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**Datasheet for the decision
of 19 December 2012**

Case Number: T 0432/10 - 3.3.02
Application Number: 98913414.3
Publication Number: 967985
IPC: A61K 31/715, A61K 45/06,
A23K 1/16, A23K 1/18, A61P 3/08
Language of the proceedings: EN

Title of invention:

Process for improving glucose metabolism, satiety, and
nutrient absorption in companion animals

Patentee:

THE IAMS COMPANY

Opponent:

NESTEC S.A.

Headword:

Process for improving glucose metabolism/THE IAMS COMPANY

Relevant legal provisions (EPC 1973):

EPC Art. 83

Keyword:

"Sufficiency of disclosure - (no): invention as claimed not
workable"

Decisions cited:

-

Catchword:

There is insufficiency of disclosure if the skilled person,
taking into account the entire teaching of the patent, is not
able to rework an invention which is defined in the claims in
a completely clear and comprehensible manner, unless he
disregards a meaningful feature thereof.



Case Number: T 0432/10 - 3.3.02

DECISION
of the Technical Board of Appeal 3.3.02
of 19 December 2012

Appellant: NESTEC S.A.
(Opponent) Avenue Nestlé 55
CH-1800 Vevey (CH)

Representative: Rupp, Christian
Mitscherlich & Partner
Patent- und Rechtsanwälte
Postfach 33 06 09
D-80066 München (DE)

Respondent: THE IAMS COMPANY
(Patent Proprietor) 7250 Poe Avenue
Dayton, Ohio 45414 (US)

Representative: Kellenberger, Jakob
N.V. Procter & Gamble Services Company S.A.
Temselaan 100
B-1853 Strombeek-Bever (BE)

Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
30 December 2009 concerning maintenance of the
European patent No. 967985 in amended form.

Composition of the Board:

Chairman: U. Oswald
Members: A. Lindner
L. Bühler

Summary of Facts and Submissions

- I. European patent No. 0 967 985, based on application No. 98 913 414.3, was granted on the basis of 27 claims.
- II. Notice of opposition was filed against the patent. The patent was opposed under Article 100(a) EPC 1973 for lack of novelty and inventive step, under Article 100(b) EPC 1973 for insufficiency of disclosure and under Article 100(c) EPC 1973 on the ground that the claims as granted contained subject-matter extending beyond the content of the application as originally filed.
- III. The appeal lies from a decision of the opposition division pronounced on 21 December 2009 and posted on 30 December 2009, maintaining the European patent on the basis of auxiliary request III filed with letter dated 19 October 2009.
- IV. In said decision, auxiliary request III was found to meet the requirements of Article 123(2) EPC and Articles 83, 54 and 56 EPC 1973. Concerning sufficiency of disclosure, the opposition division concluded that the expression "maintaining said animal on said diet for a sufficient period of time to allow said blend to ferment in the GI tract of said animal" meant that the desired effect appeared after every feed upon fermentation of the composition and progressively built up, so that the animal had to be kept on the diet for as long as necessary. That meant that said expression did not set a definite time limit for the use of the composition.

V. The appellant (opponent) lodged an appeal against that decision.

VI. Oral proceedings before the board were held on 19 December 2012.

VII. The independent claims of auxiliary request III read as follows:

"1. A non-therapeutic process for improving the glucose metabolism of a companion animal comprising the steps of: feeding said animal a diet containing from 1-11 weight percent of supplemental total dietary fiber, said supplemental total dietary fiber consisting of a blend of beet pulp, fructooligosaccharides and gum talha or gum arabic; and maintaining said animal on said diet for a sufficient period of time to allow said blend to ferment in the gastrointestinal tract of said animal.

12. A non-therapeutic process for increasing the secretion of glucagon-like peptide-1 (GLP-1) in the gastrointestinal tract (GIT) of a companion animal to improve glucose metabolism and satiety in said animal comprising the steps of: feeding said animal a diet containing from 1-11 weight percent of supplemental total dietary fiber, said supplemental total dietary fiber consisting of a blend of beet pulp, fructooligosaccharides and gum talha or gum arabic; and maintaining said animal on said diet for a sufficient period of time to allow said blend to ferment in the GIT of said animal.

13. Use of a composition containing from 1-11 weight percent of supplemental total dietary fibre consisting of a blend of beet pulp, fructooligosaccharides, and gum talha or gum arabic in the preparation of a medicament for improving glucose metabolism of a companion animal by maintaining the animal on said diet for a sufficient period to allow the blend to ferment in the GIT.

14. Use of a composition containing from 1-11 weight percent of supplemental total dietary fibre consisting of a blend of beet pulp, fructooligosaccharides, and gum talha or gum arabic in the preparation of a medicament for increasing the secretion of glucagon-like peptide-1 (GLP-1) in the gastrointestinal tract (GIT) of a companion animal to improve glucose metabolism and satiety by maintaining the animal on said diet for a sufficient period to allow the blend to ferment in the GIT.

15. Use of a composition containing from 1-11 weight percent of supplemental total dietary fibre consisting of a blend of beet pulp, fructooligosaccharides, and gum talha or gum arabic in the preparation of a medicament for the treatment of exocrine pancreatic insufficiency by maintaining a companion animal on said diet for a sufficient period to allow the blend to ferment In the gastrointestinal tract (GIT) of the animal to increase nutrient absorption and the transport of D-glucose and lauric acid in the GIT."

VIII. The appellant's arguments regarding sufficiency of disclosure can be summarised as follows:

The diet defined in the claims included a one-time administration of the dietary fiber. As it was not possible to obtain the desired beneficial effect after such a short duration, the claimed invention was not sufficiently disclosed.

IX. The respondent's arguments regarding sufficiency of disclosure can be summarised as follows:

The opposition division had correctly argued in the decision under appeal that the feature "maintaining said animal on said diet for a sufficient period of time to allow said blend to ferment in the GI tract of said animal" did not set a definite time limit for the use of the composition. Sufficiency of disclosure had to be evaluated on the basis of the application in its entirety, including the claims, the description and the figures. It was clear from the examples that the diet was not stopped after a one-time administration of the dietary fiber but continued for several weeks. The feature in question was superfluous but that did not mean that the invention defined in the claims was insufficiently disclosed.

X. The appellant requested that the decision under appeal be set aside and that the European patent No. 967985 be revoked.

The respondent requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.
2. Sufficiency of disclosure

The invention defined in claim 1 of the sole request concerns a non-therapeutic process for improving the glucose metabolism of a companion animal involving a diet in which a certain blend of dietary fibres is fed to a companion animal. The duration of the diet is defined as follows: maintaining said animal on said diet for a sufficient period of time to allow said blend to ferment in its gastrointestinal tract. This instruction is *per se* very clear: the diet has to be maintained until the blend of dietary fibres is fermented. As fermentation already occurs after the first administration of the fibre blend, the diet is reduced to a one-time administration: the fibre blend is orally administered, passes through the stomach and enters the intestine, where it is fermented. Then the diet is terminated. Such a one-time administration is in direct contradiction to the term "diet" which implies that a certain schedule concerning the administration of food is followed over a period of time that clearly surpasses a one-time administration. As a consequence, the claimed invention is contradictory in itself, so that the skilled person, trying to put into practice the invention defined in claim 1, is at a complete loss as to what he should do.

The opposition division argued that the feature "maintaining said animal on said diet for a sufficient period of time to allow said blend to ferment in the

gastrointestinal tract of said animal" did not set a definite time limit for the use of the composition. That would be the only logical way to remove the contradiction. The board, however, concludes that this interpretation would be contrary to the interest of legal certainty, as it would mean that a feature that is perfectly understandable *per se* would have to be deliberately ignored in order to make the invention workable. Such a step has to be distinguished from a situation concerning clarity, in which an unclear term figuring in a claim is interpreted in the light of the description. There, the unclear feature is not simply ignored. On the contrary, by studying the description, every precaution is taken in order to read it correctly. In the present case, however, the mental deletion of the feature in question would mean switching from the unworkable and thus insufficiently disclosed invention defined in claim 1 to a different invention that is workable but not claimed. The evaluation of sufficiency of disclosure takes account of the entire information to be found in the patent, including claims, description, examples and figures. The board, however, wishes to emphasise that the invention as defined in the claims constitutes the basis of the evaluation. If, as in the present case, the skilled person, taking into account the entire teaching of the patent, is not able to rework an invention which is defined in the claims in a completely comprehensible manner, then the invention is insufficiently disclosed. As a consequence, the requirements of Article 83 EPC 1973 are not met.

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:

N. Maslin

U. Oswald