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Datasheet for the decision of 6 February 2025

Case Number: T 0593/23 - 3.3.09

Application Number: 18205570.7

Publication Number: 3482639

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Language of the proceedings: EN

Title of invention:
PALATABILITY ENHANCERS FOR FOODS DESIGNED FOR DOGS AND CATS WITH RENAL INSUFFICIENCY

Patent Proprietor:
Hill's Pet Nutrition, Inc.

Opponent:
Société des Produits Nestlé S.A.

Headword:
Palatability Enhancers/HILL

Relevant legal provisions:
EPC Art. 54(2), 56, 76, 83, 123(2)

Keyword:
Auxiliary request 1: added subject-matter - (no); sufficiency, clarity, novelty, inventive step - (yes)

Decisions cited:
G 0002/21, T 0019/90, T 0009/93, T 0518/07, T 2228/16

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

Boards of Appeal

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Case Number: T 0593/23 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 6 February 2025

Appellant: (Patent Proprietor)	Hill's Pet Nutrition, Inc. 400 Southwest 8th Avenue Topeka, KS 66603 (US)
Representative:	Wichmann, Hendrik Wuesthoff & Wuesthoff Patentanwälte und Rechtsanwalt PartG mbB Schweigerstraße 2 81541 München (DE)
Appellant: (Opponent)	Société des Produits Nestlé S.A. Entre-deux-Villes 1800 Vevey (CH)
Representative:	Rupp, Christian Mitscherlich PartmbB Patent- und Rechtsanwälte Karlstraße 7 80333 München (DE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 3 March 2023 concerning maintenance of the European Patent No. 3482639 in amended form.**

Composition of the Board:

Chairman	A. Haderlein
Members:	A. Veronese
	R. Romandini

Summary of Facts and Submissions

I. Appeals were filed by the opponent and the patent proprietor against the opposition division's decision finding that the European patent as amended according to auxiliary request 1 filed by letter dated 20 September 2021 met the requirements of the EPC. The proprietor withdrew its appeal prior to the oral proceedings.

II. With its notice of opposition the opponent requested revocation of the patent in its entirety on the grounds under Article 100(a) (lack of novelty and lack of inventive step) and Article 100(b) and (c) EPC.

III. Claim 1 of the patent as granted reads:

"*1. A pet food composition comprising a palatability enhancing amount of a palatability enhancing composition, for use in ameliorating a symptom in a companion animal that is suffering from renal insufficiency or disease; characterized in that the palatability enhancing composition comprises protein to phosphorus in a ratio of from 5:1 to 15:1, and*
wherein the pet food composition increases consumption of the pet food composition by the companion animal."

IV. Claim 1 of auxiliary request 1, filed during the opposition proceedings, reads:

"*A pet food composition comprising a coating with a palatability enhancing amount of a palatability enhancing composition, for use in ameliorating a*

symptom in a companion animal that is suffering from renal insufficiency or disease; characterized in that the palatability enhancing composition comprises protein to phosphorus in a ratio of from 5:1 to 15:1, and
wherein the pet food composition increases consumption of the pet food composition by the companion animal."

V. The documents submitted during the opposition proceedings included:

D1: S.A. Brown et al., Clinical Techniques in Small Animal Practice, 1998, vol. 13(4), p. 217-223
D2: US 2011/0171318 A1
D5: US 2005/0037108 A1
D7: WO 2012/148769 A1
D9: US 6,254,920 B1
D12: Declaration from Dr Jewell
D13: S.J. Delaney, Vet. Clin. Small Anim., 2006, vol. 36, p. 1243-1249
D14: L. Prola et al., J. Nutr., 2006, vol. 136, p. 1988S-1990S

VI. The opposition division found *inter alia* the following.

- Claim 1 of the patent as granted (main request) complied with the requirements of Articles 76 and 123(2) EPC. The claimed invention was sufficiently disclosed. However, the subject-matter of claim 1 as granted was not novel over D2, D3 and D4.

- Claim 1 of auxiliary request 1 complied with the requirements of Articles 76 and 123(2) EPC. The claimed invention was sufficiently disclosed. The claimed subject-matter was clearly defined, was

novel over D2, D3 and D4 and involved an inventive step over D1, the closest prior art, in combination with D5 or D9.

VII. The arguments raised by the opponent (hereinafter: "appellant") which are relevant for the decision may be summarised as follows.

- The following features in claim 1 of auxiliary request 1, and the combination of them, extended beyond the content of the application and the parent application as filed: the claimed coating; the 5:1 to 15:1 protein to phosphorous ratio; the uses for ameliorating a symptom of renal disease in a companion animal and increasing food consumption in that animal. Claim 7 also contained added subject-matter.

- The reference to a coating in claim 1 was unclear. The patent did not explain what the coating of a food was, how it could be applied and how the protein to phosphorous ratio could be measured. This held true especially if the food was wet.

- The claimed invention was not sufficiently disclosed. The patent did not disclose any coated food or provide guidance for making that food, especially in the case of wet food. The difference in the protein to phosphorous ratio between the tested food according to the invention and the reference food was insignificant. However, the content of other ingredients differed considerably. Thus, there was no evidence that the protein to phosphorous ratio induced an increase in food intake and improved the symptoms of a renal disorder. It was not credible that the purported

effects were achieved over the entire scope claimed either.

- The claimed food lacked novelty over D2. This novelty objection should be admitted, having already been raised in the notice of opposition.

- The food of auxiliary request 1 lacked an inventive step over D1, the closest prior art. The food differed from that of D1 on account of the protein to phosphorous ratio present in the palatability enhancing composition and in that this composition was applied as a coating. Since these differences did not induce any effect, the problem was to provide an alternative palatability enhancing composition. The claimed solution was obvious over D1, either alone or combined with D5, D7 and D9, which disclosed palatability enhancing compositions having the claimed protein to phosphorous ratio in a coating. The claimed composition was also obvious starting from D2.

VIII. The arguments raised by the proprietor (hereinafter: "respondent") which are relevant for the decision can be summarised as follows.

- The subject-matter claimed in auxiliary request 1 was based on claims 1 to 3 and paragraphs [0008], [0014], [0015] and [0024] of the application and the parent application as filed. In particular, paragraph [0014] disclosed the relevant coating.

- The skilled person understood what a coating was and knew how to apply it to a food using standard measures. Thus, the reference to a "coating" was clear.

- The claimed invention was sufficiently disclosed. The tests in the patent and Dr Jewell's declaration D12 showed that a food coating including the claimed palatability enhancer with the claimed protein to phosphorous ratio increased the food preference of cats with renal insufficiency. This also made increased food intake credible.

- The novelty attack based on D2 was not raised during the opposition proceedings and should not be admitted. Furthermore, D2 did not disclose the claimed protein to phosphorous ratio.

- The claimed food involved an inventive step over D1, the closest prior art. D1 did not disclose a coating, the claimed protein to phosphorous ratio or their use in treating symptoms of renal disease. The tests in the patent and in D12 made it credible that a coating with the claimed protein to phosphorous ratio increased palatability and food intake. The problem was to provide an improved food that increased palatability and food consumption in an animal affected by renal disease and did not influence the protein/phosphorous intake. Neither D1 nor the other cited documents, including D5, D7 and D9, provided any pointer towards a coating with the claimed protein to phosphorous ratio for solving this problem. D5, D7 and D9 did not mention animals affected by renal insufficiency.

- During the oral proceedings the respondent requested maintenance of the patent on the basis of auxiliary requests 1 or 2 and clarified that it did not intend to pursue its original main request that

the patent be maintained as granted. It thus effectively withdrew its original main request.

The requests

IX. The appellant (opponent) requested that the decision under appeal be set aside and that the European patent be revoked.

X. The respondent (patent proprietor) requested that the patent be maintained on the basis of auxiliary requests 1 and 2 as filed during the opposition proceedings.

Reasons for the Decision

Auxiliary request 1

1. Since the respondent withdrew its original main request, auxiliary request 1 becomes the first relevant request.

2. *Amendments and compliance with Articles 123(2) and 76(1) EPC*

2.1 The appellant submitted that the following features characterising claim 1 of auxiliary request 1, and the combination of them, were not disclosed in the application for the patent or in the parent application as originally filed, which are hereinafter referred to as the "applications as filed".

- The "coating with" the palatability enhancing composition

The appellant argued that the applications as filed only disclosed a coating in relation to a method of making a pet food, not to the pet food as such, and that the method related only to making "pet food kibbles" or "particles of pieces of extruded, dry or semi-dry cat food". The coating had to be selected from among other methods for incorporating the palatability enhancing composition into the food. Coating was not preferred in those applications. During the oral proceedings the appellant also argued that adding a reference to a coating in claim 1 resulted in a new claim interpretation which extended beyond the teaching of the applications as filed. The coating in amended claim 1 comprised a certain amount of a palatability enhancing composition but could comprise other ingredients in addition to that composition. Conversely, paragraph [0014] of the applications as filed, which was the alleged basis for the coating, disclosed a coating made exclusively of the palatability enhancer.

- The ratio of "from 5:1 to 15:1"

  The appellant noted that the parent application as filed disclosed a ratio of "between 5:1 and 15:1". In its opinion this wording excluded the specific values of 5:1 and 15:1, which were otherwise encompassed by the wording "from 5:1 to 15:1" used in amended claim 1.

- The uses for "ameliorating a symptom in a companion animal suffering from renal insufficiency or disease" and for "increasing consumption of a pet food composition by the companion animal"

According to the appellant, these uses, and the combination of them, had to be selected from among other uses disclosed in paragraph [0008] of the parent application as filed.

2.2 The appellant's arguments are not convincing, for the following reasons.

2.3 Claims 1 to 3 of the parent application and claim 1 of the application as filed define a pet food composition comprising a palatability enhancing composition. Paragraph [0014] of both applications as filed teach that the palatability enhancing composition can be added to the food as a coating. It is readily apparent to the skilled person that this paragraph concerns both the method of making the pet food and a pet food which contains that coating. Whether or not a coating is disclosed as preferred is irrelevant because there is no need to select a coating from among a long list of alternatives to arrive at the claimed subject-matter. Coating is the only alternative to incorporating the enhancer into the mass of pet food. Furthermore, it is evident from the expressions "e.g." and "for example" used in paragraph [0014] that the "pet food kibbles" and the "particles or pieces of extruded, dry or semi-dry cat food" are just examples of foods which can be coated. In other words, it is clear that the teaching of paragraph [0014] relating to a coating is not limited to these examples of foods.

2.4 Furthermore, the skilled person would understand that amended claim 1 does not encompass a food coating comprising additional ingredients in addition to the palatability enhancing composition. In other words, they would understand that the wording "pet food composition comprising a coating with a palatability

enhancing amount of palatability enhancing composition" implies that the palatability enhancing composition is added in the form of a coating, in an amount inducing a palatability enhancement. This is the same teaching provided by paragraph [0014] of the applications as filed, read in the context of the invention defined in the claims of those applications as filed. Thus, the applications as filed provide a basis for adding the wording "coating with" to claim 1.

2.5 Furthermore, although claim 2 of the parent application defines the protein to phosphorous ratio with a range "between 5:1 and 15:1", the skilled person would understand that this wording includes rather than excludes the two end values, i.e. that claim 2 of the application as filed discloses the ratio of 5:1 to 15:1 characterising amended claim 1. See also the following decisions, in which the board arrived at the same conclusions in analogous situations: T 2228/16, point 2.1 of the reasons, T 9/93, point 1, and T 518/07, points 6.1 and 6.2 of the reasons.

2.6 Concerning the use specified in claim 1, it is evident from paragraphs [0008], [0009], [0015] and [0024] of the description of the applications as filed that the originally disclosed invention aims at enhancing the palatability of a pet food and that the purpose of this enhancement is to increase the food consumption of a companion animal suffering from a renal disease. Furthermore, it is evident that the final purpose is to ameliorate a symptom, e.g. loss of appetite, in an animal suffering from that disease. Thus, there is no need to make multiple selections from lists of a certain length to arrive at the claimed invention. Hence, indicating the intended use does not create

subject-matter extending beyond the content of the applications as filed either.

2.7 The appellant argued that claim 7 contained originally undisclosed subject-matter because claim 7 of the parent application as filed referred back to claims 5 and 6, which related only to feline diets. This argument is not convincing either because the subject-matter of claim 7 is disclosed in paragraphs [0019] and [0020] and in the other claims of the applications as filed, which also discloses relevant pet foods without a limitation to cats or dogs.

2.8 *Clarity*

2.9 The appellant argued that adding the word "coating" to claim 1 as granted rendered the claimed subject-matter unclear. The patent did not provide a definition for this coating or indicate what the coating was, how it could be applied and whether it had to cover the entire surface of the pet food or only part of it. Furthermore, following the addition to claim 1 of a reference to a coating, the 5:1 to 15:1 ratio had to be calculated on a different basis compared with the claims as granted. This created a new clarity issue.

2.10 These arguments are not persuasive. A coating is a layer of a particular substance which covers the surface of a material. As stated by the respondent, coating technologies and analytical techniques for determining the amounts of the relevant materials were available a long time before the filing date. Within the framework of the claimed invention, the skilled person would therefore not need any further definition to understand what the claimed coating was and how it could be analysed. Claim 1 might encompass foods whose

surface is not entirely coated. However, the fact that claim 1 is broad and encompasses these foods does not render its scope unclear. Furthermore, the basis for calculating the 5:1 to 15:1 ratio, namely the palatability enhancing composition which is present in the food, remains the same whether or not the palatability enhancing composition is included in the food in the form of a coating.

2.11 The appellant argued that the ingredients applied with a coating could migrate from the coating into the underlying food structure, preventing an accurate characterisation of the coating applied to a food. This rendered the scope of claim 1 unclear.

2.12 This argument is not convincing either. The appellant presented only a vague and tenuous allegation that the coating ingredients, and in particular proteins and phosphorous, would migrate into the underlying food mass. There is no concrete evidence that this migration would actually occur, let alone to such an extent that the determination of the protein to phosphorus ratio specified in claim 1 would become so uncertain as to render it impossible to determine the claimed scope.

2.13 Furthermore, the appellant's arguments appear primarily to be disguised objections of a lack of sufficiency of disclosure, which had not been substantiated prior to the oral proceedings. For these reasons, claim 1 does not lack clarity.

3. *Sufficiency of disclosure*

3.1 The appellant argued that contrary to what was decided in the decision under appeal, the claimed invention was not sufficiently disclosed. The appellant set out

various objections, which are dealt with in the following.

- First, the appellant argued that the patent did not disclose any working example of the claimed coated food. There was no evidence that the pet food exemplified in the patent was coated. The paragraphs describing this example did not mention any coating. Applying a coating to a pet food and obtaining the claimed protein to phosphorous ratio in that coating required an undue burden, in particular if the food was wet.

  These arguments are not persuasive. The appellant alleged, albeit without providing any evidence, that the skilled person would not be able to overcome the difficulties allegedly occurring when coating a food, especially if it was wet. As already mentioned above when discussing clarity, coating technologies and analytical techniques for determining e.g. the quantity of proteins and phosphorous in a material were available a long time before the filing date. There is no evidence that the skilled person would be unable to coat a food with a composition comprising proteins and phosphorous using commonly used coating methods. Moreover, it is credible that if the skilled person knows the quantity of phosphorous and proteins used to prepare a coating, they will know the ratio in which these ingredients are present in the final coating.

- The appellant also submitted that the patent did not make it credible that the claimed effect was achieved across the entire scope claimed. In its opinion, the patent actually provided evidence that

this effect was not achieved. Paragraph [0032] of the patent taught that the difference in phosphorous content between the pet food of the invention and the comparative food used for the tests described in the patent was only 0.03%. This small difference could not induce the purported effect, especially since the tested compositions differed in terms of the quantity of other ingredients. Moreover, the content of protein and phosphorous in both the food according to the invention and in the reference food was within the ranges given in claim 7. Hence, the reference food fell within the scope of claim 7 but did not induce the relevant effect. There was also no evidence that the composition allegedly according to the invention used for the tests was coated with a palatability enhancing composition.

These objections are not persuasive. The appellant calculated the 0.03% difference in phosphorous content on the basis of values given in paragraph [0032]. However, these values relate to amounts of phosphorous included in the entire mass of the tested foods, not in the "palatability enhancing composition" present in those foods. Comparing the values in the table in paragraph [0031] and those in paragraph [0032], as well as the results of the tests, it is evident that the "palatability enhancing composition" according to the invention was incorporated into the mass of the tested pet food but remained physically separate from it. This is the only sensible way to interpret the examples and the results observed in the tests. In fact, the protein to phosphorous ratios in the palatability enhancing composition according to the invention and in the reference composition, calculated from

the table in paragraph [0031], differ significantly: around 8.8:1 (within the claimed range) and around 4:1 (outside the claimed range), respectively. These ratios differ substantially from those contained in the total amount of the tested pet foods as shown in paragraph [0032] – these foods contain, globally, the same amount of protein (28 wt%) and a similar amount of phosphorous (0.48 wt% vs 0.51 wt%, i.e. a difference of only 0.03%). This shows that the palatability enhancer was physically separate from the rest of the food mass. It also makes it credible that the observed effects are induced by the different composition of the palatability enhancer included in the tested pet food.

The appellant noted that example 1 of the patent does not indicate whether the tested pet food was coated with a palatability enhancer. However, example 1 makes it credible that a palatability enhancing composition having the claimed protein to phosphorous ratio which is incorporated into but remains physically separate from the food mass increases the preference for that food in cats affected by renal disease (hereinafter: "renal cats"). It is reasonable to expect that this effect will be maximised if the palatability enhancing composition is applied as a coating, where it can be readily sniffed and tasted by those animals. This means that although example 1 does not mention whether the tested food was coated with the palatability enhancing composition, it does provide proof rendering it credible that the claimed effect can be obtained using the claimed food.

Concerning the appellant's reference to claim 7, it is noted that this claim defines the total amounts of ingredients included in the pet food, not in the palatability enhancing composition. Furthermore, claim 7 depends on claim 1, which defines the amounts of ingredients in the palatability enhancing composition included in that food. Accordingly, the mere fact that the total amounts of ingredients present in the tested foods fall within the ranges given in claim 7 does not mean that both foods fall under the scope of claim 1.

Furthermore, the appellant noted that the tested palatability enhancing compositions differed not only on account of the protein to phosphorous ratio but also the content of moisture, fibres, ash and fat. D13 (page 1245) showed that moisture affected the palatability of a food, while D14 (conclusions on page 1990S) showed that fibres induced gastric filling, limiting food intake. It was the different amounts of these ingredients rather than the claimed protein to phosphorous ratio that likely influenced the palatability and preference for the tested foods. What is more, the amounts of the ingredients in the composition according to the invention did not add up to 100%. This was probably due to the fact that other ingredients, probably carbohydrates, had not been listed. These were further reasons why it was not credible that the claimed protein to phosphorous ratio induced the alleged preference for the tested food.

These arguments are not convincing either. As countered by the respondent during the oral proceedings, the different amounts of these ingredients in the palatability enhancing

composition cannot be reasonably expected to affect the palatability of the tested foods. These different amounts are only present in the coating of the food, not in the food itself. As far as the moisture content is concerned, the cited passage on page 1245 of D13 describes the effect of switching from a dry food (containing around 10% moisture) to a canned or pouched food (containing around 75% moisture) in dogs and cats. These foods are very different; in particular, they have a totally different texture, consistency and appearance. These properties obviously have a major impact on the palatability of the food. Conversely, the tested foods differ only on account of the amount of moisture in the coating. This difference cannot be expected to induce any significant difference in the consistency and texture of the food and thus induce the change in palatability mentioned in the aforementioned passage of D13. Analogous considerations apply to the content of fibres. The passage of D14 mentioned by the appellant concerns the effect of changing the quantity of fibres present in the entire mass of an animal food. D14 concludes that fibres increase gastric filling and limit the food intake. However, a difference in the quantity of fibres in the coating alone cannot result in a significant difference in the quantity of ingested fibres. Hence, it cannot be reasonably expected to significantly affect gastric filling and thus induce the change in food intake mentioned in D14.

There is no further evidence that the amount of ash can affect palatability, since ash is not volatilised. Conversely, the higher amount of fat in the reference food used for the tests renders

the results even more surprising, because the presence of fat in a coating on the surface of the food would be expected to result in a stronger taste and palatability. This idea is supported by the teaching of D13 (pages 1245 and 1246).
The appellant noted that the amounts of the ingredients in the composition according to the invention did not add up to 100%, arguing that some ingredients, probably carbohydrates, had been omitted from the list. However, as noted by the respondent, even if it were accepted that the tested compositions contained some carbohydrates, this would not change the significance of the results because carbohydrates are not preferred by cats.

- Lastly, the appellant submitted that the patent did not provide evidence that any of the symptoms observed in pets affected by renal insufficiency could be ameliorated by the claimed food. What is more, a preference for the pet food according to the invention did not necessarily translate into an increased consumption of that food, let alone in companion animals other than cats and dogs.

These arguments are not convincing either. The tests in the patent show that a food comprising a palatability enhancing composition having the claimed protein to phosphorous ratio is preferred by renal cats, compared with a reference food not containing that composition. As explained in the background section of the patent, renal animals suffer from inappetence and avoid food. Paragraph [0002] reads: "Because a universal constant of renal disease is inappetence, there is a significant need for foods which are tasty and

preferred by animals, for example cats and dogs, with renal disease." D1, a review article focusing on nutritional intervention for renal animals, which reflects the common general knowledge at the filing date, confirms that companion animals affected by renal disease suffer from inappetence. It mentions increasing food palatability as a strategy to promote energy intake and prevent catabolic processes and malnutrition; see D1, abstract and page 220, section "Energy Intake". This makes it credible that renal animals will ingest a larger amount of the food containing the claimed palatability enhancer, which is preferred, rather than a food which does not contain it. Thus, it is credible that the claimed food can ameliorate at least "a symptom" in a companion renal animal, namely inappetence, and possibly other symptoms induced by malnutrition which result from inappetence in those animals. It is also noted that claim 1 does not require the food to ameliorate all symptoms affecting renal animals.

Lastly, the appellant has not substantiated the allegation that the observed effect cannot be obtained in companion animals other than cats and dogs. As in case T 19/90, the appellant has not presented any verifiable facts which could cast serious doubt on whether a skilled person could carry out the invention as claimed; see T 19/90, point 3 of the reasons.

3.2 For these reasons, the board concludes that the application for the opposed patent provides sufficient information for preparing the claimed food and also proof rendering it credible that said food is suitable

to induce the claimed therapeutic effect, as required by G 2/21.

4. *Novelty*

4.1 *Admission of the objection of lack of novelty over D2*

4.2 The appellant argued that claim 1 of auxiliary request 1 lacked novelty over D2. The respondent noted that this was a new attack and requested that it not be admitted into the appeal proceedings.

4.3 The board concurs with the respondent that this attack should not be admitted. Auxiliary request 1 was filed at the earliest possible stage of the opposition proceedings, namely with the reply to the notice of opposition. In that reply the respondent explained why the subject-matter claimed in this request was novel over the documents which, in the notice of opposition, had been considered prejudicial for the novelty of the claims as granted.

4.4 The appellant did not dispute the arguments presented in the respondent's reply. The opposition division, in its preliminary opinion issued in preparation for the oral proceedings, considered that the subject-matter claimed in auxiliary request 1 was novel over the previously cited documents, including D2. Furthermore, it noted that the appellant had not raised any novelty objection against this request; see point 2.4. The appellant did not raise any novelty objections either in its further letter filed in reply to that preliminary opinion or during the opposition proceedings; see point 3.5 of the decision and paragraph 3.1 of the minutes of the oral proceedings.

These show that the appellant explicitly stated that it had no novelty objections against auxiliary request 1.

4.5 On appeal, in its letter of 20 March 2024, the appellant argued that the new novelty attack had to be admitted because it "*ha*[d] *already been raised in the grounds of appeal and ha*[d] *been filed in direct response to the reasoned decision from the Opposition Division considering auxiliary request 1 inventive based on the distinguishing feature 'coating with a' in contrast to their correct indication with regard to sufficiency*". Furthermore, it argued that this attack was *prima facie* highly relevant.

4.6 The board does not agree. It is irrelevant that the new attack was raised with the statement setting out the grounds of appeal and as a reaction to reasons set out in the part of the decision under appeal discussing inventive step. The decisive factor is that auxiliary request 1 was filed at a very early stage of the opposition proceedings, yet during those proceedings the appellant decided and explicitly declared that it was not disputing the novelty of that request. It is evident from the facts described above that the new novelty objection could and should have been raised during those proceedings. For this reason, the board does not intend to admit this objection into the appeal proceedings (Article 12(4) and (6) RPBA).

4.7 *Inventive step*

The closest prior art

4.8 The parties did not dispute the opposition division's finding that D1 was the closest prior art. D1 is a review article focusing on interventional nutrition for

animals affected by renal disease. It describes extensively the disease and the benefits of appropriate nutritional intervention in affected pets. D1 teaches that a constant problem of renal disease is inappetence and that the affected animals find modified diets unpalatable. For this reason, these animals ingest less than the required daily energy. As a consequence, body proteins are catabolised, resulting in loss of lean body mass, lethargy and other dysfunctions. To avoid food aversion, the authors propose, *inter alia*, improving the appeal of the food and adding certain palatability enhancing substances; see the abstract and the section "Interventional Nutrition" on page 220.

4.9 This means that D1 provides a thorough analysis of the nutritional dysfunctions occurring in animals affected by renal disease and of the possible therapeutic nutritional interventions. As such, D1 is considered to reflect the common general knowledge in the relevant field before the filing date. Since the described nutritional interventions are intended essentially for the same purpose as the invention on which the opposed patent is based, the board sees no reason to deviate from the opposition division's choice of D1 as the closest prior art.

4.10 In its letter dated 20 March 2024 the appellant set out a new inventive-step attack starting from D2 as the closest prior art. This new attack is not admitted into the appeal proceedings. Analogously to what has already been explained when dealing with the new novelty attack based on D2, the new inventive-step attack based on this document could and should have been presented during the opposition proceedings. Moreover, D2 does not focus on problems arising from a decrease in appetite or on increasing food intake by enhancing the

palatability of a pet food. Thus, D2 is not the closest prior art.

Distinguishing features

4.11 The opposition division found that the claimed subject-matter differed from the teaching of D1 in that:

- the palatability enhancing composition has a protein to phosphorous ratio of from 5:1 to 15:1

- the palatability enhancing composition is included in the pet food in the form of a coating

4.12 This finding was not disputed by the parties.

Technical effects

4.13 The appellant argued that there was no evidence that the distinguishing features were associated with a technical effect, essentially reiterating the arguments presented when discussing sufficiency of disclosure. It submitted in particular the following.

- There was no evidence that the tests in the patent were conducted using a coated food.
- Preference for a food did not necessarily result in an increase of its intake and amelioration of symptoms of renal disease.
- The tested compositions contained very similar amounts of phosphorous and differed on account of the amounts of other ingredients.
- The reference composition fell within the scope of claim 7 and did not work.
- The effects were only measured in cats and did not necessarily occur in other pets.

4.14 These arguments are not persuasive. Firstly, these arguments essentially challenge the therapeutic effect and, as such, concern sufficiency of disclosure.

4.15 Furthermore, as already mentioned above when discussing sufficiency, the results of the experiments described in the patent provide credible evidence that renal animals have a significant preference for food according to the invention, coated with a palatability enhancing composition having the claimed protein to phosphorous ratio, compared with one including a palatability enhancing composition having a protein to phosphorous ratio outside the claimed range. Furthermore, as noted by the respondent during the oral proceedings before the board, the results show that, remarkably, only renal animals prefer the claimed food. Animals that are not affected by a renal disorder do not have that preference.

4.16 The board considers that the preference of renal animals for the claimed food also makes it credible that these animals will ingest an increased amount of this food. This is confirmed by the results obtained in the experiments described in D12 – the declaration from Dr Jewell. The results show that the palatability enhancing composition of the invention, having the claimed protein to phosphorous ratio, increases food consumption by renal cats compared with a palatability enhancing composition having a protein to phosphorous ratio outside the claimed range.

4.17 In point 5 of his declaration, Dr Jewell, who supervised the tests described in the patent, also confirms that the tested food according to the invention was coated. The last sentence of point 5

reads: "*The final foods were prepared by coating the palatability enhancers onto the basic food as described in [0021] of the Patent. Accordingly, the palatability enhancers were on the outer surface of the foods and were able to provide for a palatability enhancing effect.*"

4.18 D1 mentions the possibility of including known palatability enhancing substances, e.g. turkey fat or anchovy oil in pet food, to avoid food aversion in renal pets. However, D1 does not mention the relevance of selecting a certain protein to phosphorous ratio to increase palatability, or that the known palatability enhancing substances had this ratio.

4.19 Moreover, D1 does not mention any substance capable of selectively enhancing palatability in renal pets in the same way as the claimed palatability enhancing composition does.

4.20 Although no comparisons were made with foods comprising turkey fat or anchovy oil mentioned in D1, on the basis of the available results the aforementioned effects can be reasonably expected to also occur with foods comprising these ingredients if the claimed protein to phosphorous ratio is selected. This is especially true because there is no evidence that the aforementioned known substances had this ratio and also because the reference food used in the tests in the patent comprised a known standard palatability enhancing composition.

4.21 Lastly, it is also credible that, as noted by the respondent during the oral proceedings, the claimed food selectively increases the palatability for renal animals. As set out in paragraph [0033] of the patent,

normal healthy animals do not show a preference for food including a palatability enhancing composition with the claimed protein to phosphorous ratio.

Underlying technical problem

4.22 Taking into account the technical effects mentioned above, the underlying problem can be formulated as providing an improved pet food composition for use in a method for selectively increasing the palatability and the intake of food in companion animals affected by renal insufficiency or disease, thereby treating a symptom of renal insufficiency or disease in these animals.

Non-obviousness of the claimed solution

4.23 D1 discusses possible strategies for providing adequate energy intake in renal animals. Among several other options, including warming the food, providing frequent small amounts of food, switching between different food formulations and administering appetite enhancing substances such as anabolic steroids, D1 mentions the possibility of including palatability enhancing substances such as turkey fat or anchovy oil in food. However, its authors do not provide definitive conclusions on the efficacy of these strategies since they refer to them as "measures which may be of utility in enhancing food uptake".

4.24 Moreover, D1 does not mention the relevance of selecting a certain protein to phosphorous ratio to increase palatability, or that any known palatability enhancing compositions have this ratio or can be specifically tailored for renal animals. The possibility of applying a palatability enhancing

composition in the form of a coating is not mentioned either. For these reasons, D1 alone does not provide a pointer towards the claimed solution.

4.25 The appellant argued that, starting from D1 and faced with the underlying problem, the skilled person would have referred to D5, D7 and D9 and been prompted to provide a pet food comprising a coated food as defined in claim 1.

4.26 The board does not agree.

4.27 D5 relates to methods for improving the palatability and intake of dry animal foods by adding tetrapotassium pyrophosphate. The appellant pointed to compositions described in Tables 3 and 4 and calculated that some of the disclosed compositions had the claimed protein to phosphorous ratio.

4.28 However, the focus of D5 is to improve the palatability of dry foods, which are more easily and economically produced and commercialised than canned foods but less palatable. D5 is focused on the commercial advantages of normal foods intended for healthy animals rather than on increasing the intake of food in unhealthy animals. In particular, D5 does not even mention the problem of improving the palatability of a food in animals affected by a renal disease.

4.29 As shown in D1, animals affected by renal disease suffer from a pathological inappetence and aversion to food. The difficulty of increasing the intake of foods in these animals is evidenced by the aforementioned cautious wording used by the authors when describing different strategies for nourishing these animals. This

means that renal animals cannot be expected to react to food like healthy animals.

4.30 As already discussed above, the tests in the patent make it credible that a food coated with the claimed palatability enhancing composition increases palatability and food intake compared with a food including a standard palatability enhancer. Furthermore, it is also credible that this effect only occurs in animals affected by renal insufficiency, not in healthy animals.

4.31 These effects could not be expected from either D1 or D5. Consequently, even if some compositions described in D5 may have the claimed protein to phosphorous ratio, the skilled person would not have considered using them to solve the underlying problem.

4.32 Like D5, both D7 and D9 also describe methods for improving the palatability and intake of dry animal foods by adding a pyrophosphate salt. However, the teaching of these documents does not go beyond that of D5. Like D5, these documents do not even mention the problem of providing a food composition specifically tailored to providing nutrition to renal animals. Therefore, the same conclusions apply.

4.33 For these reasons, the claimed subject-matter involves an inventive step over the cited prior-art documents.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

K. Götz-Wein A. Haderlein

Decision electronically authenticated