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**Datasheet for the decision  
of 29 March 2010**

**Case Number:** T 0153/08 - 3.3.09

**Application Number:** 95944667.5

**Publication Number:** 0793422

**IPC:** A23G 3/30

**Language of the proceedings:** EN

**Title of invention:**

Method of making a chewing gum products containing a liquid aspartame dispersion

**Patentee:**

WM. WRIGLEY JR. COMPANY

**Opponent:**

Cadbury Schweppes Plc

**Headword:**

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**Relevant legal provisions:**

EPC Art. 56

EPC R. 98

**Relevant legal provisions (EPC 1973):**

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**Keyword:**

"Novelty - fresh ground of opposition"

"Inventive step - No"

**Decisions cited:**

G 0007/95

**Catchword:**

-



Case Number: T 0153/08 - 3.3.09

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.09  
of 29 March 2010

**Appellant:**  
(Opponent)

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**Respondent:**  
(Patent Proprietor)

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**Representative:**

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**Decision under appeal:**

Interlocutory decision of the Opposition  
Division of the European Patent Office posted  
7 November 2007 concerning maintenance of the  
European patent No. 0793422 in amended form.

**Composition of the Board:**

**Chairman:** W. Sieber  
**Members:** J. Jardón Álvarez  
M-B. Tardo-Dino

## Summary of Facts and Submissions

I. The grant of European patent No. 0 793 422 in respect of European patent application No. 95944667.5, in the name of WM. WRIGLEY JR. COMPANY, which had been filed on 28 December 1995 as International application PCT/US95/16929 (WO - 96/020610), was announced on 24 September 2003 (Bulletin 2003/39). The granted patent contained 8 claims, whereby Claim 1 read as follows:

"1. A method of making a chewing gum composition comprising:

- a) providing from 5% to 80% gum base, from 0.1% to 10% flavour and 5% to 90% bulking and sweetening agent, the bulking and sweetening agent comprising an aqueous aspartame dispersion comprising at least 20% aspartame; and
- b) mixing the gum base, bulking and sweetening agent and flavour to make a chewing gum composition."

Claims 2 to 8 were dependent claims.

II. A notice of opposition requesting the revocation of the patent in its entirety on the grounds that the claimed subject-matter did not involve an inventive step (Article 100(a) EPC) was filed by Cadbury Schweppes Plc on 17 June 2004.

The following documents were cited with the notice of opposition:

D1: EP 0 407 019 A2;

D2: US 4 722 844 A; and

D3: US 4 671 967 A.

III. By its interlocutory decision issued in writing on 7 November 2007, the opposition division refused the proprietor's main request (claims as granted) because the subject-matter of Claim 1 lacked an inventive step, and decided that the claims of the proprietor's first auxiliary request met the requirements of the EPC. Claim 1 of the first auxiliary request, filed with letter dated 20 April 2007, read as follows:

"1. A method of making a chewing gum composition comprising:

- a) providing from 5% to 80% gum base, from 0.1% to 10% flavour and 5% to 90% bulking and sweetening agent, the bulking and sweetening agent comprising an aqueous aspartame dispersion comprising a food polymer and at least 20% aspartame; and
- b) mixing the gum base, bulking and sweetening agent and flavour to make a chewing gum composition."

The opposition division noted in its decision that the opponent's objection with regard to lack of novelty over D2 was a late-filed and new ground of opposition (filed for the first time with the letter dated 3 May 2007, i.e. after the nine-month opposition period). Since, however, D2 did not anticipate the claimed subject-matter (neither explicitly nor implicitly), the

opposition division did not introduce the late-filed and new ground of opposition into the proceedings.

Concerning inventive step of the first auxiliary request, the opposition division, starting from D2 as closest prior art document, saw the problem to be solved by the claimed subject-matter in the provision of an alternative sweetener to be applied in a suitable chewing gum composition. The solution to this technical problem, namely the use of a food polymer in the initial aspartame dispersion, was in the opposition division's opinion not obvious for the skilled person as the cited prior art did not suggest this measure.

The opposition division also indicated that it would have arrived at the same conclusion when using D1 as the closest prior art.

- IV. On 21 December 2007 the opponent (appellant) lodged an appeal against the decision of the opposition division and paid the appeal fee on the same day.

In the statement of grounds of appeal filed on 26 February 2008, the appellant requested the revocation of the patent in its entirety on the grounds of lack of novelty and lack of inventive step. The appellant also filed the following additional documents:

D6: NutraSweet® Custom Liquid 50™. A new, more convenient form of NutraSweet® brand sweetener for improved handling and dissolution in many applications." 1994 The NutraSweet Company; and

- D7: Food Technology, August 1994, page 175;  
information of the NutraSweet Co. about NutraSweet<sup>®</sup>  
sweetener.
- V. With its reply dated 3 July 2008 the patent proprietor (respondent) stated that it would not be filing any further submissions on this case, but requested that the appeal be dismissed.
- VI. On 25 May 2009 the board issued a communication pursuant to Rules 84(1) and 100(1) EPC pointing to the fact that the European patent had been surrendered or had lapsed for all the designated contracting states, but that the appeal proceedings might be continued at the request of the appellant.
- VII. By letter dated 11 June 2009 the appellant requested the continuation of the appeal proceedings.
- VIII. The arguments presented by the appellant in its written submissions may be summarized as follows:
- The appellant maintained that the subject-matter of Claim 1 lacked novelty having regard to the disclosure of D2. D2 disclosed a sweetening agent containing more than 20% aspartame for use in chewing. D2 also disclosed the incorporation of a food polymer into the sweetening agent. Although D2 did not exemplify a chewing gum composition, the ingredients according to Claim 1 were all conventional ingredients used in conventional amounts and therefore implicitly disclosed in D2.

- Concerning inventive step, the appellant argued that the claimed subject-matter lacked inventive step when starting from D1 or D2 as the closest prior art. It would then have been obvious for the skilled person, when preparing a chewing gum, to try the sweetening agent of D2 comprising an aqueous aspartame dispersion. Furthermore, D2 confirmed the desirability of using a food polymer thickening stabilizer in the sweetening agent. The appellant also noted that the patent in suit did not make any reference to an unforeseen advantage arising from using a food polymer in the dispersion.
  
  - Moreover at the priority date of the patent in suit, NutraSweet® Custom Liquid 50™, a sweetening agent comprising aspartame, was commonly available and marketed as already admitted in paragraph [0017] of the patent in suit. As could be seen from D6, NutraSweet® Custom Liquid 50™ had improved dissolution rates which improved mixing and reduced process times, producing a uniform final product. Consequently, no inventive step could be acknowledged in the use of a known sweetener in a food stuff to obtain the expected advantage.
- IX. The respondent did not file any arguments in support of its request.
- X. The appellant requested that the decision under appeal be set aside and that the European patent No. 0 793 422 be revoked.

The respondent requested that the appeal be dismissed.

## Reasons for the Decision

1. The appeal is admissible. The appeal proceedings are continued on the appellant's request (Rule 98 EPC) (see point VI, above).
2. *Procedural matter*
  - 2.1 The patent was only opposed on the ground of lack of inventive step in view of D1 to D3 (point II, above). The objection that the claimed subject-matter was not novel over D2 was considered by the opposition division as a new and late-filed ground of opposition which was not introduced into the proceedings (point III, above).
  - 2.2 In a case where a patent has been opposed under Article 100(a) EPC on the ground that the claims lack an inventive step in view of documents cited in the notice of opposition, the ground of lack of novelty vis-à-vis the said documents based on Article 52(1) and 54 EPC is a fresh ground for opposition and accordingly may not be introduced into the appeal proceedings without the agreement of the patentee (G 7/95, OJ EPO 1996, 626, headnote).
  - 2.3 In the present case the respondent has not manifested its agreement to the introduction of the ground of lack of novelty into the proceedings. On the contrary, it explicitly stated it would not be filing any further submissions on this case (point V, above). Consequently, this fresh ground of opposition, i.e. lack of novelty, cannot be introduced into the proceedings by the board.



3. *Inventive step (Article 56 EPC)*

3.1 The patent in suit

The claimed subject-matter relates to a method of making chewing gum compositions containing a liquid aspartame dispersion containing at least 20% aspartame. The liquid aspartame dispersion has a rapid dissolution rate, which improves mixing and thereby reduces the processing time for making chewing gum (see paragraph [0011] of the patent specification).

3.2 Closest prior art

3.2.1 The board agrees with the finding in the decision under appeal that the closest prior art is represented by document D2.

D2 relates to a process for stabilizing the sweetness of a water-containing food which comprises adding an aspartame composition having improved dispersibility and solubility to said food and uniformly dispersing said aspartame composition (see Claim 1 and column 2, lines 48 - 55). The aspartame composition comprises aspartame and an aqueous dispersing agent, wherein the aspartame is present in an amount sufficient to saturate the aqueous dispersing agent and additionally to provide undissolved aspartame (column 3, lines 35 - 43). In Example 1 an aqueous dispersion of aspartame in water is prepared comprising more than 20% aspartame. Furthermore, D2 refers to the desirability of utilizing additional thickening stabilizers in order to enhance dispersion and floating stability of the aspartame in the dispersing agent. By way of example, D2 refers to

xanthan gum, guar gum or a polysaccharide, i.e. food polymers (column 4, lines 14 - 24). In Example 3, (i) sucrose and water, (ii) aspartame and water, and (iii) xanthan gum (i.e. a food polymer) are mixed and homogenized to obtain a liquid sweetening agent. The aspartame composition described in D2 is used *inter alia* in chewing gum (Claim 3 and column 6, lines 20 - 24). As stated in column 6, lines 49 - 57, with the sweetened foods of D2 there is no loss in sweetness, since aspartame is stable for a prolonged time even when water is co-present. Furthermore, since aspartame has a good quality of sweetness, a flavour improving effect is obtained as is, in the case of chewing gum, an effect of lengthening of the sweetness time.

There is, however, no specific example in D2 of a method of making a chewing gum using these aspartame compositions.

3.2.2 The subject-matter of Claim 1 thus differs from the disclosure of D2 in that it specifies the amounts of gum base (5% to 80%), flavour (0.1% to 10%) and bulking and sweetening agent (5% to 90%), i.e. the ingredients which have to be mixed to make a chewing gum composition.

3.3 Problem to be solved and its solution

3.3.1 Having regard to this prior art, the objective technical problem to be solved by the claimed subject-matter can be seen in the implementation of the teaching of D2 for the preparation of a chewing gum composition.

3.3.2 This problem is credibly solved by the claimed method wherein the amounts of the chewing gum ingredients and the mixing step are specified. The example in the specification shows the preparation of a chewing gum working according to the claimed subject-matter. This finding was not contested by the appellant.

#### 3.4 Obviousness

3.4.1 It remains to be decided whether it would have been obvious for the skilled person to solve this technical problem by the means claimed.

3.4.2 In the board's judgement this is indeed the case for the following reasons:

- The skilled person wishing to implement the teaching of D2 would immediately contemplate to mix the sweetening composition of D2 with conventional gum ingredients and thus arrive at a process falling within the scope of Claim 1. In fact, the gum base ingredients and the amounts thereof specified in Claim 1 are nothing but conventional ingredients used in conventional amounts, as argued by the appellant and not disputed by the respondent. In particular, as regards the amounts of the ingredients, they undisputedly overlap with the amounts used in known processes for preparing chewing gum (see, for instance, D1 disclosing a chewing gum composition comprising from 40% to 75% of a gum base -page 10, lines 43 - 59-; from 0.02% to 0.5% of a flavouring agent - page 13, lines 43 - 44-; and up to 60% bulking agents including sweetening agents - page 11, lines 31 - 39). The

skilled person aiming at implementing the teaching of D2 would mix these components and thus arrive at the claimed method without using any inventive skill.

- According to paragraph [0011] of the specification the use of a liquid dispersion containing at least 20% aspartame improves mixing and thereby reduces the processing time for making chewing gum. However, this improvement cannot justify an inventive step. Document D6 discloses that the use of NutraSweet® Custom Liquid 50™, an aspartame dispersion containing a food polymer (sodium carboxymethylcellulose -see last paragraph of page 1, left column-) "can improve mixing and reduce process times" (page 1 of D6, first paragraph, left column). Accordingly, it was to be expected that such improvement would be achieved when using a sweetening agent comprising an aqueous aspartame dispersion including a food polymer in the preparation of chewing gum and no inventive step can be acknowledged for this improvement. The improvement is merely the logical consequence of the measure taken.
  
- Also the fact that the aspartame releases quickly in chewing gum (see [0036]) cannot justify an inventive step. This advantage is apparently not linked to the method of preparation but rather to the aspartame itself. The flavour improving effect of the aspartame dispersions is already mentioned in D2 (see column 6, lines 49 - 57).
  
- Finally, the board cannot follow the argument of the opposition division that it would not have been

obvious for the skilled person to include a food polymer in the initial aspartame dispersion of D2 in order to provide an alternative sweetener. As stated in point 3.2.1 above, the incorporation of a food polymer is already disclosed and exemplified in D2. The skilled person would therefore include a food polymer when applying the teaching of D2 to chewing gums. Nor does the patent in suit make any reference to an unforeseen advantage arising from using a food polymer in the dispersion which could justify an inventive step.

3.4.3 In summary, the subject-matter of Claim 1 of the sole request is not based on an inventive step.

## **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

G. Röhn

W. Sieber