3 Furthermore, D1 does not disclose corn starch in an amount of 40 to 70 wt%.

5.2.4 Therefore, claims 1 and 8 are novel over D1.

5.3 Novelty over D3

5.3.1 The appellant's view was that D3 disclosed, implicitly, in column 4, hydrolysed protein and native high-amylose corn starch (see lines 43 to 46).

5.3.2 This is not correct. As with D1, see point 5.2.2 above, there is no (experimental) evidence for the appellant's allegation that the protein disclosed in D3 is to be regarded as hydrolysed.

5.3.3 Moreover, the passage in column 4 referred to above discloses tapioca starch, not corn starch. Furthermore, in column 4, line 7, corn is disclosed as a carbohydrate source, but not directly and unambiguously in conjunction with native high-amylose starch.

5.3.4 Finally, claim 1 of D3 discloses a food product which comprises the following mandatory starch composition:

- 15 to 50% cereal starch,
- 5 to 30% pre-gelatinised starch and
- 1 to 30% of a high-amylose starch having an amylose to amylopectin ratio of at least 40:60.

This starch composition is manifestly different from the one stipulated in claim 1 of the patent in suit.

5.3.5 Thus, claims 1 and 8 are novel over D3.

5.4 Novelty over the product Hill's z/d Ultra Allergen Free

5.4.1 The appellant argued that Hill's z/d Ultra Allergen Free disclosed all of the features of claim 1. In this context, it referred to documents D19 to D21, which allegedly described the product, and to D24, a declaration drafted by one of the inventors of the patent. D24 allegedly disclosed that the product comprised native high-amylose corn starch.

5.4.2 However, the disclosures of D19 to D21 do not point towards, let alone disclose, hydrolysed protein or native high-amylose corn starch. At best, these documents disclose corn starch.

5.4.3 In D24 it is stated that "Hill's z/d Ultra Allergen Free did not contain native high-amylose corn starch prior to 2006". This submission was made with respect to document D19, in which a product distributed in 2006 is described. D24 cannot be genuinely understood as an acknowledgement that after 2006 the product contained native high-amylose corn starch.

5.4.4 Finally, Mr Rozzi's declaration (D27) filed with the respondent's reply confirms that the product in question did not contain native high-amylose corn starch prior to the filing date of the patent in suit.

5.4.5 Thus, claims 1 and 8 are novel over Hill's z/d Ultra Allergen Free.

5.5 To conclude, the ground for opposition under Article 100(a) EPC in conjunction with Article 54 EPC does not prejudice the maintenance of the patent as granted.

6. *Ground for opposition - inventive step*

6.1 In the decision under appeal, documents D3, D4, D10 and the product Hill's z/d Ultra Allergen Free were regarded as possible closest prior art items. The opposition division decided that the claims of the patent as granted involved an inventive step.

6.2 The appellant contested this decision but used the same starting points as the opposition division for assessing inventive step.

6.3 In the following, claim 1 is addressed, which is broader in scope than claim 8. It is uncontested that the conclusions drawn for claim 1 also apply to claim 8.

6.4 Closest prior art

6.4.1 The invention in the patent concerns an animal food composition that comprises a protein source such as poultry liver hydrolysate (i.e. protein hydrolysate). When such a protein source and conventional starch is heated, in the preparation of the product, issues with viscosity are observed.

6.4.2 None of the starting points used in the appellant's objection of a lack of inventive step discusses issues with hydrolysed proteins. Consequently, the starting points do not refer to the technical problem of the patent in suit, i.e. issues observed with viscosity.

6.4.3 Clearly, the closest prior art does not need to address the same or a similar technical problem as the patent in suit. Opponents are essentially free to choose the

starting point they want to have considered. However, a conscious choice of starting point, made with knowledge of the respective benefits and drawbacks of the various types concerned, not only determines the subject-matter serving as a starting point but also defines the framework for further development within this particular type (see Case Law of the Boards of Appeal of the EPO, 10th edition, 2022, Chapter I.D.3.6, first paragraph).

6.4.4 In the following, D3 will be discussed first and comprehensively as the closest prior art. It is understood, and this was common ground between the parties, that the same result would have been obtained using any of the other starting points suggested (D4, D10 or Hill's z/d Ultra Allergen Free).

6.5 D3 as the starting point

6.5.1 The respondent argued that the distinguishing features over D3 were:

- (a) native high-amylose corn starch comprising at least 50% by weight of the corn starch
- (b) corn starch in an amount of 40 to 70 wt% based on the total weight of the composition
- (c) hydrolysed protein

6.5.2 The board agrees with this assessment. The appellant did not argue that D3 disclosed features (a) and (b). As explained in point 5.3 above, D3 does not disclose hydrolysed proteins, i.e. feature (c).

6.5.3 The next step in the problem-solution approach is to assess which technical problem the distinguishing features solve.

6.5.4 In the decision under appeal, the technical problem identified was to improve the processing and the quality of the final product when it comprises a source of conventional starch and a source of hydrolysed protein. This formulation corresponds to the one derivable from the patent.

6.5.5 The appellant contested this formulation of the technical problem. Based on its own experiments reported in D18 and D26, the appellant argued as follows:

- First, the viscosity profile over time upon heating of a composition according to the patent's claim 1 (e.g. Test Sample D in Figure 2 of the patent in suit) could not be reproduced in the experiments in D18 and D26. For a similar composition to that of Test Sample D, a different viscosity profile was obtained in D18 and D26.
- Second, the viscosity profile over time upon heating, as observed in D18 and D26, depended both on the type of hydrolysed protein used and the ratio of conventional starch to high-amylose starch. The technical problem identified in the patent was not solved for all protein hydrolysates. Moreover, the combination of features in claim 1 was not critical for obtaining an effect on the viscosity profile over time upon heating.
- In view of these results, the only technical problem which was solved was to modulate the viscosity of the animal food compositions.

- 6.5.6 The board accepts the appellant's formulation of the technical problem, namely to modulate the viscosity of the animal food composition.
- 6.5.7 The next step is to decide whether the skilled person would have provided the distinguishing features in combination to solve the technical problem.
- 6.5.8 The appellant argued that the skilled person would have known that amylose was suitable for modifying and controlling the viscosity of compositions. In view of this, the skilled person would have increased the amount of amylose. The relevant teaching was to be found, for example, in D2 or D5.
- 6.5.9 As set out in point 6.5.1 above, there are three distinguishing features. All three of these features contribute to modifying the viscosity of the composition.
- 6.5.10 The composition of D3 is designed to provide a pet food having a low energy density that is nutritionally complete. As set out in detail above (see point 5.3.4), the composition requires as a mandatory feature a specific mixture of starches. The starches required are cereal starch, pre-gelatinised starch and high-amylose starch. The latter starch is present in a relatively low amount compared to the other starches.
- 6.5.11 The appellant did not convincingly explain why the skilled person would have been motivated to modify the teaching of D3 to arrive at a composition with corn starch in an amount of 40 to 70 wt% based on the total weight of the composition and at least 50% by weight of the corn starch being native high-amylose corn starch.

6.5.12 Even if the skilled person had arrived at such a combination, the composition obtained would still lack hydrolysed proteins.

6.5.13 Now, the protein source of claim 1 of the patent in suit, hydrolysed protein, has an impact on the viscosity. It contributes to modulating the composition's viscosity. This is one of the findings set out in the patent in suit. In view of this, the appellant's secondary line of argument, that adding hydrolysed protein merely solved the partial problem of providing a hypo-allergenic composition, cannot be followed.

6.5.14 To conclude, starting from D3 as the closest prior art, the skilled person would not have provided the combination of features (a) to (c) as set out in point 6.5.1 above to solve the technical problem. Therefore, the subject-matter of claims 1 and 8 involves an inventive step.

6.6 D4 or D10 as the starting point

6.6.1 The distinguishing features of claim 1 over D4 or D10 are at least:

- native high-amylose corn starch comprising at least 50% by weight of the corn starch
- corn starch in an amount of 40 to 70 wt% based on the total weight of the composition

6.6.2 As explained in point 6.5.6 above, the technical problem is to modulate the viscosity of the animal food compositions.

- 6.6.3 Taking the teaching in D4 or D10 into consideration, the appellant's argument that the skilled person would generally apply higher amounts of high-amylose starch is not tenable. The same applies to the conclusion that the skilled person would have arrived at the specific combination of features of claim 1 to solve the technical problem.
- 6.6.4 D4 and D10 concern compositions comprising 4 to 25% by weight of starch and specified amounts of several other documents. The compositions are designed to replace casein in pet food compositions. There is no reason why the skilled person starting from either of these two documents would have provided a composition comprising corn starch in a much higher amount, i.e. from 40 to 70 wt% based on the total weight of the composition on a dry matter basis.
- 6.6.5 For this reason alone, an inventive-step objection based on D4 or D10 as the closest prior art cannot succeed. The subject-matter of claims 1 and 8 involves an inventive step.
- 6.7 Hill's z/d Ultra Allergen Free as the starting point
 - 6.7.1 With regard to Hill's z/d Ultra Allergen Free as the starting point for assessing inventive step, the same considerations as those made above apply (see point 6.5.1 as to the distinguishing features and point 6.5.6 as to the formulation of the technical problem).
 - 6.7.2 The considerations made above concerning obviousness with respect to D3, D4 and D10 also apply to this starting point. The board fails to see what would have motivated the skilled person to modify the commercial

product such that it incorporates simultaneously all three distinguishing features in order to solve the technical problem. The subject-matter of claims 1 and 8 involves an inventive step.

6.8 To conclude, the appellant did not present arguments that justify reversing the opposition division's decision on inventive step. The ground for opposition under Article 100(a) in conjunction with Article 56 EPC does not prejudice the maintenance of the patent as granted.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



M. Schalow

A. Haderlein

Decision electronically authenticated