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**Datasheet for the decision
of 24 September 2010**

Case Number: T 0397/08 - 3.3.09

Application Number: 99934862.6

Publication Number: 1098572

IPC: A23K 1/18

Language of the proceedings: EN

Title of invention:

Animal food composition

Patentee:

MARS UK LIMITED

Opponent:

NESTEC S.A.

Headword:

-

Relevant legal provisions:

EPC Art. 123

Relevant legal provisions (EPC 1973):

EPC Art. 54, 56, 84

Keyword:

"Added subject-matter - no"

"Novelty - yes, after amendment"

"Inventive step - yes"

Decisions cited:

G 0001/03

Catchword:

-



Case Number: T 0397/08 - 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 24 September 2010

Appellant 01: NESTEC S.A.
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office
announced orally on 14 November 2007 and posted
21 December 2007 concerning maintenance of
European patent No. 1098572 in amended form.

Composition of the Board:

Chairman: W. Sieber
Members: J. Jardón Álvarez
W. Sekretaruk

Summary of Facts and Submissions

I. European patent No. 1 098 572 was granted in respect of European patent application No. 99934862.6, which was filed in the name of MARS UK LIMITED on 16 July 1999 as International application PCT/GB1999/002303 (WO 2000/003606). The mention of grant was published on 17 November 2004 in Bulletin 2004/47. The patent was granted with seventeen claims, Claims 1, 2 and 16 reading as follows:

"1. A breath-freshening dry or semi-moist pet food composition comprising at least 40 ppm by weight of one or more plant extract(s) selected from essential oil(s), oleoresin(s) which means the fraction obtained by solvent extraction from spices and herbs, absolute(s) and fruit juice(s)."

"2. A pet food composition according to claim 1 which is a pet biscuit."

"16. The use of one or more plant extract(s) in the manufacture of a dry or semi-moist pet food composition for reducing oral malodour in a domestic animal, wherein the plant extract(s) is/are present in an amount of at least 40ppm by weight and wherein the plant extract(s) are selected from essential oil(s), oleoresin(s) which means the fraction obtained by solvent extraction from spices and herbs, absolute(s) and fruit juices."

Claims 3 to 15 and 17 were dependent claims.

II. A notice of opposition was filed by NESTEC S.A. on 17 August 2005. The opponent requested revocation of the patent in its entirety on the grounds that the claimed subject-matter lacked novelty and did not involve an inventive step (Article 100(a) EPC 1973), that the patent did not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Article 100(b) EPC 1973), and that its subject-matter extended beyond the content of the application as filed (Article 100(c) EPC 1973).

During the opposition proceedings *inter alia* the following documents were cited:

D1: US 5 017 389 A;

D5/D5a: EP 1 063 897 B1/ WO 99/47000 A1; a document to be regarded as state of the art only in accordance with Article 54(3) EPC;

D6: JP 08310931 A; and

D7: JP 10025246 A.

III. Taking into account the amendments made by the proprietor during the opposition proceedings, the opposition division found that the patent and the invention to which it related met the requirements of the EPC. The interlocutory decision was announced orally at the oral proceedings held on 14 November 2007 and issued in writing on 21 December 2007.

The opposition division held that the claimed subject-matter was disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art and that the subject-matter of the claims of the main request fulfilled the requirements of Articles 100(c) 1973 and 123(2) EPC. However, the main request was not allowed because the subject-matter of Claim 1 lacked novelty over Example 7 of D5 (Article 54(3) EPC) and the subject-matter of Claim 2 lacked novelty over D7 (Article 54(1) and (2) EPC 1973).

Finally, the opposition division held that the subject-matter of Claims 1 to 17 of auxiliary request IIB filed on 14 November 2007 during the oral proceedings met the requirements of the EPC. Claims 1, 2 and 16 of auxiliary request IIB read as follows:

"1. A breath freshening dry or semi-moist pet food composition comprising at least 40 ppm and no more than about 800 ppm by weight of one or more plant extract(s) selected from essential oil(s), oleoresin(s) which means the fraction obtained by solvent extraction from spices and herbs, absolute(s) and fruit juice(s), wherein said pet food composition is other than an animal food product comprising 36.9 to 38.89 wt% beef tallow, 30 wt% protein solids, 30 wt% wheat flour, 1 wt% emulsifier, 0.1 wt% antioxidant and 0.01 to 2.0 wt% rosemary, clove, eucalyptus and/or parsley seed oils."

"2. A breath-freshening dry or semi-moist pet food composition according to claim 1 wherein said pet food composition is a pet biscuit."

"16. The use of one or more plant extract(s) in the manufacture of a dry or semi-moist pet food composition for reducing oral malodour in a domestic animal, wherein the plant extract(s) is/are present in an amount of at least 40ppm by weight and wherein the plant extract(s) is/are selected from essential oil(s), oleoresin(s) which means the fraction obtained by solvent extraction from spices and herbs, absolute(s) and fruit juices, wherein said pet food composition is other than an animal food product comprising 36.9 to 38.89 wt% beef tallow, 30 wt% protein solids, 30 wt% wheat flour, 1 wt% emulsifier, 0.1 wt% antioxidant and 0.01 to 2.0 wt% rosemary, clove, eucalyptus and/or parsley seed oils."

IV. On 15 February 2008 the opponent (appellant 01) filed an appeal against the interlocutory decision of the opposition division and paid the prescribed fee on the same day. With the statement setting out the grounds of appeal filed on 21 April 2008, appellant 01 requested that the decision under appeal be set aside and the patent be revoked in its entirety. According to appellant 01 the subject-matter of Claims 1 and 16 as allowed by the opposition division contained added subject-matter, and the claimed subject-matter lacked novelty and inventive step.

Appellant 01 also filed the following document:

D24: Prof. Dr. E. Steinegger *et al.*, "Lehrbuch der Pharmakognosie und Phytopharmazie", Springer-Verlag Berlin Heidelberg 1988, pages 336-339.

V. On 29 February 2008 the patent proprietor (appellant 02) also lodged an appeal against the interlocutory decision of the opposition division and paid the prescribed fee on the same day. A statement setting out the grounds of appeal was filed on 29 April 2008, including a main request and sets of claims for seven auxiliary requests.

VI. Appellant 01 filed its reply to the grounds of appeal of appellant 02 on 28 August 2008 and further submissions on 30 December 2008 and 13 August 2009.

The reply of appellant 02 to the grounds of appeal of appellant 01 was filed on 16 September 2008. It also filed a further submission on 14 May 2009. Appellant 02 also filed sets of claims for two further auxiliary requests and the following translations of prior art documents already on file:

D6A: English translation of D6; and

D24A: English translation of D24.

VII. On 17 May 2010 the board dispatched a summons to attend oral proceedings scheduled for 24 September 2010. In the attached communication the board drew the attention of the parties to the points to be discussed during the oral proceedings.

VIII. With letter dated 24 August 2010, appellant 02 filed sets of claims for ten further auxiliary requests.

IX. With letter dated 24 August 2010 appellant 01 filed further arguments in support of its request.

- X. On 24 September 2010 oral proceedings were held before the board. In the course of the oral proceedings, after having discussed the then-pending main request, appellant 02 withdrew the main request and all its previous auxiliary requests and filed four new requests headed "new auxiliary requests I to IV".

Independent Claims 1, 2 and 15 of auxiliary request I read as follows:

"1. A breath-freshening dry or semi-moist pet food composition comprising at least 40 ppm and no more than about 800 ppm by weight of one or more plant extract(s) selected from essential oil(s), wherein said pet food composition is other than an animal food product comprising 36.9 to 38.89 wt% beet tallow, 30 wt% protein solids, 30 wt% wheat flour, 1 wt% emulsifier, 0.1 wt% antioxidant and 0.01 to 2.0 wt% rosemary, clove, eucalyptus and/or parsley seed oils, and wherein said essential oil(s) are selected from angelica root, aniseed, basil, bay, bergamot, bergamot FCF, cajeput, camphor, cardamom, carrot, cassia, cedarwood (Atlas), cedarwood (Chinese), cedarwood (Texas), cedarwood (Virginia), celery, chamomile, clary sage, clove bud, clove leaf, cinnamon leaf, coriander, cumin, dill, eucalyptus, fennel, frankincense, geranium, ho-wood, lemongrass, lemon, *litsea*, marjoram, melissa, myrrh, myrtle, niaouli, neroli, nutmeg, orange, palmarosa, patchouli, peppermint, petit grain, pimento berry, pine needle, *ravensara aromatica*, rosewood, rosemary, sage (Dalmatian), tea tree, thyme and verbena."

"2. A breath-freshening dry or semi-moist pet food composition comprising at least 40 ppm by weight of one or more plant extract(s) selected from essential oil(s) wherein said pet food composition is a pet biscuit, and wherein said essential oil(s) are selected from angelica root, aniseed, basil, bay, bergamot, bergamot FCF, cajeput, camphor, cardamom, carrot, cassia, cedarwood (Atlas), cedarwood (Chinese), cedarwood (Texas), cedarwood (Virginia), celery, chamomile, clary sage, clove bud, clove leaf, cinnamon leaf, coriander, cumin, dill, eucalyptus, fennel, frankincense, geranium, ho-wood, lemongrass, lemon, *litsea*, marjoram, melissa, myrrh, myrtle, niaouli, neroli, nutmeg, orange, palmarosa, patchouli, peppermint, petit grain, pimento berry, pine needle, *ravensara aromatica*, rosewood, rosemary, sage (Dalmatian), tea tree, thyme and verbena."

"15. The use of one or more plant extract(s) in the manufacture of a dry or semi-moist pet food composition for reducing oral malodour in a domestic animal, wherein the plant extract(s) is/are present in an amount of at least 40ppm by weight and wherein the plant extract(s) is/are selected from essential oil(s), wherein said pet food composition is other than an animal food product comprising 36.9 to 38.89 wt% beef tallow, 30 wt% protein solids, 30 wt% wheat flour, 1 wt% emulsifier, 0.1 wt% antioxidant and 0.01 to 2.0 wt% rosemary, clove, eucalyptus and/or parsley seed oils."

Claims 3 to 14 and 16 were dependent claims.

XI. The arguments presented by appellant 01 in its written submissions and at the oral proceedings insofar as they

are relevant for the present decision may be summarized as follows:

- The application as filed lacked a basis for the use of the term "dry or semi-moist" in combination with "pet food composition". The mentioned term "dry or semi-moist" was used in the application as filed only in combination with "pet food". As the terms "pet food" and "pet food composition" were not interchangeable, the amendment extended beyond the content of the application as filed.
- The subject-matter of Claim 12 of auxiliary request I was not clear. In this dependent claim reference was made to cinnamon oil, an oil not mentioned in any one of the previous claims.
- Appellant 01 had raised in its written submissions objections concerning Article 83 EPC and Rule 80 EPC. However, in view of the amendments made to auxiliary request I by appellant 02, appellant 01 did not pursue these objections at the oral proceedings before the board.
- Concerning novelty, appellant 01 saw the disclosure of D5a as novelty destroying for the subject-matter of Claim 2 of auxiliary request I. Example 7 of document D5a included the same components as the food composition of Claim 2 and the general teaching of D5a indicated the same processing steps for the manufacture of the pet food.
- Concerning inventive step, it considered document D6a as the closest prior art because it had the most

features in common with the claimed subject and thus was the most promising "springboard". The fact that the compositions of D6a were used to prevent carious teeth would not discourage the skilled person from using this document as the closest prior art, because oral hygiene was intrinsically linked to halitosis (bad breath). Thus, starting from the pet food compositions of D6a, appellant 01 saw the technical problem to be solved as being the provision of alternative pet food compositions. The solution was obvious in view of D6a alone, which already mentioned some of the essential oils covered by the claims such as for instance eucalyptus. Insofar as the claims related to essential oils not explicitly disclosed in D6a, this subject-matter was also obvious for the skilled person in the absence of an unexpected effect.

- Alternatively, the claimed subject-matter was also obvious when starting from D1 as the closest prior art. In this case the problem to be solved could be seen in the provision of an alternative to the liquid compositions disclosed in D1. Appellant 01 saw no technical obstacle in the provision of dry or semi-moist compositions, in particular because such compositions were well known in the field. The skilled person would expect that an effect achieved by an essential oil in a liquid composition would be equally achieved in a solid composition.

XII. The arguments of appellant 02 may be summarised as follows:

- Appellant 02 admitted that in the application as filed the term "dry or semi-moist" did not appear in the same sentence as the term "pet food composition", but argued that there was a clear and unambiguous disclosure for the amendment. In its opinion there was explicit support in the application for interpreting the term "pet food composition" as referring to the same entity as the term "pet food".

- The subject-matter of Claim 2 related to a pet biscuit while D5a only disclosed the inner filling of a multicomponent food product having a dual texture. No biscuit was prepared in document D5a, which therefore was not novelty destroying.

- Concerning inventive step, appellant 02 regarded the breath-freshening drinks of D1 as representing the closest prior art. D6a could not be regarded as the closest prior art document simply because the food compositions of D6a had a different use. The active agents used in the therapy disclosed in D6a targeted caries-causing bacteria and D6a did not teach anything about the effect of the active agents in reducing malodour in a domestic animal. Appellant 02 defined the technical problem to be solved as the provision of an alternative breath-freshening composition. The provision of the claimed dry or semi-moist compositions was not obvious over D1 alone or in combination with the other documents. There was no motivation for the skilled person to modify the drink compositions and arrive at the claimed compositions.

XIII. Appellant 01/opponent requested that the decision under appeal be set aside and the European patent No. 1 098 572 be revoked.

Appellant 02/patent proprietor requested that the decision under appeal be set aside and that the European patent be maintained on the basis of auxiliary request I to IV, filed during the oral proceedings.

Reasons for the Decision

1. The appeals are admissible.

AUXILIARY REQUEST I

2. Amendments (Article 100(c) EPC 1973/123 EPC)

2.1 Claims 1-16 of auxiliary request I are based on Claims 1-10 and 12-17 as granted.

2.2 Independent Claims 1, 2 and 15 of auxiliary request I refer to a "dry or semi-moist" "pet food composition", a feature which was already present in the corresponding granted claims.

2.2.1 This feature was objected to by appellant 01 as not being supported by the application as filed, essentially because the term "dry or semi-moist" appeared in the application as filed only in association with a "pet food" but not with a "pet food composition".

2.2.2 However, the above mentioned feature is disclosed in the application as filed because therein the terms "pet food" and "pet food composition" are used to refer to one and the same subject.

This is clear, for example, from the passage bridging pages 2 and 3 of the application as filed wherein it is stated that "In an embodiment of the invention, the **pet food** comprises about 200ppm of one or more plant extracts by weight of the **food composition**" [emphasis by the board].

Furthermore, the disclosure at page 4, lines 30-33 teaches that one aspect of the invention is a method of reducing oral malodour, comprising "...the administration to, or consumption by, the animals in need thereof of a **pet food composition** which contains at least about 40ppm by weight of the composition of one or more plant extracts." [Emphasis by the board]. It is clear from this paragraph that in the application as originally filed the wording "pet food composition" was used to refer to the pet food product to be fed to the animal, and not to an intermediate composition from which the pet food product is made.

2.2.3 Concerning the argument of appellant 01 that the term "pet food composition" refers only to the mixture of ingredients which are used in the preparation of the (final) pet food product, it is noted that this interpretation is not supported in the application as filed, where the mixture of ingredients from which "the pet food" or "pet food composition" is made is referred to throughout the specification as "a dough" (see

page 3, lines 18-19 and the passage from page 6, line 28 to page 9, line 33).

- 2.2.4 Thus, the feature "dry or semi-moist pet food composition" in Claims 1, 2 and 15 of auxiliary request I does not contravene Article 123(2) EPC.

- 2.3 During the opposition/appeal proceedings further amendments were made to the claims. These amendments, which were made in order to distinguish the claimed subject-matter from the disclosure of documents D5a, D6a and D7, also fulfil the requirements of Article 123 EPC.
 - 2.3.1 Thus the plant extract(s) referred to in Claims 1 and 2 were limited to the list of specific essential oils as disclosed on page 5, lines 18-28 of the application as filed, from which list lavender oil is deleted.

In Claim 15, the plant extract(s) were limited to essential oils.

- 2.3.2 Moreover a disclaimer ("other than an animal food product comprising 36.9 to 38.89 wt% beef tallow, 30 wt% protein solids, 30 wt% wheat flour, 1 wt% emulsifier, 0.1 wt% antioxidant and 0.01 to 2.0 wt% rosemary, clove, eucalyptus and/or parsley seed oils") was introduced into Claims 1 and 15 in order to limit the claimed subject-matter from the disclosure of D5a, a document to be regarded as state of the art only in accordance with Article 54(3)EPC. The disclaimer fulfils the criteria for assessing the allowability of a disclaimer as set out in decision G 1/03 (OJ EPO 2004, 413). This was not contested by appellant 01.

2.4 The amendments made also undisputedly restrict the scope of the claims.

2.5 Consequently, the subject-matter of the claims therefore fulfils the requirements of Articles 123(2),(3) EPC.

3. *Clarity (Article 84 EPC 1973)*

3.1 Appellant 01 contested the clarity of Claim 12. It pointed out that in Claim 12 reference was made to the use of "cinnamon oil" as essential oil, while in Claims 1 and 2 "cinnamon leaf" was mentioned as the source of the essential oil. Taking into account that for example in Claims 1 and 2 reference was made as regards the plant clove to "clove bud" and to "clove leaf", it was not clear from which part of the plant the cinnamon oil of Claim 12 was to be obtained.

3.2 However, Claim 12 is a dependent claim, which refers to the pet food composition "according to any preceding claim". Since "cinnamon leaf" essential oil is the only cinnamon oil mentioned in the preceding claims (cf. Claims 1 and 2), the limitation of the previous claims carries over to the cinnamon oil referred to in Claim 12.

3.3 The subject-matter of Claim 12 is therefore clear and fulfils the requirements of Article 84 EPC 1973.

4. *Novelty*

4.1 As pointed out above (see point 2.3), the claims were amended during the opposition/appeal proceedings in order to establish novelty. Firstly, a disclaimer was introduced into Claims 1 and 15 in view of the disclosure of D5a (Example 7, Table 9). Secondly, the plant extracts referred to in Claims 1 and 2 were limited to specific essential oils in order to exclude the food compositions of D6a, in particular Example 7 of D6a, and the cookie disclosed in Example 3 of D7. Since, however, document D6a utilised the essential oils as inhibitors for glucosyl transferase, i.e. in order to reduce synthesis of glucan, and document D7 used lavender essential oil as an active ingredient in a food for the treatment of insomnia, the plant extract(s) referred to in Claim 15 ("Use of one or more plant extract(s) for ... reducing oral malodour in domestic animals ...") were merely limited to essential oil(s).

In fact, the novelty of Claims 1 and 15 was not contested by appellant 01 during the oral proceedings. Nor did the board see any reason to raise an objection on its own motion.

4.2 Appellant 01 maintained that the subject-matter of Claim 2 of auxiliary request I still lacked novelty having regard to the disclosure of Example 7/Table 9 of document D5a. It argued that there was no definition of pet biscuit in the patent in suit and consequently the term should be understood in a broad way. Taking that into account, it concluded that D5a anticipated the claimed subject-matter because the food compositions of

D5a contained the same components (cf. Example 7) and were prepared using processing steps that could be used to make a biscuit (cf. page 23, lines 5-21).

- 4.3 There is, however, no clear and unambiguous disclosure in D5a of a pet biscuit as claimed in Claim 2.
- 4.3.1 D5a is directed to a dual component animal food product with increased palatability in which, essentially, a hard outer shell surrounds a soft inner filling (see page 7, lines 11-33). Example 7 of D5a describes the preparation of an inner filling having a composition covered by Claim 2, but there is no indication in D5a that this inner filling is used to make a biscuit. In fact, there is no indication in D5a of the exact nature of the pet food prepared with the inner filling of Example 7. The only information given on page 28, lines 8 to 11 is that "The following examples show other embodiments of the present invention having an outer shell made with ingredients similar to that used in the above Examples and having inner lipid softer mixtures as indicated below". It follows that Example 7 of D5a does not disclose a pet biscuit and therefore it does not anticipate the subject-matter of Claim 2.
- 4.3.2 Moreover the general teaching of D5a also does not anticipate the claimed pet biscuit. There is no information in D5a that the food products prepared according to D5a are used to prepare biscuits. The paragraph on page 23, lines 5 to 21, relied upon by appellant 01, actually relates to a mild drying step (see lines 20-21) and not to a baking as required to prepare a biscuit.

4.4 Hence, there is no clear and unambiguous disclosure in D5a of an embodiment falling within the scope of Claim 2, either in the specific or in the general disclosure of D5a. The subject-matter of this claim is therefore novel over D5a.

5. *Inventive step (Article 56 EPC 1973)*

5.1 The patent in suit is concerned with reducing malodour in pets. It is based on the finding that essential oils in dry or semi-moist pet food compositions reduce the level of unpleasant volatile sulphur compounds and thus have a breath-freshening effect (see Example 1). The efficacy of the essential oils is said to arise from their anti-bacterial activity (see Examples 2 and 3).

5.2 Closest prior art

5.2.1 The board considers, in agreement with appellant 02, that the closest prior art is represented by D1.

5.2.2 D1 discloses a nutritional drink composition which may include an agent for freshening the breath of an animal, the agent being selected from any known breath freshener including chlorohexidine, thymol and cetylpyridinium chloride, thymol being a compound found in oil of thyme (see column 2, lines 58-62; see also column 5, lines 9-17 and Claim 1). Thus the compositions of D1 containing the same components as the claimed compositions and having the same use represent the closest prior art.

5.2.3 Contrary to this, appellant 01 relied on D6a as the closest prior art. Document D6a utilises essential oils

as inhibitors of glucosyltransferases in order to reduce dental caries (Claims 1 and 2). It also discloses pet food containing said oils (see [0016] and Example 7). Appellant 01 relied on D6a as closest prior art basically because in its opinion the compositions of D6a had the most features in common with the claimed invention.

5.2.4 However, in the board's view, D6a does not represent a suitable starting point for the assessment of inventive step for the following reasons:

- According to EPO practice, in selecting the closest prior art, the first consideration is that it must be directed to the same purpose or effect as the invention (see, for instance Case Law of the Boards of Appeal 6th edition 2010 Chapter ID.3.2).
- The compositions of D6a are not used for reducing malodour or to achieve a breath-freshening effect. They are used to avoid the formation of glucan by inhibiting the action of glucosyltransferases in the oral cavity so as to prevent the formation of caries.
- The board cannot accept the argument of appellant 01 that the skilled person would deduce a breath-freshening effect from the compositions of D6a because oral hygiene was intrinsically linked to halitosis. Appellant 01 relied mainly on paragraph [0002] of the patent in suit to support this argument, but appellant 02 convincingly argued that the study referred to in this paragraph was a human study and in any event no reference was made to a causal association. As further explained by

appellant 02, the therapy disclosed in D6a, which specifically targets caries-causing bacteria, teaches nothing about the effect of the active agents in reducing oral malodour, in essence because the bacteria which are responsible for oral malodour are abundant in the mouth of a pet whereas the bacteria which cause caries are very rare. Accordingly, it is not possible to infer from the disclosure of D6a that the compositions described therein would freshen the breath of domestic animals.

- Since D6a is not directed to reducing malodour, it does not qualify as closest prior art document.

5.3 Problem to be solved and its solution.

5.3.1 The distinguishing feature of the claimed compositions with respect to the compositions of the closest prior art D1 lies in the presentation form. Thus while the compositions of D1 are liquid compositions, those now claimed are dry or semi-moist compositions.

5.3.2 The objective technical problem to be solved by the claimed subject-matter can thus be formulated as the provision of alternative breath-freshening compositions provided in another delivery format.

5.3.3 The proposed solution to this problem is the claimed dry or semi-moist composition which is useful as a breath-freshening composition.

5.3.4 The results of the examples in the specification demonstrate that this problem has been credibly solved by the claimed compositions. The amount of volatile

sulphur compounds in the breath of dogs fed with biscuits containing eucalyptus oil is reduced when compared with dogs fed with biscuit without eucalyptus as can be seen from the results of Example 1 in the patent specification (compare biscuits 1 and 2).

5.3.5 The board is thus satisfied that the technical problem defined above is solved by the claimed compositions. This finding was not contested by appellant 01.

5.4 Obviousness.

5.4.1 It remains to be decided whether, in view of the available prior art documents, it would have been obvious for the skilled person to solve this technical problem by the means claimed, that is to say, if it would have been obvious for the skilled person to modify the drink compositions of D1 to obtain the claimed compositions.

5.4.2 There is no hint to this solution in D1 itself. D1 deals exclusively with liquid compositions, namely nutritional drinks containing approximately 90 to 98 weight percent water (see Claim 1; see also column 2, lines 14-18). The breath-freshening agent therein dispersed would be expected to distribute itself fairly evenly around the animal's mouth, thereby achieving a breath-freshening effect.

In contrast, a dry or semi-moist composition is consumed much more rapidly by the animal. It has a shorter residence time in the mouth and would not be expected to distribute itself evenly round the mouth. Given that difference, the skilled person would not

expect that the breath-freshening effect shown by the liquid format of D1 would also be shown by a semi-moist pet food composition and a biscuit, respectively. On the contrary, it is unexpected that solid compositions could achieve a breath freshening effect. There is therefore no hint in D1 as to modify the drink compositions therein disclosed in a manner to arrive at the compositions of Claim 1.

5.4.3 There is also no hint to the claimed compositions in D6a. As stated above the compositions of D6a are directed to caries and the bacteria responsible for caries are rarely present in the mouth of a pet. Consequently, when starting from D1 and addressing the problem of the invention there is nothing to motivate the skilled person to adopt the dry format taught in D6a and use it in D1, as D6a is not concerned with breath-freshening products.

5.4.4 The board can also not accept the argument of appellant 01 regarding a lack of inventiveness that there was no technical obstacle for the preparation of the claimed compositions, since very similar semi-moist and dry compositions were already well known in the art, for instance in D6a.

Although it is correct that there was no technical obstacle to providing the claimed compositions, this issue is, however, not relevant for the assessment of obviousness. The relevant question to be asked is whether or not there was a hint in the prior art for the preparation of the claimed compositions to solve the posed technical problem. For the reasons given above, the answer to this question is clearly no.

Moreover it appears that the argument of appellant 01 is based on the *ex-post facto* knowledge of the invention.

5.4.5 The finding that by using dry or semi-moist compositions comprising essential oils as defined in the present claims, breath freshening compositions for treating malodour can be prepared, is a finding that cannot be deduced from the cited prior art.

5.4.6 Hence, the board concludes that the person skilled in the art having in mind the technical problem to be solved and having the prior art related to this technical field at his disposal would not have arrived in an obvious manner at the claimed invention in the form of Claims 1, 2 and 15 of auxiliary request I. The same applies to dependent Claims 2 to 14 and 16, which represent particular embodiments of the subject-matter of said claims.

6. As auxiliary request I of appellant 02 is allowed, there is no need for the Board to deal with the further requests.

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 European patent on the basis of Claims 1 to 16 of auxiliary request I filed at the oral proceedings of 24 September 2010, after any necessary consequential amendment of the description.

The Registrar

The Chairman

R. Schumacher

W. Sieber