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**Datasheet for the decision
of 30 June 2015**

Case Number: T 2303/12 - 3.3.06
Application Number: 01924831.9
Publication Number: 1268722
IPC: C11C3/14, C11B5/00, A23D9/00,
A23L1/30, B01D15/00
Language of the proceedings: EN

Title of invention:
CONJUGATED LINOLEIC ACID COMPOSITIONS

Applicant:
Aker Biomarine ASA

Headword:
CLA compositions/Aker Biomarine

Relevant legal provisions:
EPC Art. 52(1), 54, 111(1), 123(2)

Keyword:
Amendments - added subject-matter (yes) -
(Main Request and Auxiliary Requests 1 to 3) - added subject-
matter (no) - (Auxiliary Request 4)
Novelty - (yes) - (Auxiliary Request 4)
Remittal to the department of first instance - (yes) -
(for further prosecution on the still outstanding issues)

Decisions cited:

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

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Case Number: T 2303/12 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 30 June 2015

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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 19 March 2012
refusing European patent application No.
01924831.9 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman E. Bendl
Members: G. Santavicca
S. Fernández de Córdoba

Summary of Facts and Submissions

- I. The appeal lies from the decision of the Examining Division to refuse the European patent application No. 01 924 831.9.
- II. The decision under appeal was based on seven claim requests, labelled Main Request and Auxiliary Requests 1 to 6. Claims 1 according to the Main Request and Auxiliary Requests 1 to 2, Claims 1 and 6 according to Auxiliary Request 3 and Claims 1, 6 and 7 according to Auxiliary Request 4, respectively, read as follows (amendments of Claims 1 of the Auxiliary Requests as compared to Claim 1 of the Main Request made apparent by the Board):

Main Request

"1. A composition comprising an isomerized conjugated linoleic acid moiety, a metal oxidant chelator and a peroxide scavenger, said conjugated linoleic acid moiety having a sufficiently low volatile organic compound concentration so that the taste and smell of said composition is not affected, wherein said isomerized conjugated linoleic acid moiety is a free fatty acid, an alkyl ester or a triacylglyceride."

Auxiliary Requests 1 and 2

*"1. A composition comprising an isomerized conjugated linoleic acid moiety, a metal oxidant chelator and a peroxide scavenger, said conjugated linoleic acid moiety having a ~~sufficiently low volatile organic compound concentration so that the taste and smell of said composition is not affected~~ **content of low molecular weight volatile organic compounds not***

exceeding 100 ppm total during a storage period of at least thirty days under inert storage conditions, wherein said isomerized conjugated linoleic acid moiety is a free fatty acid, an alkyl ester or a triacylglyceride."

Auxiliary Request 3

"1. A composition comprising an isomerized conjugated linoleic acid moiety, a metal oxidant chelator and a ~~peroxide-scavenger~~ **an antioxidant selected from the group of α -tocopherol, β -tocopherol and ascorbyl palmitate,** said conjugated linoleic acid moiety having a ~~sufficiently low volatile organic compound concentration so that the taste and smell of said composition is not affected~~ **content of low molecular weight volatile organic compounds not exceeding 100 ppm total during a storage period of at least thirty days under inert storage conditions,** wherein said isomerized conjugated linoleic acid moiety is a free fatty acid, an alkyl ester or a triacylglyceride."

"6. The composition as claimed in any one of claims 1 to 5 wherein said composition has an oil stability index of from twenty to one hundred hours at sixty degrees Celsius."

Auxiliary Request 4

Claim 1 of Auxiliary Request 4 is identical to Claim 1 according to Auxiliary Request 3.

"6. A food product comprising the compositions of any one of the preceding claims."

"7. A food supplement comprising the compositions of any of the preceding claims."

- III. In the decision under appeal, the Examining Division *inter alia* concluded that
- the claimed subject-matter of the Main Request and of Auxiliary Requests 1-3 did not meet the requirements of Article 123(2) EPC; and,
 - the food product/supplement of Claims 6 and 7 of Auxiliary Request 4 lacked novelty over the dressings disclosed in Example 16 of D11.
- IV. In its statement setting out the grounds of appeal dated 26 July 2012, the Appellant (re)submitted the Main Request and Auxiliary Requests 1 to 6 dealt with in the decision under appeal, as well as a further claim request, labelled Auxiliary Request 7, consisting of Claims 1-10 of Auxiliary Request 6.
- V. In its statement of grounds, the Appellant essentially argued
- that the amendments to the claims were based on the application as originally filed,
 - that Example 16 of D11 neither disclosed a metal oxidant chelator nor any of the antioxidants required by the claims of Auxiliary Request 4.
 - Furthermore, there was no evidence in D11 that the compositions would be stable enough to have a low molecular weight volatile organic compounds content of less than 100 ppm after storage for 30 days under inert conditions.

Still in its statement, the Appellant requested that the impugned decision be set aside and that a patent be granted on the basis of the claims according to the Main Request, alternatively on the basis of any of

Auxiliary Requests 1 to 7, all claim requests submitted with the statement setting out the grounds of appeal dated 26 July 2012.

VI. With letters dated 16 and 22 June 2015 the Appellant announced that it would not be attending the oral proceedings and maintained its requests as listed *supra*.

VII. Oral proceedings were held in the announced absence of the Appellant on 30 June 2015, pursuant to Rule 115(2) EPC and Article 15(3) RPBA.

Reasons for the Decision

Admissibility of the claim requests

1. The Main Request and Auxiliary Requests 1 to 4 are identical to the respective claim requests dealt with in the decision under appeal. Therefore, these claim requests are clearly admissible (Article 12(1) RPBA).

Main Request

Amendments - Article 123(2) EPC

2. Independent Claim 1 according to the Main Request contains the feature "*peroxide scavenger*".

2.1 In the decision under appeal the Examining Division considered this feature in combination with the (remaining) features of the Main Request not to be directly and unambiguously derivable from the application as filed.

2.2 In the grounds of appeal the Appellant referred to Claims 48 to 51 of the application as filed as the basis for Claim 1 of the Main Request. Said claims do not contain the feature "*peroxide scavenger*",

Claims 48 to 51 as originally filed define a composition containing conjugated linoleic acid, also referred to as CLA, having a sufficiently low volatile organic compound concentration, so that the taste and smell of the composition is not affected.

2.2.1 According to the corresponding passage of the description of the application as filed (first paragraph on page 28), this effect is to be equated with a concentration of less than 100 ppm of volatile organic compounds. This paragraph also highlights that such a low concentration is only achieved according to **some embodiments** of the invention: "*Accordingly, some embodiments of the present invention provide a food product containing a conjugated linoleic acid moiety, wherein the conjugated linoleic acid moiety has a sufficiently low volatile organic acid compound concentration so that taste and smell of the food product is not affected.*" (emphasis added).

2.2.2 On the other hand, the passage on page 24, first full paragraph, lines 14-15 (this passage has particularly been invoked by the Appellant as basis for the amendment in Claim 1 at issue), describes the prevention of oxidation *inter alia* by using "*a combination of metal oxidant chelators and peroxide scavengers*". As expressly stated in this paragraph, however, this combination too reflects only **specific embodiments** of the invention, namely "*[i]n other embodiments, a combination of metal oxidant chelators*

and peroxide scavengers is included in the CLA composition" (emphasis added).

The Board does not see any hint in the application as originally filed to link these separate, specific embodiments, i.e. to combine their features. Thus, they have to be seen as two distinct, separate embodiments of the invention, which do not belong together.

2.2.3 The same considerations apply to the further mention of the feature "*peroxide scavenger*" on page 26, line 5, which only refers to the addition of **one** of the compounds in question: "*In some embodiments, oxidation of CLA is prevented by the addition of metal chelators or peroxide scavengers to the finished product.*" (emphasis added).

2.2.4 Therefore, as the combination of features of Claim 1 has no basis in the original application, Claim 1 extends beyond the contents of the disclosure of the application as filed, thus contravenes the requirements of Article 123(2) EPC.

2.3 Consequently, the Main Request is not allowable.

Auxiliary Requests 1 and 2

Amendments - Article 123(2) EPC

3. Since Claims 1 of Auxiliary Requests 1 and 2 still contain the objected to "*peroxide scavenger*" in combination with the further features as discussed *supra*, the grounds for refusing the Main Request apply *mutatis mutandis* to these claims of Auxiliary Requests 1 and 2, which requests consequently are not allowable either.

Auxiliary Request 3

Amendments - Article 123(2) EPC

4. Claim 1 of Auxiliary Request 3 no longer contains the objected feature *"peroxide scavenger"*.
- 4.1 However, as also exposed in the decision under appeal, Auxiliary Request 3 comprises dependent Claim 6 (reading as follows: *"The composition as claimed in any one of claims 1 to 5 wherein said composition has an oil stability index of from twenty to one hundred hours at sixty degrees Celsius"*), referring *inter alia* to Claim 1, which contains the feature *"storage period of at least thirty days"*.
- 4.2 This particular combination of features (oil stability index, storage period) was neither reflected by the wording of Claims 16-28 of the application as filed, nor disclosed in the corresponding parts of the description of the application as filed and was therefore objected by the Examining Division. It becomes particularly apparent when comparing the following embodiments generally disclosed in the application, that the features at issue are (at most) disclosed as alternative embodiments (emphasis added below):
 - (a) Page 5, lines 4-7 (*"In some preferred embodiments, the compositions comprise an isomerized conjugated linoleic acid moiety, the composition having a content of low molecular weight volatile organic compounds not exceeding 100 ppm total during a storage period of at least thirty days under inert storage conditions"*);

- (b) Page 5, lines 7-11 ("In other preferred embodiments, the present invention provides compositions comprising an isomerized conjugated linoleic acid moiety, said composition containing not more than 100 ppm total of low molecular weight volatile organic compounds and having an oil stability index of from twenty to one hundred hours at sixty degrees Celsius"); or,
- (c) Page 24, lines 16-17 "In some embodiments, gas chromatography/mass spectroscopy is used in detect the presence of volatile organic breakdown products of CLA";
- (d) Page 24, lines 17 ff. In other embodiments, oil stability index (OSI) measurements are used to detect the presence of volatile organic breakdown products of CLA. In preferred embodiments ..." (see also page 26, lines 8-28, "In some embodiments the amount of oil is measured by the oil stability index ... An example ...").

4.3 Thus, Claim 6 of Auxiliary Request 3 does not fulfil the requirements of Article 123(2) EPC, and therefore Auxiliary Request 3 is not allowable either.

Auxiliary Request 4

Amendments - Article 123(2) EPC

5. The claims of Auxiliary Request 4 were not objected under Article 123(2) EPC by the Examining Division.

5.1 The Board has no reason to take a different stance, as:

- (a) Claim 1 is based on the combination of Claims 1-5, 12 and 13 as originally filed, which combination was implicitly referred to in the references of

the said claims, apart from the deletion of the options "lecithin" and "BHT" in the list of Claim 13 as filed, which, however, represents a deletion within a single list.

(b) Claims 2 to 7, respectively, correspond to Claims 6 to 9 and 14 to 15 of the application as filed.

5.2 Hence, Auxiliary Request 4 meets the requirements of Article 123(2) EPC.

Novelty

6. The sole ground for refusal under Article 54 EPC in the decision under appeal concerns Claims 6 and 7 of Auxiliary Request 4 (point II, *supra*), defining a food product and a food supplement comprising the composition defined in Claim 1, and is based on the disclosure of Example 16 of D11.

7. Example 16 of D11 discloses ranch style dressings (thus, food products or food supplements). They include glycerides rich in the cis 9, trans 11 isomer of CLA, as made in Example 7 of D11, and are prepared according to the following recipe:

Liquid oil	25.0 wt%
Maltodextrin	20.0 "
Dried egg yolk	0.8 "
Xanthum gum	0.4 "
Vinegar	5.0 "
Water	48.8 "

7.1 In order to prepare the dressings, the water and the maltodextrin were blended first, then the egg yolk, the xanthum gum and the vinegar were sequentially added under stirring until complete mixing had occurred. Then

the oils were slowly added to the aqueous phase whilst mixing, until all the oil appeared to have been dispersed. Finally the viscosities and the oil droplets size distribution were determined.

- 7.2 The Examining Division concluded in its decision that (dried) egg yolk inherently contained lecithin and various tocopherols including α - and β -tocopherol and that therefore at least the subject-matter of Claims 6 and 7 was anticipated.
- 7.3 In the decision under appeal an alleged non-relevance of the required maximum amount of 100 ppm of volatile organic compounds was only discussed in an *obiter dictum* referring to Claim 1, but no detailed reasoning was given in this respect with regard to the objected Claims 6 and 7 vis-à-vis the disclosure of D11.
- 7.4 However, even when disregarding this aspect, no evidence has been provided by the Examining Division that the composition according to Example 16 of D11, in particular the dried egg yolk, actually comprises the combination of a metal oxidant chelator and an antioxidant selected from α -tocopherol, β -tocopherol and ascorbyl palmitate, as required by the claims at issue.

As specified *supra*, the Examining Division postulated that it was generally known that a (dried) egg yolk contained various tocopherols, including α - and β -tocopherol. However, it is also commonly known that losses of tocopherols may be encountered when heat processing (e.g. drying) products in the presence of oxygen/air (e.g. see for instance the general textbook Römpp Lexikon Lebensmittelchemie, 9. ed. 1995, pages 902/903, chapter "Vitamin E").

7.5 More concrete effects of storage conditions on the content of tocopherols in dried egg yolk can for instance be derived from S.X. Li et al, *Cholesterol Oxidation in Egg Yolk Powder During Storage and Heating as Affected by Dietary Oils and Tocopherols*, Journal of Food Science, Volume 61, No.4, 1996 (see in particular Table 3, which shows that in dried egg yolk powder sample S0, stored for 4 months, the amount of tocopherols was reduced from 228 to 38.8 micrograms/g yolk powder, i.e. to 17% of its initial content).

Thus, since both, heating and storage strongly reduce the amounts of tocopherols present in dried egg yolk and no details are given in this respect in D11, it cannot be assumed **with certainty** that the dried egg yolk product used in D11 contains tocopherols at all.

7.6 Therefore, Example 16 of D11 does not directly and unambiguously disclose that all the compounds required by Claims 6 and 7 (both containing the composition according to Claim 1) are present.

The food product defined in Claim 6 and the food additive according to Claim 7 at issue are thus new over the disclosure of D11.

Remittal

8. Since other outstanding issues (such as novelty of the subject-matter of the claims, e.g. Claim 1, vis-à-vis the remaining prior art disclosures or inventive step) have either not been dealt with in the decision under appeal or have only briefly been mentioned in *obiter dicta*, the Board considers it appropriate, in the present case, to remit the case to the department of

first instance for further prosecution on the basis of the claims of Auxiliary Request 4 submitted with the statement setting out the grounds of appeal.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution on the basis of the claims according to Auxiliary Request 4 filed with the statement setting out the grounds of appeal dated 26 July 2012.

The Registrar:

The Chairman:



D. Magliano

E. Bendl

Decision electronically authenticated