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**Datasheet for the decision
of 24 July 2007**

Case Number: T 0929/05 - 3.3.09

Application Number: 95302061.7

Publication Number: 0674842

IPC: A23K 1/14

Language of the proceedings: EN

Title of invention:

Pet food product containing fermentable fibres

Patentee:

THE IAMS COMPANY

Opponent:

NESTEC S.A.

Headword:

-

Relevant legal provisions:

EPC Art. 123(2)

Keyword:

"Amendment not directly and unambiguously derivable from application as filed"

Decisions cited:

T 0201/83

Catchword:

Reasons 2



Case Number: T 0929/05 - 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 24 July 2007

Appellant:
(Patent Proprietor)

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Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 4 May 2005
revoking European patent No. 0674842 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: P. Kitzmantel
Members: J. Jardón Álvarez
W. Sekretaruk

Summary of Facts and Submissions

I. The grant of European patent No. 0 674 842 in respect of European patent application No. 95302061.7 in the name of THE IAMS COMPANY, which had been filed on 28 March 1995, was announced on 4 December 2002 (Bulletin 2002/49) on the basis of 10 claims. Independent Claims 1 and 7 read as follows:

"1. A pet food product for use in maintaining normal gastrointestinal function and ameliorating chronic diarrhoea in pet animals comprising a pet food composition containing fermentable fibers which have an organic matter disappearance of 15 to 60 percent when fermented by faecal bacteria for a 24 hour period, wherein said fibers comprise a blend of beet pulp, citrus pectin, and guar gum, said fibers being present in amounts from 3 to 9 weight percent of supplemental total dietary fiber.

7. The use of a pet food composition containing fermentable fibres which have an organic matter disappearance of 15 to 60 percent when fermented by faecal bacteria for a 24 hours period, said fibres being present from about 3 to 9 percent of supplemental total dietary fibre in the manufacture of a pet food product for use in the restoration and maintenance of normal gastrointestinal function and amelioration of chronic diarrhoea in pet animals."

Claims 2 to 6 and 8 to 10 were dependent claims.

II. A Notice of Opposition was filed against this patent by Nestec S.A. on 4 September 2003. The Opponent requested

the revocation of the patent in its entirety. The opposition was based on the grounds of Article 100(a) EPC for lack of novelty and inventive step, Article 100(b) EPC for lack of sufficient disclosure and 100(c) EPC for subject-matter which extended beyond the content of the application as originally filed.

III. By its decision announced orally on 22 February 2005 and issued in writing on 4 May 2005 the Opposition Division revoked the patent.

This decision related to seventeen requests: a main request corresponding to the maintenance of the patent as granted, eleven auxiliary requests (auxiliary requests 1 to 3, 3a, 4, 5, 5a and 6 to 9) filed with letter dated 22 December 2004 and five amended auxiliary requests (amended auxiliary requests 1, 2, 3 (amended twice) and 4) filed on 22 February 2005, during the oral proceedings.

The Opposition Division revoked the patent because in its opinion the subject-matter of Claim 1 of the main request did not fulfil the requirements of Article 123(2) EPC and the subject-matter of the claims according to the auxiliary requests did not fulfil the requirements of Article 123(2) EPC, Article 84 EPC or Article 54 EPC.

Concerning Claim 1 of the main request, the Opposition Division held that it contained an undue generalization, not supported by the application as filed, of the "combination blend CB" specified in examples 4 and 5 comprising a blend of beet pulp, citrus pectin and guar gum in the concrete weight ratio of 80:10:10 and

constituting specifically 7.5 percent by weight of supplemental total dietary fibre. Additionally, while this "combination blend" consisted of three components only, the use of the word "comprise" in amended Claim 1 implied that further components, for which no support could be found in the application as originally filed, might be added.

The Opposition Division noted also that the application as originally filed gave the value of the organic matter disappearance for the single fibres but not for the blend as now claimed.

IV. On 5 July 2005 the Patent Proprietor (Appellant) lodged an appeal against the decision of the Opposition Division and paid the appeal fee on the same day.

With the Statement of Grounds of Appeal filed on 12 September 2005, the Appellant filed sets of amended claims for a main request and four auxiliary requests and requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request or any one of these auxiliary requests.

V. By letter dated 15 February 2006, the Respondent (Opponent) disputed all the arguments submitted by the Appellant and requested that the appeal be dismissed and the patent be revoked in its entirety.

The Respondent further requested the admission into the proceedings of the following documents:

A10: Gregory A. Reinhart, "Fiber nutrition and intestinal function critical for recovery", DVM news magazine, pages 6A, 7A and 15A, June 1993; and

A11: <http://www.avs.uidaho.edu/avs305/comparative%20digestion.htm>, a non-dated internet page concerning Comparative Digestion Physiology.

VI. The Board in a communication dated 25 May 2007 commented on the case. The Board was *inter alia* of the preliminary opinion that document A10 should be admitted into the proceedings due to its relevance and that its disclosure was novelty destroying for the subject-matter of Claim 7 of the main request and auxiliary request 1, the subject-matter of Claim 6 of auxiliary request 2, the subject-matter of Claim 1 of auxiliary request 3 and the subject-matter of Claim 2 of auxiliary request 4.

VII. By letter dated 20 June 2007, the Appellant withdrew all its previous requests and filed an amended main request as its only request. This amended set of 8 claims included two independent claims: Claim 1, which corresponds to granted Claim 1 (see point I above), and Claim 7 which reads as follows:

"7. The use of a pet food composition containing fermentable fibres which have an organic matter disappearance of 15 to 60 percent when fermented by faecal bacteria for a 24 hours period, said fibres being present from 3 to 9 percent of supplemental total dietary fibre in the manufacture of a pet food product for use in the restoration and maintenance of normal

gastrointestinal function and amelioration of chronic diarrhoea in pet animals, wherein said fibres comprise a blend of beet pulp, citrus pectin and guar gum."

The Appellant also informed the Board that it would not attend the oral proceedings scheduled for 24 July 2007 and requested that the Board takes its decision based upon the documents on file.

VIII. By fax submitted on 19 July 2007 the Board informed the parties that while the subject-matter of the claims appeared to be novel, the Board had serious doubts about the compliance of the subject-matter of Claim 1 with the requirements of Article 123(2) EPC.

IX. Oral proceedings were held on 24 July 2007 in the absence of the Appellant.

X. The arguments presented by the Appellant in its written submissions, insofar as they are relevant for the present decision, may be summarized as follows:

The Appellant argued that the application as originally filed clearly indicated by the wording "fermentable fibres" that mixtures of fibre sources should be covered (cf. for instance page 2, lines 35 - 38 of the A-document "mixtures of these fibers"). Moreover the combination blend CB exemplified in examples 4 and 5 gave support for the use of the three component blend now claimed. It was further clear from the application as originally filed that the invention was essentially directed to the use of fermentable sources having an OMD (organic matter disappearance) of from 15% to 60% and consequently a further restriction of the scope of

Claim 1 to the ratio of 80:10:10 disclosed in the examples was not necessary.

- XI. The arguments presented by the Respondent may be summarized as follows:

The Respondent considered that the term "comprise" used in Claim 1 constituted a broadening of the original disclosure because it implied that further fibres could be present in the claimed pet food whilst in examples 4 and 5 a blend of only three specific fibres was used. Furthermore, amended Claim 1 covered any ratio of the components in a total amount of 3 to 9 weight percent of supplemental total dietary fibre, while support was only given for the specific component ratio of 80:10:10 and for the specific amount of 7.5 weight percent.

- XII. The Appellant requested that the decision under appeal be set aside and that the European patent No. 0 674 842 be maintained on the basis of the set of claims filed with letter dated 20 June 2007.

The Respondent requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.
2. *Amendments (Article 123 EPC).*
 - 2.1 Claim 1 as granted is essentially based on Claim 1 of the application as originally filed. The only amendment

made is that the fermentable fibres used are defined as "a blend of beet pulp, citrus pectin, and guar gum".

2.2 It is not disputed that there is no general disclosure of such a blend in the application documents as originally filed.

2.2.1 The only reference in the application as originally filed to a blend of beet pulp, citrus pectin and guar gum is to be found in examples 4 and 5. In these examples dogs (example 4) or cats (example 5) were fed with a diet formulated to contain 7.5% supplemental total dietary fibre and containing as fibre source a "combination blend CB" consisting of 80% of beet pulp (the reference to 30% beet pulp in example 4 is considered an obvious mistake that should read 80%, thus allowing a total of 100%), 10% of citrus pectin and 10% of guar.

2.2.2 Although the organic matter disappearance (OMD) value of the combination blend is not given in the examples, such composition blend is said to be an embodiment of the invention (page 9, lines 7 - 8). The OMD value of the blend can in any case be calculated from the individual OMD values disclosed in Table 3 and results in an OMD value of 45.06 for the blend (see also last paragraph of page 3 of the letter of the Appellant dated 22 December 2004 during the opposition proceedings).

2.3 It is to be decided if, in the context of the whole disclosure of the application as filed, this exemplified blend wherein the weight ratio of the individual fibre sources is 80:10:10 and which is added

to a pet food diet in an amount of 7.5%, supports the subject-matter of granted Claim 1 according to which the three components can be used in any given ratio and the blend can be added to a pet food diet in an amount varying from 3 to 9 weight percent of supplemental total dietary fibre.

With other words, it is to be decided if the content of the application as originally filed allows these generalizations of the exemplified embodiment.

- 2.3.1 The application as originally filed is directed to a pet food composition containing fermentable fibres for maintaining normal gastrointestinal function and ameliorating chronic diarrhoea in animals.

- 2.3.2 Claim 1 as originally filed was directed to such pet food compositions, the fermentable fibres being defined as:
 - i) having an organic matter disappearance of 15 to 60 percent when fermented by faecal bacteria for a 24 hour period, and

 - ii) being present in amounts from 3 to 9 weight percent of supplemental total dietary fibre.

- 2.3.3 According to page 2, lines 35 - 37 of the description as originally filed (A-document), the term "fermentable fibres" is intended to mean any fibre source which can be fermented by intestinal bacteria to produce a significant quantity of short-chain fatty acids. As preferred fermentable fibres suitable for use in the invention beet pulp, citrus pulp, rice bran, carob bean

and gum talha are mentioned, as well as mixtures of these fibres, with beet pulp being the most preferred (see A-document: page 2, lines 37 - 38 and 53; Claims 6 and 7).

- 2.3.4 Neither citrus pectin, nor guar gum are mentioned as preferred fermentable fibres to be used in the invention.
- 2.3.5 Concerning the OMD requirement of the fermentable fibres, the OMD values of fibrous substrates when exposed to dog and cat faecal microflora are determined in example 3. According to Table 3, the OMD values for beet pulp vary from 38.2 (for dog microflora) to 35.0 (for cat microflora). According to the same table, the values for guar gum and citrus pectin are always above 70% and therefore well outside of the range of 15 -60 percent covered by Claim 1 of the application as originally filed.
- 2.3.6 Taking account of this disclosure in the application as filed, the Board concludes that there is no general teaching for a blend of beet pulp, citrus pectin and guar gum to be present in amounts from 3 to 9 weight percent. On the contrary, from the above passages the skilled person would be discouraged from using citrus pectin and guar gum as they have OMD values outside the range required by Claim 1.
- 2.3.7 The skilled person could only derive from examples 4 and 5 (see 2.2 above) that a very specific composition consisting mainly (80%) of beet pulp, the preferred fermentable fibre, and including also 10% of citrus pectin and 10% of guar gum, formulated in compositions

so as to amount to 7.5% supplemental dietary fibre, may also be used for maintaining normal gastrointestinal function and ameliorating chronic diarrhoea. The skilled person, however, could not derive therefrom - either alone or in the context of the application's whole disclosure - the much broader concept of the claimed blend.

2.4 In view of the above, the claimed generalised combination of a preferred fibre (beet pulp) with two other fibres which do not fulfil the OMD criteria of original Claim 1 (citrus pectin and guar gum) results in subject-matter which cannot be derived clearly and unambiguously from the content of the application as filed.

2.5 The Board disagrees with the argument of the Appellant that from the specific disclosure in examples 4 and 5 the skilled person would understand that any combination of the three fibres, namely beet pulp, citrus pectin and guar gum, would fall within the claimable disclosure of the invention, provided that the fibre source generated had an OMD of from 15 to 60%.

A generalization on the basis of a specific example is usually objectionable under Article 123(2) EPC and it is only under exceptional conditions that it may be allowed, the relevant criterion applied according to T 201/83 (OJ EPO 1984, 481) being that "the skilled person could have readily recognised that this value was not so closely associated with the other features of the example as to determine the effect of that embodiment of the invention to significant degree".

In the present case the fact that examples 4 and 5 use one "inventive" fermentable fibre (beet pulp) in combination with two explicitly "non-inventive" fibres in a concrete weight ratio (80:10:10) is by itself sufficient to enable the conclusion to be drawn that the "effect" produced by the exemplified combination blend must be very closely associated with the use of the specific fibre combination in the specific weight ratio used.

A generalization of this single embodiment to any possible blend of beet pulp, citrus pectin and guar gum (and also including further fibres due to the use of the word comprise) in amounts from 3 to 9 weight percent constitutes a disclosure not derivable from the application as originally filed.

2.6 In conclusion, the subject-matter of Claim 1 of the patent offends against Article 123(2) EPC and the Appellant's only request must therefore be rejected.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Röhn

P. Kitzmantel