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**Datasheet for the decision
of 27 April 2023**

Case Number: T 1187/20 - 3.3.09

Application Number: 10804827.3

Publication Number: 2459006

IPC: A23K10/20, A23K50/48

Language of the proceedings: EN

Title of invention:

WET FOOD COMPOSITIONS HAVING THE CHARACTERISTICS OF DRY FOOD
COMPOSITIONS

Patent Proprietor:

Société des Produits Nestlé S.A.

Opponent:

Mars, Incorporated

Headword:

Wet food compositions having the characteristics of dry food
compositions/NESTLÉ

Relevant legal provisions:

EPC Art. 100(b), 83

Keyword:

Sufficiency of disclosure - (no)

Decisions cited:

T 0063/06

Catchword:



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Case Number: T 1187/20 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 27 April 2023

Appellant: Mars, Incorporated
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 10 March 2020
rejecting the opposition filed against European
patent No. 2459006 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman A. Haderlein
Members: M. Ansorge
A. Jimenez
C. Meiners
F. Blumer

Summary of Facts and Submissions

- I. The opponent (appellant) lodged an appeal against the opposition division's decision rejecting the opposition.
- II. With the notice of opposition, the opponent had requested that the patent be revoked, *inter alia*, on the ground for opposition under Article 100(b) EPC.
- III. The opposition division decided, *inter alia*, that the invention could be carried out by a skilled person, so the ground for opposition under Article 100(b) EPC did not prejudice the maintenance of the patent.
- IV. Claims 1 and 10 of the patent as granted (main request) read as follows:

"1. A wet food composition comprising:

from 90 to 99% of one or more meat emulsion chunks; and

from 1 to 10% of one or more binders;

wherein the meat emulsion chunks are formed from one or more meats that have been emulsified and sized and formed into meat emulsion chunks, wherein the meats include meat from avian, bovine, ovine, piscine, or porcine animals, or combinations thereof;

wherein the binders are selected from (i) the group consisting of starches; maltodextrins; undenatured, water-soluble animal proteins; undenatured, water-soluble plant proteins; hydrocolloid gums; or combinations thereof; or

(ii) the group consisting of sodium alginate, carrageenan, pectin, guar, carob, locust bean gum, egg white, collagen, gelatin, milk proteins, plasma, and combinations thereof;

wherein the composition has a moisture content greater than 45%, and

wherein the composition has the characteristics of a dry food composition having one or more of the following characteristics: (1) the wet food composition is relatively dry to the touch when compared to typical wet food compositions; (2) the wet food composition is relatively hard, inelastic, and crumbly when compared to typical wet food compositions; and (3) the wet food composition is generally stable at ambient conditions without preservatives."

"10. A method for making a wet food composition having the characteristics of a dry food composition comprising forming a meat emulsion; processing the meat emulsion to produce meat emulsion chunks; comminuting the meat emulsion chunks to produce chunks having a size of less than 100 mm in two dimensions; mixing the comminuted chunks with from 1 to 10% of one or more binders; and pressing and shaping the mixture of comminuted chunks and binders to produce a wet food composition having a moisture content greater than 45% and having the characteristics of a dry food composition having one or more of the following characteristics: (1) the wet food composition is relatively dry to the touch when compared to typical wet food compositions; (2) the wet food composition is relatively hard, inelastic, and crumbly when compared to typical wet food compositions; and (3) the wet food composition is generally stable at ambient conditions

without preservatives, wherein the meat emulsion includes meat from avian, bovine, ovine, piscine, or porcine animals, or combinations thereof;

and wherein the binders are selected from (i) the group consisting of starches; maltodextrins; undenatured, water-soluble animal proteins; undenatured, water-soluble plant proteins; hydrocolloid gums; or combinations thereof; or (ii) the group consisting of sodium alginate, carrageenan, pectin, guar, carob, locust bean gum, egg white, collagen, gelatin, milk proteins, plasma, and combinations thereof."

Claim 1 of auxiliary request 1 differs from claim 1 of the main request essentially in that characteristics (1) and (2) are deleted.

Claim 1 of auxiliary request 2 differs from claim 1 of the main request in that the feature "wherein the meat emulsion chunks are formed from one or more meats that have been emulsified and sized and formed into meat emulsion chunks" is amended to "wherein the meat emulsion chunks are formed from one or more meats that have been emulsified and sized to less than 100 mm in two dimensions and formed into meat emulsion chunks" (emphasis added).

Claim 1 of auxiliary request 3 differs from claim 1 of the main request in that the feature "wherein the meat emulsion chunks are formed from one or more meats that have been emulsified and sized and formed into meat emulsion chunks" is amended to "wherein the meat emulsion chunks are formed from one or more meats that have been emulsified and sized to less than 10 mm in two dimensions and formed into meat emulsion chunks" (emphasis added).

Claim 1 of auxiliary request 4 differs from claim 1 of the main request in that the feature "wherein the composition has the characteristics of a dry food composition having one or more of the following characteristics" is amended to "wherein the composition has the characteristics of a dry food composition having ~~one or more of~~ the following characteristics" (amendment indicated by strikethrough).

Claim 1 of auxiliary request 5 differs from claim 1 of auxiliary request 2 in that the feature "wherein the composition has the characteristics of a dry food composition having one or more of the following characteristics" is amended to "wherein the composition has the characteristics of a dry food composition having ~~one or more of~~ the following characteristics" (amendment indicated by strikethrough).

Claim 1 of auxiliary request 6 differs from claim 1 of auxiliary request 3 in that the feature "wherein the composition has the characteristics of a dry food composition having one or more of the following characteristics" is amended to "wherein the composition has the characteristics of a dry food composition having ~~one or more of~~ the following characteristics" (amendment indicated by strikethrough).

Claim 1 of auxiliary request 7 is identical to claim 10 of the main request.

Claim 1 of auxiliary request 8 differs from claim 1 of the main request in that the feature "from 1 to 10% of

one or more binders" is amended to "from 2 to 7% of one or more binders".

Claim 1 of auxiliary request 9 differs from claim 1 of the main request in that the feature "wherein the composition has a moisture content greater than 45%" is amended to "wherein the composition has a moisture content greater than 65%".

V. The parties' relevant arguments, submitted in writing and during the oral proceedings, are reflected in the Reasons for the Decision below.

VI. Requests

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

The respondent (proprietor) requested that the appeal be dismissed (main request) or, alternatively, that the patent be maintained on the basis of one of auxiliary requests 1 to 9, filed with the letter of 26 September 2022.

Reasons for the Decision

MAIN REQUEST (claims of the patent as granted)

1. Sufficiency of disclosure

1.1 The appellant argued that the invention could not be carried out, so the opposition division had erred when finding that the ground for opposition under

Article 100(b) EPC did not prejudice the maintenance of the patent.

- 1.2 The respondent argued that the invention could be carried out. The burden of proof was on the appellant to demonstrate that the invention could not be carried out, and there was no reason to shift the burden of proof to the respondent. No verifiable facts had been submitted by the appellant which raised serious doubts that the invention could be carried out. The patent contained Examples 2 and 3 which demonstrated ways to produce the claimed composition. In addition, claim 1 of the patent constituted a complete and sufficient disclosure of how to carry out the invention, i.e. merely implementing the structural features of claim 1 resulted in the claim feature "characteristics of a dry food composition" with characteristics (1), (2) and/or (3). The appellant's objections represented merely clarity objections which possibly led to a broad interpretation of the claim, but lack of clarity was not a ground for opposition.
- 1.3 For the following reasons, the board does not share the respondent's view.
 - 1.3.1 Claim 1 relates to a wet food composition having a moisture content of greater than 45% and the "characteristics of a dry food composition". In addition, it is, for instance, required in claim 1 that the claimed composition is generally stable at ambient conditions without preservatives (see characteristic (3) of claim 1). The same limitations are present in the main method claim 10.
 - 1.3.2 Claim 1 contains a contradiction or conflicting features in that it relates to a wet food composition

having a moisture content of greater than 45%, which may be up to 90% as mentioned in paragraph [0028] of the patent, but at the same time has the "characteristics of a dry food composition". Another contradiction in claim 1 is that the claimed composition has a moisture content of a typical wet food composition which is known to degrade and spoil rather quickly, but claim 1 requires that the claimed composition is generally stable at ambient conditions without preservatives.

Even when accepting for the sake of argument that the highest moisture content of 90% as explicitly indicated in paragraph [0028] of the patent was unrealistically high and thus would be excluded by a skilled person, there can be no doubt from the teaching of the patent that the moisture content of the claimed composition may be up to 85% (the upper limit of the more preferred range mentioned in paragraph [0028]) or 82% (the upper limit of the most preferred range mentioned in paragraph [0028]). A moisture content of 82% or 85% is considered a very high moisture content which represents the upper limit typically found in "wet food compositions" or even above it (see paragraph [0005] of the patent). The board is unable to acknowledge that a skilled person would exclude a water content in the upper part of the more preferred or most preferred moisture content range explicitly taught in the patent.

- 1.3.3 Although the moisture content of the claimed composition is high or very high, the content of binder required in claim 1 may be as low as 1% and up to 10%.
- 1.3.4 The crucial question in the current case is whether there are serious doubts substantiated by verifiable facts that the invention can be carried out.

1.3.5 To assess this question, the description of the patent and the definitions given in it, in particular for the claim feature "characteristics of a dry food composition", are also relevant.

1.3.6 Paragraph [0003] of the patent gives the following explanation:

"[0003] "Dry" food compositions contain less than about 12% moisture. They are typically hard, inelastic, and/or crumbly. Also, they are dry to the touch and stable under ambient conditions without the use of preservatives."

This paragraph gives a definition of typical characteristics of dry food compositions, so the claim feature "characteristics of a dry food composition" is to be interpreted in light of the description in such a manner that the claimed composition is (i) typically hard, inelastic, and/or crumbly and (ii) also dry to the touch and stable under ambient conditions without the use of preservatives. This interpretation is in line with paragraph [0027] of the patent. Thus, characteristics (1) to (3) of claim 1 relate to these dry food characteristics and further specify them in a slightly different manner.

1.3.7 As can be taken from paragraph [0005] of the patent, wet food compositions contain greater than about 45% moisture, typically from about 65 to about 82%. They are usually soft and runny, particularly if they contain gravy. They are moist to the touch. They are often messy to process and handle. Generally, they do not contain preservatives and are hermetically sealed and stabilised by heating, e.g. retorting. They tend to

degrade and spoil within hours if exposed to ambient conditions.

In view of the above information given in the patent, wet food composition are, for instance, soft and runny, moist to the touch and suffer from the problem that they tend to degrade and spoil rather quickly.

1.3.8 Paragraph [0009] of the patent mentions that attempts to produce food compositions having the convenience of dry food compositions and the advantages of wet food compositions have had limited success. This information undoubtedly demonstrates that it was at least a very challenging task to produce a wet food composition having at the same time the characteristics of a dry food composition. Finding a solution to achieve the conflicting properties of having a wet food but, at the same time, having the characteristics of a dry food was consequently difficult.

1.3.9 The above information in the patent represents what a skilled person derives when reading the patent. This information in the patent qualifies as verifiable facts raising serious doubts that the invention can be carried out. It should be kept in mind, as noted above, that the preferred moisture content of the composition may be up to 85%, which is even higher than the moisture content typically found in wet food compositions, whereas the binder content may be as low as 1%. Under the current circumstances, no experimental proof is necessary as additional evidence to raise serious doubts that the invention can be carried out, as argued by the respondent. When considering the overall information given in the patent and - as demonstrated in point 1.3.10 below - the absence of an example falling within claim 1, the board considers

that there is only a weak presumption that the invention can be carried out (T 63/06, Headnote).

Under the circumstance of this case, the board concludes that the burden of proof has shifted, and it is on the respondent to demonstrate that the invention can be carried out. Put differently, it is up to the respondent to demonstrate how the contradiction in claim 1 can be resolved.

- 1.3.10 The respondent argued that the Examples 2 and 3 of the patent exemplified ways to carry out the invention. In its view, Examples 2 and 3 fell within the scope of claim 1 since the moisture content, the binder content and the meat emulsion chunk content were fulfilled in Examples 2 and 3.

The board does not agree.

The amount of additional water mixed with the binders before combining this mixture with the comminuted chicken chunks, as done in Examples 2 and 3, cannot be simply added to the chicken chunks.

As stated in paragraph [0032] of the patent, the binders are hydrated by water from the chunks and/or water added to the composition. Thus, it cannot be concluded that the additional water simply becomes part of the chunks. The hydrated binders are not considered part of the chunks. The board also shares the opposition division's conclusion that the dried vegetable ingredients used in Examples 2 and 3 absorb at least part of the water. Paragraph [0032] further mentions that the hydrated binders form a viscous composition that maintains the shape of the wet food composition after they are pressed into a particular

shape, which in the board's view further supports that the hydrated binders are not part of the chunks but instead act as a means for maintaining the shape of the final wet food composition.

Thus, Examples 2 and 3 of the patent do not meet the meat emulsion chunk content required in claim 1.

With respect to the amount of binder in Examples 2 and 3, the respondent argued that the amount of plasma powder, wheat gluten and guar gum used in Examples 2 and 3 fell within the scope of claim 1 (see Tables 2 and 3). In its view, the comminuted chicken chunks used in Examples 2 and 3 were not the comminuted chicken chunks produced in Example 1, which have a significant amount of wheat gluten as a binder.

In the board's view, it is not logical to assume from Examples 1 to 3 of the patent that Example 1 merely represents an exemplary way of producing comminuted chicken chunks which is later on not used in the Examples 2 and 3, even though the identical terminology "comminuted chicken chunks" is used in Example 1 and Examples 2 and 3.

Under the assumption that the comminuted chicken chunks of Example 1 were used in Examples 2 and 3, the amount of wheat gluten in the final composition would be above the upper limit of 10% required in claim 1 since the comminuted chicken chunks of Example 1 already contain about 21% of wheat gluten as the binder. Consequently, Examples 2 and 3 would not fall under claim 1 for a further reason, in addition to the amount of meat emulsion chunks. Wheat gluten, which is a preferred binder in the patent (see paragraph [0032] of the patent), may be subsumed under an undenatured water-

soluble plant protein as defined in claim 1, in line with the respondent's argument. Thus, Examples 2 and 3 cannot give any guidance on how to resolve the contradiction in claim 1 simply because Examples 2 and 3 fall outside claim 1.

When assuming that the comminuted chicken chunks in Examples 2 and 3 are not those produced in Example 1 but some other not further specified chicken chunks, as argued by the respondent, there is even less guidance on how to resolve the contradiction in claim 1. The respondent did not refer to any document to demonstrate the composition of typical chicken chunks, let alone its binder content or its suitability for achieving the characteristics of a dry food composition or one or more of characteristics (1) to (3) required in claim 1.

Since Example 2 of the patent does not fall within claim 1, the respondent's argument that it can be taken from Figure 1 and paragraph [0041] of the patent that the round patties produced in Example 2 achieved the claimed functional features cannot be acknowledged. In addition, paragraph [0041] of the patent does not provide guidance on the measures necessary for obtaining the claimed functional features.

- 1.3.11 The board does not share the respondent's view that claim 1 contains a complete and sufficient disclosure on how to carry out the invention when considering the structural features of claim 1. Producing a wet food composition by combining 90 to 99% of meat emulsion chunks and 1 to 10% of one or more binders defined in claim 1 and adjusting the moisture content to greater than 45% does not automatically lead to a composition having the characteristics of a dry food composition with one or more of characteristics (1) to (3). Given

the breadth of the structural features of claim 1, in particular the moisture content which may be up to 85% when considering the upper limit of the more preferred moisture range, this is not credible from a technical point of view.

1.3.12 The fact that characteristics (1), (2) and (3) are vaguely defined and there are no measuring methods in the patent for measuring or assessing these functional properties makes it even more difficult to resolve the contradiction in claim 1. Moreover, it makes it almost impossible to determine how the claimed composition is constituted. As correctly pointed out by the appellant, this does not merely relate to uncertainty at the boundary of the claim, it is not even possible to determine what the core of the invention is and how the claimed composition is to be determined.

1.3.13 In summary, there is no guidance in the patent on how to achieve a wet food composition having the "characteristics of a dry food composition" with one or more of characteristics (1) to (3), keeping in mind that the claimed wet composition may have a very high moisture content and a low binder content. The skilled person's common general knowledge does not provide this guidance either.

In view of the above, the invention cannot be carried out, so the ground for opposition under Article 100(b) EPC prejudices the maintenance of the patent.

AUXILIARY REQUESTS 1 TO 9

2. The conclusion of lack of sufficiency of disclosure for the main request equally applies to auxiliary requests 1 to 9. The respondent itself considered that

if the main request failed for lack of sufficiency, the same conclusion would apply to all auxiliary requests on file. In view of this, the board sees no reason why one of the auxiliary requests on file could be judged differently to the main request. Thus, there is no allowable claim request on file.

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:



M. Schalow

A. Haderlein

Decision electronically authenticated