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**Datasheet for the decision
of 27 January 2022**

Case Number: T 2644/19 - 3.3.09

Application Number: 12775022.2

Publication Number: 2779846

IPC: A23L33/19, A61K35/20, A61P3/10,
A23C21/00

Language of the proceedings: EN

Title of invention:

USE OF WHEY PROTEIN MICELLES FOR INFANTS AT RISK OF OBESITY OR
DIABETES

Patent Proprietor:

Société des Produits Nestlé S.A.

Opponent:

N.V. Nutricia

Headword:

Micellar proteins/NESTLÉ

Relevant legal provisions:

EPC Art. 99(1)
EPC R. 77(1), 139
RPBA Art. 12(4)
RPBA 2020 Art. 13(1)

Keyword:

Clarification of the opponent's identity by documents showing the opponent's original intention - (yes)

Admission in appeal of documents which were not filed during the opposition proceedings - (yes)

Request for hearing a member of the opposition division as witness - refused

Opposition division's decision finding the opposition inadmissible set aside - (yes)

Remittal to the opposition division - (yes)

Decisions cited:

J 0005/11, T 0615/14

Catchword:



Beschwerdekammern

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Chambres de recours

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Case Number: T 2644/19 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 27 January 2022

Appellant: N.V. Nutricia
(Opponent) Eerste Stationsstraat 186
2712 HM Zoetermeer (NL)

Representative: Schrell, Andreas
Gleiss Große Schrell und Partner mbB
Patentanwälte Rechtsanwälte
Leitzstrasse 45
70469 Stuttgart (DE)

Respondent: Société des Produits Nestlé S.A.
(Patent Proprietor) Entre-deux-Villes
1800 Vevey (CH)

Representative: Plougmann Vingtoft a/s
Strandvejen 70
2900 Hellerup (DK)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 12 July 2019
rejecting the opposition filed against European
patent No. 2779846 as inadmissible pursuant to
Rule 77 EPC.**

Composition of the Board:

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

Summary of Facts and Submissions

- I. The appeal was filed by the opponent against the opposition division's decision rejecting the opposition filed against European patent No. 2 779 846 as inadmissible.
- II. With its notice of opposition the opponent had requested that the patent be revoked 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. In its decision, announced during the oral proceedings held before the opposition division, the opposition division found that:
- there was a discrepancy between the name of the opponent identified in Form 2300 ("N.V. Nutricia") and that in Annex I to Form 2300 ("Nutricia Research B.V."),
 - no evidence was available to establish that the opponent's original intention was to file an opposition in the name of "N.V. Nutricia", rather than "Nutricia Research B.V.",
 - in the absence of that evidence the opposition was not admissible.
- IV. The following documents were filed, among other documents, by the opponent (appellant) with its statement setting out the grounds of appeal.

- AD4: Email dated 3 April 2018 giving instructions to file an opposition against EP 2 779 846
- AD5a: Draft, dated 24 May 2018, of the notice of opposition against EP 2 779 846
- AD5b: Email dated 24 May 2018 containing the draft of the notice of opposition AD5a as an attachment
- AD6: Email dated 31 May 2018 in response to the email AD5b containing the draft of the notice of opposition AD5a
- AD8: Internal notes concerning a telephone conversation held on 6 June 2018

V. The following documents were filed by the appellant with its letter dated 24 July 2020.

- AD14: Letter from Mr Schrell from Gleiss & Große dated 16 April 2010 concerning the first meeting between Gleiss & Große and Danone
- AD15: Instructional email concerning the filing of an opposition mentioned in point 3 of AD14
- AD16: Instructional email concerning the filing of a further opposition
- AD17: Further instructional emails concerning the filing of further oppositions
- AD18: Printout from the internal case management system PatOrg

VI. The **appellant's** arguments which are relevant for the decision can be summarised as follows.

- The opposition had been duly filed and the name of the correct opponent "N.V. Nutricia", indicated in Form 2300, had been entered in the European Patent Register.

- The indication of the opponent in Form 2300 had been complete and had included the opponent's address, which was missing from Annex I; therefore, Form 2300 took precedence for identifying the opponent.
- The opposition division's preliminary opinion issued in preparation for the oral proceedings had been that the opposition was admissible.
- The issue of admissibility had been raised by the proprietor only six days before the oral proceedings held before the opposition division. The opponent could not have prepared a proper line of defence and gathered evidence supporting its case at such short notice.
- The opposition division had made the postponement of the oral proceedings conditional on a statement from the opponent's representative that they would have provided conclusive evidence concerning the opponent's identity by the filing date. The representative could not have been expected to make such a statement during the hearing. Had they made it, but later not found evidence, they could have been blamed for having unnecessarily delayed the proceedings.
- The evidence provided on appeal confirmed that it was the opponent's real intention to file the opposition in the name of N.V. Nutricia. Therefore, the decision under appeal was to be set aside and the opposition was to be considered admissible.

VII. The proprietor's (**respondent's**) arguments which are relevant for the decision can be summarised as follows.

- During the oral proceedings held before the opposition division the opponent had been given the option of postponing the oral proceedings and providing evidence confirming the opponent's true intention at the time when the opposition was filed; however, as shown in the minutes of the oral proceedings, the opponent had "deliberately and actively" refused the offer.
- It could hardly have been a surprise to the opponent to have been asked to provide evidence during the oral proceedings. The opposition division's offer to postpone the oral proceedings was not conditional on a statement that "conclusive evidence" would have been filed proving the opponent's original intention. The opposition division had only asked the opponent to indicate whether it was "confident" that it could have filed relevant evidence had the oral proceedings been postponed.
- By requesting that the oral proceedings be postponed, the opponent would have had time to address the new issue and collect supporting evidence. By not requesting that the proceedings be postponed, the opponent had not acted with due care. Therefore, the evidence filed on appeal, which could have been filed during the opposition proceedings, was not to be admitted.
- Irrespective of the issue of its admission, the available evidence did not demonstrate that the opponent's real intention was to file the

opposition in the name of N.V. Nutricia. Therefore, the appeal had to be dismissed.

Requests

VIII. The appellant requested that:

- the decision under appeal be set aside and that the opposition be considered admissible and, furthermore,
- that the case be remitted to the opposition division to discuss the merits of the case.

IX. The respondent requested that:

- the appeal be dismissed and that the patent be maintained as granted or, alternatively,
- that the case be remitted to the opposition division or, alternatively,
- that the patent be maintained on the basis of one of auxiliary requests 1 to 3 filed with the reply to the statement setting out the grounds of appeal,
- and furthermore, that one or more of the members of the opposition division be summoned as a witness to clarify the questions posed by the chairman during the oral proceedings and the opponent's replies.

Reasons for the Decision

1. *Preliminary remarks*
- 1.1 The appeal relates to the issue of whether uncertainty concerning the opponent's identity, which has led to the finding that the opposition is not admissible, can be resolved by providing evidence that, when the opposition was filed, the true intention was to designate a specific person as the opponent.
- 1.2 The notice of opposition, dated 6 June 2018, contains the completed Form 2300 and, as an annex, a separate document entitled "Annex I" setting out the grounds for opposition. "N.V. Nutricia", with its address in "1ste Stationstraat 186, 2712 HM Zoetermeer, Netherlands", is indicated as the opponent in Form 2300 (see box III); however, the header of Annex I mentions "Nutricia Research B.V." as the opponent.
- 1.3 When the opposition was received by the EPO, N.V. Nutricia was deemed to be the opponent. Its name and address, indicated in Form 2300, were entered in the European Patent Register. N.V. Nutricia is still identified as the opponent in the register at the present time.
- 1.4 In its preliminary opinion issued in preparation for the oral proceedings the opposition division considered the opposition admissible. It was only with a letter dated 20 June 2019, six days before the scheduled oral proceedings before the opposition division, that, referring to Annex I, the proprietor (now respondent) raised doubts as to the opponent's identity and the admissibility of the opposition.

1.5 During the oral proceedings the opposition division considered that, due to the discrepancy found between Form 2300 and Annex I, and in the absence of evidence that the original intention was to file an opposition in the name of N.V. Nutricia, the opposition was inadmissible according to Article 99(1) and Rule 77(1) EPC.

1.6 The board agrees with the opposition division that, since "N.V. Nutricia" is named as the opponent in Form 2300, while the header of page 1 of Annex I refers to "Nutricia Research B.V." as the opponent, the documents filed during the opposition period may be considered to raise doubts as to the opponent's real identity.

2. *Relevance of T 615/14*

2.1 In decision T 615/14 (points 1.2 to 1.5 of the Reasons), the board decided that a request to correct the designation of the opponent in the notice of opposition is allowable under Rule 139 EPC, first sentence, provided that:

- the correction reflects what was originally intended when the notice of opposition was filed,
- the correction does not give effect to a change of mind or development of plans, and
- that it represents the opponent's actual rather than ostensible intention.

2.2 Applying these principles, the board decided that the person originally erroneously identified as the opponent in Form 2300, who was also entered in the

European Patent Register, could be replaced with the correct one by way of correction under Rule 139 EPC.

2.3 The present case is different because when the opposition was filed, the right person, indicated in Form 2300, was deemed to be the opponent and was entered in the European Patent Register. Therefore, there is no need to correct the name of the opponent.

2.4 Despite the differences, the board considers that the principles developed in T 615/14 can be applied in the present case. In an analogous manner the doubts that the opposition division found concerning the opponent's identity can be resolved by taking into account evidence demonstrating the opponent's original intentions.

3. *Admission of the appellant's evidence*

3.1 During the appeal proceedings the appellant filed documents AD1 to AD18 as evidence that the opponent's original intention was to file the opposition in the name of N.V. Nutricia. The respondent requested that this evidence not be admitted.

3.2 The respondent held that the appellant had not acted with due care during the opposition proceedings because it had actively refused the opposition division's offer to postpone the oral proceedings. This postponement was meant to give to the appellant more time to collect and submit relevant evidence. Had it requested oral proceedings, the appellant would have had the option of submitting evidence during the opposition proceedings. Since it had actively refused the postponement, the appellant ought not to be given a further opportunity to file evidence on appeal.

- 3.3 The board does not agree. The proprietor's (now respondent's) objection concerning the opponent's identity was raised very late, with no justification, a few days before the oral proceedings were held before the opposition division. This objection related to facts which occurred before the opposition was filed. At such short notice the then opponent's representative could not have been expected to gain access to these facts or to even know whether evidence existed to address the new objection.
- 3.4 The opponent's (now appellant's) letter dated 24 June 2019 shows that the opponent promptly attempted to address the objection by relying on available evidence. In the letter the opponent notes that only Form 2300 contains all the necessary details needed to identify the opponent, whereas Annex I only mentions a name; furthermore, it notes that the correct person has been identified by the EPO as the opponent and that its name has been entered in the European Patent Register. It also explains that, although the facts are different from those in T 615/14, in which the wrong person was initially identified as opponent, the principles laid out in this decision can be relied on to correct the erroneous name indicated in Annex I. This means that the opponent acted promptly, and with the expectation that the opposition division would have found the new objection to be unfounded.
- 3.5 The minutes of the oral proceedings (points 3.2, 3.3 and 4) and the decision under appeal (page 6) show that the option of postponing the oral proceedings was discussed with the parties; however, there is no evidence that the then opponent "actively refused" a

postponement. Point 3.4 of the minutes reads as follows:

"3.4 The CM asked wether [sic] in case of postponement of the OP the O would be able to conclusive [sic] provide evidence.

The O indicated that he was not sure that clear cut evidence could be provided and that he would rely on parallel cases".

3.6 The respondent submitted that the first statement confirms that the opposition division was willing to postpone the oral proceedings, and also that this statement meant that the then opponent's representative was merely asked whether they were "confident" that "it was likely" that relevant evidence could be produced. Since the representative had answered in the negative, the opposition division had correctly decided not to postpone the oral proceedings.

3.7 The board agrees that the representative could have requested a postponement; however, the circumstances of the case must be taken into account. As already mentioned above, the new objection was raised very late. It concerned facts and situations which are beyond those which a representative can be expected to know from relying on the documents on file. Therefore, it is reasonable to believe that during the oral proceedings the representative could not have been sure that they would be able to find relevant evidence at a later date. This indeed appears to be the meaning of their answer. It is also comprehensible that in this situation the representative might not have felt able to actively request a postponement. Had they requested it but not found any evidence later, they could have

been blamed by their client, the opposition division or the other party for having unnecessarily delayed the proceedings.

3.8 This means that the then opponent's representative did not act without due care during the opposition proceedings. This is all the more true considering that they were responding to a new objection raised without any reasons at a very late stage of the opposition proceedings.

3.9 The respondent has drawn attention to decision J 5/11. This decision concerns a case in which an applicant was invited by the receiving section to provide evidence in support of a request for re-establishment of rights. The applicant failed to file evidence and the request was refused. In the ensuing appeal the board considered that, since the applicant had not filed any evidence with the receiving section, the evidence filed on appeal was not admissible.

3.10 This board considers that the situation in the present case differs substantially from that described in J 5/11. First of all, this decision related to a different issue, namely that of re-establishment of rights before the receiving section in *ex partes* proceedings. Furthermore, and more importantly, in case J 5/11 the applicant/appellant had been invited to provide evidence within a two-month time limit. In the present case the appellant was confronted with an unexpected objection only six days before the oral proceedings. No time limit was set for addressing the new objection. Therefore, J 5/11 is not relevant to the present case.

- 3.11 The board therefore concludes that there is no reason to disregard AD1 to AD13, filed by the appellant with its statement setting out the grounds of appeal in direct reply to the opposition division's adverse decision (Article 12(4) RPBA 2007).
- 3.12 AD14 to AD18 were filed by the appellant in response to the respondent's argument, raised for the first time by the respondent in its reply to the statement of grounds of appeal, that there was no evidence of a "general instruction" within the representative's firm Gleiss & Große that oppositions from Danone had to be filed in the name of N.V. Nutricia. This was not contested by the respondent. Therefore, these documents are not disregarded either (Article 13(1) RPBA 2020).
4. *Request that a member of the opposition division be heard as a witness*
- 4.1 The respondent requested that one or more of the members of the opposition division be heard as a witness to clarify the questions posed by the opposition division during the oral proceedings and the answers given by the appellant.
- 4.2 The board does not consider it necessary to hear a member of the opposition division. The minutes of the oral proceedings held before the opposition division provide the essentials of the oral proceedings. Their content has not been contested by the respondent. The minutes are detailed enough to understand the questions posed by the opposition division and the replies provided by the opponent. The respondent's interpretation of the statements in the minutes has been taken into account by the board; see point 3.6 above. Therefore, the board considers that it can

decide on the case by relying on the minutes of the oral proceedings and without hearing a member of the opposition division.

4.3 This request is therefore refused.

5. *Opponent's true intention when the opposition was filed*

5.1 The documents filed by the appellant show that the opponent's true intention was to file the opposition in the name of N.V. Nutricia. The chain of events which preceded the filing of the opposition, which can be reconstructed on the basis of AD4, AD5a, AD5b, AD6, AD8 and Form 2300, fully supports this interpretation:

- the email dated 3 April 2018 (AD4) shows that Mr Wobbes, from Danone, of which N.V. Nutricia is a subsidiary, instructed Mr Schrell, the representative from the law firm Gleiss & Gross, to file an opposition against EP 2778746, the opposed patent,
- the email (AD5b) dated 24 May 2018, bearing the reference number 302210, shows that Mr Schrell asked Mr Wobbes whether he agreed with the draft of the attached notice of opposition (AD5a) against EP 2778746, in which N.V. Nutricia is indicated as opponent,
- the email (AD6) dated 31 May 2018, bearing the reference number 302210, shows that Mr Wobbes confirmed to Mr Schrell that he agreed with the draft of the opposition shown in AD5a,
- the internal note (AD8), dated 6 June 2018, bearing the reference number 302210, shows that Mr Wobbes

confirmed to Mr Wohlfahrt, replacing Mr Schrell on the date when the opposition was filed, that the opposition had to be filed in the name of N.V. Nutricia, and

- Form 2300, filed with the notice of opposition on 6 June 2018, indicates N.V. Nutricia as the opponent, together with its complete address. Annex I only contains a header and does not contain any address information.

5.2 During the appeal proceedings the respondent argued that AD4 did not specify that N.V. Nutricia had to be indicated as the opponent, and also that there was no evidence that there were general instructions within the representative's firm to file oppositions from Danone in the name of N.V. Nutricia. Both N.V. Nutricia and Nutricia Research B.V. were subsidiaries of Danone. If there had been general instructions, there would not have been any need to file D8. Furthermore, AD8 was practically illegible.

5.3 These arguments are not persuasive. The board is satisfied that, on the basis of the aforementioned evidence as a whole, it is credible that the representative's original intention was to file an opposition in the name of N.V. Nutricia. The board is also satisfied that the indication of a different person as the opponent in Annex I was the result of an error. Documents AD4 and AD8 alone do not provide conclusive evidence; however, they fit perfectly into the picture of the events which preceded the filing of the opposition presented by the appellant. The legibility of AD8 was also questioned; however, AD8 contains a date, the same reference number 302210 as

AD5a, AD5b and AD6, Mr Wobbes' name, and the indication of N.V. Nutricia as the opponent.

- 5.4 AD14 to AD18 complete the picture, demonstrating that there were general instructions within Gleiss & Große to indicate N.V. Nutricia as the opponent in oppositions from Danone. The fact that, on the day that the opposition was filed, a telephone call took place confirming that N.V. Nutricia was to be named as opponent does not rule out the existence of these general instructions. Instead, it attests to the scrupulous attitude of the concerned parties towards confirming those instructions.

6. *Conclusions*

- 6.1 For these reasons, the board concludes that the evidence submitted during the appeal proceedings resolves any ambiguity concerning the opponent's identity. This clarification removes the reasons which led the opposition division to decide that the opposition was not admissible. Therefore, the decision is to be set aside, the opposition is to be deemed admissible and the case is to be remitted to the opposition division for the substantive issues to be dealt with.
- 6.2 Contrary to case T 615/14, in the present case there is no need to identify a different person as the opponent in the European Patent Register. The person intended to be the opponent has already been entered as such in the European Patent Register.

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 for further prosecution.

The Registrar:

The Chairman:



A. Nielsen-Hannerup

A. Haderlein

Decision electronically authenticated