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**Datasheet for the decision
of 10 October 2018**

Case Number: R 0004/18

Appeal Number: T 1712/15 - 3.3.09

Application Number: 09735962.4

Publication Number: 2278885

IPC: A23D7/00

Language of the proceedings: EN

Title of invention:
Lipid-containing compositions and methods of use thereof

Applicant:
Asha Nutrition Science, Inc

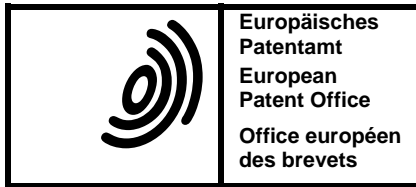
Headword:
Decision, existence of

Relevant legal provisions:
EPC Art. 106, 112a

Keyword:
Petition for review - inadmissible;
No decision by Board of Appeal

Decisions cited:
G 0008/91, J 0008/81, T 0934/91, T 0838/92, T 0212/97,
T 0231/99, T 0713/02

Catchword:
-



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Case Number: R 0004/18

D E C I S I O N
of the Enlarged Board of Appeal
of 10 October 2018

Petitioner:
(Applicant)

Asha Nutrition Sciences, Inc
PO Box 1000
Palo Alto
California 94302 - USA

Representative:

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Issue under review:

**Proceedings in T 1712/15 before the Technical
Board of Appeal 3.3.09 of the European Patent
Office.**

Composition of the Board:

Chairman: C. Josefsson
Members: D. Rogers
M. Harrison

Summary of Facts and Submissions

- I. The petition for review concerns appeal proceedings T 1712/15 of the Board of Appeal 3.3.09. The appeal was against a decision of the Examining Division.
- II. Oral proceedings were held before the Board of Appeal on 27 July 2017. At the end of the oral proceedings the appellant's representative (hereafter "Representative 1") withdrew the appeal. The CEO of the appellant also attended these oral proceedings. The appellant will, where appropriate, also be referred to as the "Petitioner" in this decision.
- III. Under cover of a letter dated 3 August 2017 a copy of the minutes of the oral proceedings before the Board was sent to Representative 1.
- IV. Under cover of a letter (Form 3324) dated 8 August 2017 Representative 1 was informed that the Board had closed the proceedings without a substantive decision due to the withdrawal of the appeal during the oral proceedings.
- V. On 7 November 2017 the appellant authorised a new representative (hereafter "Representative 2").
- VI. Under cover of a letter dated 20 December 2017 Representative 2 requested a correction of the minutes of the oral proceedings before the Board.
- VII. In a communication dated 17 January 2018 the Board informed Representative 2 that it saw no reason to correct the minutes.

VIII. On 26 March 2018 Representative 2 filed a petition for review under Article 112a EPC.

IX. In the petition for review the Petitioner submitted that:

"...a review of the "conclusions" imposed in the communication dated 17 January 2018 by the Technical Board of Appeal 3.3.09, and of fundamental procedural defects in the appeal proceedings in case T 1712/15 - 3.3.09 is requested due to which the Petitioner is adversely affected in that EP 09735962.4 (EP 2278885) was refused, additionally, the erroneously imposed "conclusions" are adversely affecting Petitioner's divisional application EP 17182663.9, in which the Examiner holds the Petitioner to "conclusions" derived by the Board".

X. The Petitioner bases its petition on Article 112a(2), (c), (d) and (e) EPC, that is:

"(c) a fundamental violation of Article 113 occurred in that the Petitioner's right to be heard was violated;

(d) a fundamental procedural defect defined in the Implementing Regulations Rule 142 and Article 133(2) EPC occurred in the oral proceedings held on 27 July 2017 in that the Petitioner was unrepresented; and

(e) a criminal act established under the conditions laid down in the Implementing Regulations had an impact on the oral proceedings and the "conclusions" imposed by the Board, in that their (sic) was a collusion between the Board and [Representative 1],

Petitioner's then authorized representative, at the oral proceedings held on 27 July 2017, to undermine the Petitioner".

- XI. The request to amend the minutes of the oral proceedings before the Board, and the Board's refusal to amend are an important part of the Petitioner's case. One of the amendments that the Petitioner sought to have made to the minutes was to change the word "conclusion" to "preliminary view". This is best illustrated by an example (emphasis added by Enlarged Board). The Board wrote in the minutes, bottom of page 2:

"After the oral proceedings were resumed at 10:10, the Chairman gave the Board's conclusion that claim 1 did not meet the requirements of Article 123(2)EPC".

The Petitioner sought to have this changed to:

"After the oral proceedings were resumed at 10:10, the Chairman said that the Board's preliminary view was that claim 1 did not meet the requirements of Article 123(2)EPC".

- XII. The Petitioner argues that its recollection that the Board expressed a "preliminary view" and not a "conclusion" is correct. The consequence of the Board's minutes expressing a "conclusion" is that the minutes are to be considered as being a decision.

- XIII. The Enlarged Board issued a communication setting out its preliminary opinion on the case.

XIV. The Petitioner filed its reply to this communication within the time limit provided for doing so.

XV. In this reply the Petitioner expanded upon the arguments in the petition. In particular the Petitioner argued that the Examining Division dealing with application No. 17182663.9 (a divisional application of the application in suit in T 1712/15, the appeal underlying this petition, hereafter "the Divisional application") treated the minutes in T 1712/15 as being a decision. According to the Petitioner this was evidenced by page 2, paragraph 2 of "Form 1507" (the Enlarged Board notes that this is in fact Form 1703) of 14 March 2018, where the Examining Division stated:

"In the present case, the earlier (Parent) application has been refused for deficiencies under Article 123(2) EPC."

XVI. In its reply the Petitioner further argues that the minutes are to be considered as a decision due to their procedural context. Further, the Petitioner argued that it was unrepresented at the oral proceedings before the Board of Appeal and that the Board itself induced the withdrawal of the appeal. Once the appeal was withdrawn, the Board switched to a "conclusion". Hence the minutes:

"...irreversibly determined the matter at stake concluding the proceedings in refusal of the subject application and adversely affecting the applicant's divisional application." - (point 9.B, page 12 of 22, Petitioner's Reply)

XVII. On the issue of inducing the withdrawal of the appeal, the Petitioner's CEO gave her own recollection of this part of the oral proceedings before the Board of Appeal as follows [the anonymization is by the Enlarged Board]:

"Accurate statements made near the end of oral proceedings are as follows.

(1) After Mr. S announced that AR23 would not be admitted into proceedings, Mr. A asked if the Board would not allow the Applicant to withdraw the appeal at that point?

(2) Mr. S said, "I have only given the Board's preliminary views, not conclusions. Therefore, the Applicant can withdraw the appeal."

(3) Mr. A then said, "Applicant withdraws the appeal."

(4) Subsequently, Mr. S said, "I will now give Board's conclusion that claim 1 of main request and auxiliary requests 1 to 22 do not comply with Article 123(2) EPC."

Reasons for the Decision

Preliminary Issues

1. As preliminary issues the Enlarged Board will deal with the following matters: non-representation of the Petitioner at the oral proceedings; negative impact of Board of Appeal minutes on the Divisional application; the Board of Appeal inducing the withdrawal of the appeal; and collusion between Representative 1 and the Board of Appeal.

Non-representation of the Petitioner before the Board of Appeal

2. This preliminary issue concerns the Petitioner's assertion that it was not represented at the oral proceedings before the Board of Appeal. The Petitioner's CEO was present at the oral proceedings before the Board, as was its duly appointed professional representative, Representative 1. There is no evidence to suggest that the mandate of Representative 1 was ever terminated by the Petitioner during the course of those proceedings. Quite to the contrary, all the evidence available shows that Representative 1 continued with its mandate to represent the Petitioner throughout the oral proceedings. The minutes with corrections proposed by the Petitioner indeed confirm this. It was not until three months after these oral proceedings that Representative 1 was replaced by Representative 2. The Enlarged Board thus finds that the Petitioner was represented at the oral proceedings before the Board of Appeal.

Examination of Divisional application negatively influenced by Minutes issued by Board of Appeal

3. Turning now to whether the Examining Division dealing with the Divisional application considered the minutes in case T 1712/15 as being a decision: the wording in Form 1703 does not support this. It is quite evident that the Examining Division was referring to the decision of the Examining Division that led to case T 1712/15, not to any decision of the Board of Appeal. The Form 1703 in question deals with added matter

issues (i.e. issues under Article 76(1) and 123(2) EPC). The decision of the Examining Division that led to case T 1712/15 found that the subject-matter of the claims according to the Main Request and Auxiliary Requests 1 to 8 did not fulfil the requirement of Article 123(2) EPC, Auxiliary Requests 9 and 10 containing claims with subject-matter which was found not to be novel. The set of claims in the single request discussed in Form 1703 concerns the claims of the application as filed. The Examining Division's aim in Form 1703 was to suggest possible acceptable claims upon the basis of the application as filed and to avoid those issues that arose with the requests containing amended claims in the parent application. Thus an adverse effect (if any) on the Divisional application comes from the decision of the Examining Division to reject the Petitioner's European Patent application No. 09735962.4.

Did the Board of Appeal induce the withdrawal of the appeal?

4. As regards the suggestion that the Board of Appeal induced the withdrawal of the appeal, the evidence of the Petitioner itself shows that the Chairman of the Board simply informed Representative 1 of the procedural situation in response to a direct question on whether it was still possible to withdraw the appeal. The Enlarged Board notes that paragraph (4) of the Petitioner's CEO's recollections (see point XVII) corresponds neither to the minutes of the oral proceedings, nor to the amendments to these minutes that the Petitioner requested.

Collusion between Representative 1 and the Board of Appeal

5. The Enlarged Board can find no evidence of collusion between Representative 1 and the Board of Appeal. As evidence of collusion the Petitioner has merely put forward its CEO's criticism of Representative 1's professional performance.

Are the minutes a decision?

6. Article 112a(1) EPC provides that any party to appeal proceedings adversely affected by the decision of the Board of Appeal may file a petition for review of the decision by the Enlarged Board of Appeal.
7. Thus a prerequisite for a petition for review is the existence of a Board of Appeal decision. The Enlarged Board finds that "decision" in Articles 106 and 107 EPC has the same meaning as "decision" in Article 112a EPC.
8. According to the case law of the Boards, whether a document constitutes a decision depends upon the substance of its contents rather than its form (see e.g. J 0008/81, OJ 1982, 10, point 3).
9. The criterion of substance has to be assessed in the procedural context (see T 0713/02, OJ 2006, 267, point 2.1.4). In the present case the procedural context is that of an appeal proceedings that were ended by the withdrawal of the appeal by the sole appellant.
10. Another feature of a decision is that it involves a reasoned choice between legally viable alternatives

(see T 0934/91, OJ 1994, 184, point 5). This is not the case for minutes of oral proceedings, and any correction thereof, the purpose of which is to reflect the course of the oral proceedings (see T 0231/99, points 1.1 and 1.2).

11. The consistent case law of the Boards of Appeal has been that the minutes of oral proceedings, and the correction thereof, are not decisions in the sense of Article 106 EPC (see T 0838/92, point 3; T 0212/97, point 2.2; T 0231/99, points 1.1 and 1.2; CLBA 8th edition 2016, IV.E.2.2.2(b)(viii)). That, in all these cases, a separate formal decision was issued does nothing to alter the conclusion that minutes are not considered to be a decision. The Enlarged Board also notes that in the present case, T 1712/15, the minutes did not terminate the proceedings (see point 7, page 10 of 22 of the Petitioner's Reply): the proceedings were terminated by the appellant's withdrawal of its appeal.
12. The key argument of the Petitioner is that the use of the word "conclusion" in the minutes makes the minutes into a decision on the issues upon which a conclusion had been made. Thus in the present case, if the Petitioner's view were followed, the Board of Appeal made a decision that claim 1 of the Main Request and Auxiliary Requests 1 to 22 did not meet the requirement of Article 123(2) EPC. The Enlarged Board does not see how the use of "conclusion" instead of "preliminary view", in the context of the minutes of an oral proceeding can transform these minutes into a decision. The Enlarged Board notes that the common practice of the Boards is to express views or conclusions on the substantive issues before them during the course of the

oral proceedings. A decision on the case is then made at the end of the oral proceedings. As regards procedural issues, such as admittance of documents and claim requests, the Board necessarily makes decisions on such issues during the course of the oral proceedings. An example of such a decision (the word "decision" is used) is found on page 4 of the minutes. It concerns the decision not to admit Auxiliary Request 23. Other than this decision on the admissibility of a request containing a new claim 1, the minutes do not show that any other decision was made. In this case the appeal proceedings were terminated by the withdrawal of the appeal. This ended the suspensive effect of the appeal and the decision of the Examining Division became final (see G 0008/91, OJ EPO 1993, 346).

13. The Enlarged Board hence finds that there is no decision of the Board of Appeal in this case. The petition is thus inadmissible and the question of allowability does not arise.

Order

For these reasons it is unanimously decided that:

The petition for review is rejected as clearly inadmissible.

The Registrar:

The Chairman:

C. Eickhoff

C. Josefsson