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**Datasheet for the decision
of 14 May 2024**

Case Number: T 0191/22 - 3.3.08

Application Number: 11703847.1

Publication Number: 2529035

IPC: C12R1/46, A23C9/12

Language of the proceedings: EN

Title of invention:

Lactic bacterium for texturizing food products selected on basis of phage resistance

Patent Proprietor:

Chr. Hansen A/S

Opponent:

DuPont Nutrition Biosciences ApS

Headword:

Lactic bacterium/HANSEN

Relevant legal provisions:

RPBA 2020 Art. 12(3), 13(2)

Keyword:

Statement of grounds of appeal - party's complete appeal case
(no) - reasons set out clearly and concisely (no)
Amendment after summons - taken into account (no)

Decisions cited:

T 1904/16



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Case Number: T 0191/22 - 3.3.08

D E C I S I O N
of Technical Board of Appeal 3.3.08
of 14 May 2024

Appellant: DuPont Nutrition Biosciences ApS
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 18 November
2021 rejecting the opposition filed against
European patent No. 2529035 pursuant to
Article 101(2) EPC**

Composition of the Board:

Chair T. Sommerfeld
Members: A. Schmitt
A. Bacchin

Summary of Facts and Submissions

- I. The appeal lodged by the opponent (appellant) lies from the decision of the opposition division to reject the opposition filed against European patent No. 2 529 035 (the patent), which was granted on the basis of European patent application No. 11 703 847.1, filed as an international application published as WO 2011/092300.
- II. The opposition proceedings were based on the grounds for opposition in Article 100(a) EPC, in relation to novelty (Article 54 EPC) and inventive step (Article 56 EPC), and those in Article 100(b) and (c) EPC.
- III. With the reply to the appeal, the patent proprietor (respondent) requested that the appeal be dismissed, i.e. the patent be maintained as granted (main request), and submitted sets of claims of auxiliary requests 1 to 10, which are identical to the sets of claims of auxiliary requests 1 to 10 submitted in the opposition proceedings.
- IV. The board summoned the parties to oral proceedings in accordance with their requests. In a communication under Article 15(1) RPBA the board expressed its preliminary opinion, according to which it considered, *inter alia*, that the appellant had failed to address the opposition division's finding that the subject-matter of claims 8 and 9 of the patent as granted involved an inventive step. The board also considered that no substantiated objections had been raised by the appellant against, *inter alia*, the set of claims of

auxiliary request 5, in which - compared to the set of claims as granted - claims 1 to 7 had been deleted.

- V. Oral proceedings were held as scheduled. During the oral proceedings, the respondent withdrew the previous main request and auxiliary requests 1 to 4, and made auxiliary request 5 the current main request.

Claims 1 to 4 of the current main request read as follows:

"1. A bacterial strain belonging to the species *Streptococcus thermophilus*, selected from the group consisting of:

CHCC11977 which was deposited at the Deutsche Sammlung von Mikroorganismen und Zellkulturen GmbH under the accession number DSM22935, CHCC12339 which was deposited at the Deutsche Sammlung von Mikroorganismen und Zellkulturen GmbH under the accession number DSM24090, and CHCC13140 which was deposited at the Deutsche Sammlung von Mikroorganismen und Zellkulturen GmbH under the accession number DSM 24023.

2. A bacterial strain belonging to the species *Lactobacillus delbrueckii* subsp. *bulgaricus*, selected from the group consisting of CHCC12813 which was deposited at the Deutsche Sammlung von Mikroorganismen und Zellkulturen GmbH under the accession number DSM24074.

3. A composition comprising a bacterial strain of any of claims 1-2.

4. A method for producing a fermented milk product, comprising fermenting a milk substrate with a bacterial

strain of any of claims 1-2, or a composition of claim 3."

VI. The parties' submissions and arguments relevant to the decision are set out in the reasons for the decision below.

VII. The requests of the parties relevant to the decision were as follows:

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

The respondent requested that the patent be maintained in amended form on the basis of the set of claims of the main request filed as auxiliary request 5 with the reply to the appeal.

Reasons for the Decision

Main request

Consideration of objections raised against the main request (Article 12(3) RPBA)

1. The set of claims of the main request consists of four claims identical to claims 8 to 11 of the patent as granted. These claims concern specific bacterial strains (claims 1 and 2), a composition comprising one of these bacterial strains (claim 3) and a method comprising fermenting a milk substrate with one of these bacterial strains (claim 4). (See section V. above for full claim wording.)
2. In the statement of grounds of appeal, the appellant submitted reasoned objections against claim 1, but not

against claims 8 to 11, of the patent as granted (see also section IV. above). However, the opposition division's reasoning as to why the subject-matter of product claims 8 and 9 of the patent as granted involved an inventive step (points 27, 27.1 and 27.2 on pages 8 and 9 of the decision under appeal) was different from its reasoning with respect to inventive step of the subject-matter of method claim 1 (points 26, 26.1, 26.2, 26.2.1 and 26.2.2 on pages 7 and 8 of the decision under appeal).

3. Thus, the statement of grounds of appeal lacks any indication as to why, in the appellant's view, the opposition division might have erred in its assessment of inventive step of product claims 8 and 9 of the patent as granted and hence lacks any substantiated objections against claims 8 to 11 of the patent as granted. As a consequence, none of the appellant's objections raised in the statement of grounds of appeal against the claims of the patent as granted are relevant to the set of claims of the current main request, which consists of four claims identical to claims 8 to 11 of the patent as granted.

4. The current main request is identical to auxiliary request 5 filed in the opposition proceedings and re-submitted with the reply to the appeal (see sections III. and V. above). With regard to the auxiliary requests filed in the opposition proceedings, the appellant indicated in the statement of grounds of appeal that "*none of the Auxiliary Requests comply with the requirements of the EPC for at least the reasons presented during the opposition proceedings*" (see third paragraph of section 7 on page 34 of the statement of grounds of appeal).

5. However, general references to arguments submitted during the opposition proceedings are not automatically part of the appeal case, in particular if they do not comply with the requirements set out in Article 12(3) RPBA. This provision states that the statement of grounds of appeal must contain a party's complete appeal case and must set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed, amended or upheld. The purpose of this provision is to ensure fair proceedings for all parties and to enable the board to start working on the case on the basis of each party's complete submissions (see, e.g., T 1904/16, Reasons 15).

6. Therefore, it is neither for the board nor for the other party to collect the details of a party's case from submissions made before the opposition division, in order to determine which of the arguments raised in opposition may still have merit in light of the contested decision and the findings thereof. Instead, it is for the appellant itself to present its whole case clearly and concisely, and to expressly specify all the facts, arguments and evidence relied on (see Article 12(3) RPBA). Sweeping references to submissions made in opposition proceedings, especially if not put in the context of the decision under appeal, cannot be a substitute for appropriate substantiation in the appeal proceedings (see Case Law of the Boards of Appeal, 10th edition, 2022, V.A. 4.3.5.(b)).

7. The above is imperative, and all the more so in the present case, since the opposition division had considered inventive step of claims 8 and 9 of the patent as granted (claims 1 and 2 of present main request) separately and independently from inventive

step of claim 1 of the patent as granted and had found that the subject-matter of claims 8 and 9 of the patent as granted involved an inventive step (see point 2. above; see points 27, 27.1 and 27.2 of the decision under appeal). If the appellant had indeed intended to object to this finding of the opposition division, which was favourable to the then patent proprietor, it would have been its duty to present its complete case in compliance with Article 12(3) RPBA.

8. Hence, to the extent that the appellant intended to rely on unspecified objections raised during the opposition proceedings against one (or more) of the then auxiliary requests, including auxiliary request 5, which is now the main request, these objections were unsubstantiated and do not form part of the appeal proceedings.
9. Consequently, no substantiated objections were raised in the statement of grounds of appeal against the claims of the current main request. Moreover, no specific objections were raised following the reply to the statement of grounds of appeal, namely when the set of claims of the current main request was re-submitted by the respondent.

*Consideration of objections raised against the main request
(Article 13(2) RPBA)*

10. During the oral proceedings before the board, the appellant asserted that claims 1 and 2 of the current main request lacked an inventive step. Indeed - according to the appellant - products arbitrarily obtained from a non-inventive method were necessarily also obvious themselves. As the method of claim 1 of the patent as granted did not involve an inventive

step, it necessarily followed that product claims 1 and 2 of the main request were not inventive either. The arguments concerning inventive step raised in the statement of grounds of appeal against method claim 1 of the patent as granted must therefore also apply to product claims 1 and 2 of the current main request.

11. This line of argument was not raised, however, prior to the oral proceedings before the board and is hence an amendment to the appellant's appeal case. Its admittance is subject to the provisions set out in Article 13(2) RPBA, according to which any amendment to a party's appeal case made after notification of a communication under Article 15(1) RPBA is not to be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.
12. The appellant has not pointed to any exceptional circumstances that could show why this line of argument was not already presented in the statement of grounds of appeal in the context of product claims 8 and 9 of the patent as granted.
13. Moreover, claims 8 and 9 of the patent as granted concern specific bacterial strains and not - as asserted by the appellant - products obtained by the method of claim 1 of the patent as granted. In view of this, the board cannot accept that there were any exceptional circumstances that could justify why the appellant did not address inventive step of these claims prior to the oral proceedings before the board.
14. The board therefore decided to exercise its discretion not to consider the objections against claims 1 and 2 of the main request raised during the oral proceedings

before the board in the appeal proceedings under Article 13(2) RPBA.

15. In the absence of any objections raised by the appellant against any of the claims of the main request, the board concludes that the claims of the main request meet the requirements of the EPC.

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 with the order to maintain the patent on the basis of claims 1 to 4 of the main request, which was filed as auxiliary request 5 with the reply to the statement of grounds of appeal, and the description and drawings of the specification to be adapted, as necessary.

The Registrar:

The Chair:



L. Malécot-Grob

T. Sommerfeld

Decision electronically authenticated