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**Datasheet for the decision
of 14 January 2016**

Case Number: T 2451/13 - 3.3.09

Application Number: 07715867.3

Publication Number: 1981360

IPC: A23L1/29, A23L1/30, A23L1/212

Language of the proceedings: EN

Title of invention:
SENSORIC IMPRINTING

Patent Proprietor:
N.V. Nutricia

Opponent:
NESTEC S.A.

Headword:

Relevant legal provisions:
EPC Art. 53(c), 123(2), 56
RPBA Art. 12(4), 13(1), 13(3)

Keyword:

Review of first-instance decision to admit late-filed ground
Ground for opposition under Article 100(a)/53(c) EPC
Admissibility of new objection under Article 123(2) EPC
Admissibility of late-filed auxiliary request
Admissibility of document filed in response to the statement of
f grounds of appeal
Public availability of commercial brochure from opponent -
standard of proof
Kit of parts - inventive step

Decisions cited:

G 0007/93, T 0743/89, T 0472/92, T 0782/92, T 0097/94,
T 0055/01, T 1257/04, T 0804/05, T 1553/06, T 0002/09,
T 1635/09

Catchword:

If the publication date of a document originating from an
opponent (or a subsidiary thereof) is in dispute, the opponent
must prove that date "up to the hilt". The yardstick for this
proof is that of "beyond reasonable doubt" rather than
"absolute certainty" (point 3.2).



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Case Number: T 2451/13 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 14 January 2016

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 1 October 2013
revoking European patent No. 1981360 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman

W. Sieber

Members:

M. O. Müller

E. Kossonakou

Summary of Facts and Submissions

I. This decision concerns the appeal filed by the proprietor of European patent No. 1 981 360 against the decision of the opposition division to revoke it.

II. With the notice of opposition, the opponent had requested revocation of the patent in its entirety on the grounds under Article 100(a) (lack of novelty and inventive step), 100(b) and 100(c) EPC.

In the course of the opposition proceedings a new ground for opposition under Article 100(a)/53(c) EPC was raised.

The documents submitted during the opposition proceedings included:

D1: C. J. Gerrish et al., Am. J. Clin. Nutr., volume 73, 2001, pages 1080 to 1085; and

D2: "Starting Solid Foods - Start HealthyTM Stay Healthy Feeding Guidelines", American Dietetic Association.

III. The opposition division's decision was based on a main request and auxiliary requests 1 to 7.

- The main request (patent as granted) contained the following independent claims:

"1. A non-therapeutic method for sensoric imprinting of different tastes in an infant, comprising the steps of:

a. administering to the infant one portion of a food product A (FP-A); followed by

b. administering to the infant one portion of a food product B (FP-B); followed by

c. administering to the infant one portion of a food product C (FP-C); followed by

d. administering to the infant one portion of a food product D (FP-D);

wherein FP-A comprises a plant material and FP-B comprises a plant material from a plant species other than a plant species used for the manufacture of FP-A and FP-C comprises a plant material from a plant species other than the plant species used for the manufacture of FP-A and other than a plant species used for the manufacture of FP-B and FP-D comprises a plant material from a plant species other than a plant species used for the manufacture of FP-A, other than a plant species used for the manufacture of FP-B and other than a plant species used for the manufacture of FP-C; and wherein FP-A, FP-B, FP-C and FP-D are infant nutrition or plant puree and wherein FP-A, FP-B FP-C and FP-D comprise at least 50 wt.% plant material from a single plant species based on dry weight of the food product."

"2. Use of a food product A (FP-A), a food product B (FP-B), a food product C (FP-C) and a food product D (FP-D), for the preparation of a kit of parts according to claim 7 for sensoric imprinting of different tastes in an infant,

wherein FP-A comprises a plant material and FP-B comprises a plant material from a plant species other than a plant species used for the manufacture of FP-A and FP-C comprises a plant material from a plant species other than the plant species used for the manufacture of FP-A and other than a plant species used for the manufacture of FP-B and FP-D comprises a plant material from a plant species other than a plant species used for the manufacture of FP-A, other than a plant species used for the manufacture of FP-B and other than a plant species used for the manufacture of FP-C; and wherein FP-A, FP-B, FP-C and FP-D are infant nutrition or plant puree and wherein FP-A, FP-B, FP-C and FP-D comprise at least 50 wt.% plant material from a single plant species based on dry weight of the food product."

"7. A kit of parts suitable for sensoric imprinting of different tastes in an infant, said kit comprising 4 to 100 containers comprising food product and at least one container with one portion food product A (FP-A) and one container with one portion food product B (FP-B) and one container with one portion food product C (FP-C) and one container with one portion food product D (FP-D), wherein:

a. FP-A and FP-B and FP-C and FP-D are (a1) in a form suitable for administration to an infant or (a2) in a form suitable for administration to an infant after admixing with an aqueous liquid;

- b. FP-A comprises a plant material;
- c. FP-B comprises a plant material from a plant species other than the plant species used for the manufacture of FP-A;
- d. FP-C comprises a plant material from a plant species other than the plant species used for the manufacture of FP-A and other than a plant species used for the manufacture of FP-B
- e. FP-D comprises a plant material from a plant species other than a plant species used for the manufacture of FP-A, other than a plant species used for the manufacture of FP-B and other than a plant species used for the manufacture of FP-C
- f. FP-A, FP-B, FP-C and FP-D comprise at least 50 wt.% plant material from a single plant species based on dry weight of the food product; and
- g. one portion of food product is:
 - (i) 2 to 50 ml liquid or semiliquid food product;
 - (ii) 2 to 50 gram dry infant nutrition; and/or
 - (iii) 150 to 250 ml liquid infant nutrition."

The main request was rejected under Article 100(a) in conjunction with Article 53(c) EPC. This late-filed opposition ground was admitted into the proceedings since it was considered *prima facie* relevant, and also a reaction to decision

T 1635/09, which had been published after the expiry of the opposition period. The reduction of the occurrence of diseases referred to in claim 6 represented a therapeutic effect which was the inseparable result of this claim's method. Therefore the non-therapeutic disclaimer of claim 1 did not necessarily exclude non-patentable subject-matter according to Article 53(c) EPC.

- Auxiliary requests 1 to 4 were rejected for lack of novelty.
- Auxiliary requests 5 and 6 were rejected on the grounds that their respective claim 1 did not meet the requirements of Article 123(2) EPC.
- Auxiliary request 7 was rejected for lack of inventive step, since the subject-matter of claim 1 was not inventive over the closest prior-art document D1. Claim 1 of this request read as follows:

"1. Use of a food product A (FP-A), a food product B (FP-B), a food product C (FP-C) and a food product D (FP-D), for the preparation of a kit of parts according to claim 5 for sensoric imprinting of different tastes in an infant, said use comprising stimulating the consumption of vegetables later in life and/or increasing familiarization with multiple plant tastes, wherein FP-A comprises a plant material and FP-B comprises a plant material from a plant species other than a plant species used for the manufacture of FP-A and FP-C comprises a plant material from a plant species other than the plant species used for the manufacture of FP-A

and other than a plant species used for the manufacture of FP-B and FP-D comprises a plant material from a plant species other than a plant species used for the manufacture of FP-A, other than a plant species used for the manufacture of FP-B and other than a plant species used for the manufacture of FP-C; and wherein FP-A, FP-B, FP-C and FP-D are infant nutrition or plant puree and wherein FP-A, FP-B, FP-C and FP-D comprise at least 50 wt.% plant material from a single plant species based on dry weight of the food product, wherein said plant material in FP-A, FP-B, FP-C and FP-D is vegetable plant material, and wherein at least two different food products are administered to the infant per day."

According to the opposition division, claim 1 differed from D1 in that at least two different food products had to be administered to the infant each day, and in terms of the portion size of the food (via the reference to the kit-of-parts claim). No technical effect had been shown for these distinguishing features. The objective technical problem was therefore how to provide an alternative use of a kit of parts for providing sensoric imprinting of different tastes in an infant. The skilled person looking for such an alternative would consider the step of varying the volume of the food portion as a routine step, particularly since the size of containers for infant food was usually adapted according to the infant's age. Furthermore, the administration of two or more different food products per day could be considered a routine adaptation of the food regime employed in D1. Therefore, the subject-

matter of claim 1 was obvious in view of this document.

- IV. On 29 November 2013 the proprietor (hereinafter: the appellant) filed an appeal. The statement setting out the grounds of appeal was filed on 3 February 2014 together with auxiliary requests 1 to 6, the main request being maintenance of the patent as granted.
- V. A response was filed by the opponent (hereinafter: the respondent) with its letter of 19 May 2014 together with
- D16: Brochure 55-107 from Gerber Products Company, ©2002, 2 pages; and
- D17: Article "Children under two need Five A Day", PediatricBasics, No. 98, Spring 2002 edition, 13 pages.
- VI. On 7 July 2015, the board communicated its preliminary opinion to the parties. The board observed that it did not see any reason to set aside the opposition division's decision to admit the late-filed ground under Article 100(a)/53(c) EPC into the proceedings and that it considered this ground to prejudice the maintenance of the patent on the basis of the main request. The board furthermore addressed *inter alia* novelty and inventive step over D1. Regarding D16, the board indicated that it considered this document to have been publicly available before the priority date of the patent.
- VII. With letter dated 8 July 2015, the appellant filed new auxiliary requests 5 and 6.

- VIII. Further comments were provided by the respondent with its letter dated 1 October 2015 and by the appellant with its letter dated 14 December 2015.
- IX. On 14 January 2016, oral proceedings took place before the board. At the beginning of the oral proceedings, the appellant withdrew the main request and auxiliary request 1 and made auxiliary request 2 its new main request. After the board had announced its opinion on claim 1 (a non-therapeutic method claim) of this request, the appellant filed a new auxiliary request 1 and subsequently a new auxiliary request 2 and withdrew all remaining lower-ranking auxiliary requests. The respondent requested that new auxiliary request 2 not be admitted into the proceedings.
- X. Claim 1 of the main request reads as follows:
- "1. A non-therapeutic method for sensoric imprinting of different tastes in an infant, said method comprising stimulating the consumption of vegetables later in life and/or increasing familiarization with multiple vegetable tastes, said method comprising the steps of:
- a. administering to the infant one portion of a food product A (FP-A); followed by
- b. administering to the infant one portion of a food product B (FP-B); followed by
- c. administering to the infant one portion of a food product C (FP-C); followed by
- d. administering to the infant one portion of a food product b (FP-D);

wherein FP-A comprises a plant material and FP-B comprises a plant material from a plant species other than a plant species used for the manufacture of FP-A and FP-C comprises a plant material from a plant species other than the plant species used for the manufacture of FP-A and other than a plant species used for the manufacture of FP-B and FP-D comprises a plant material from a plant species other than a plant species used for the manufacture of FP-A, other than a plant species used for the manufacture of FP-B and other than a plant species used for the manufacture of FP-C; and wherein FP-A, FP-B, FP-C and FP-D are infant nutrition or plant puree and wherein FP-A, FP-B, FP-C and FP-D comprise at least 50 wt.% plant material from a single plant species based on dry weight of the food product, wherein said plant material in FP-A, FP-B, FP-C and FP-D is vegetable plant material."

XI. Claims 1 and 5 of auxiliary request 1 read as follows:

"1. Use of a food product A (FP-A), a food product B (FP-B), a food product C (FP-C) and a food product D (FP-D), for the preparation of a kit of parts according to claim 5 for sensoric imprinting of different tastes in an infant, said use comprising stimulating the consumption of vegetables later in life and/or increasing familiarization with multiple plant tastes, wherein FP-A comprises a plant material and FP-B comprises a plant material from a plant species other than a plant species used for the manufacture of FP-A and FP-C comprises a plant material from a plant species other than the plant species used for

the manufacture of FP-A and other than a plant species used for the manufacture of FP-B and FP-D comprises a plant material from a plant species other than a plant species used for the manufacture of FP-A, other than a plant species used for the manufacture of FP-B and other than a plant species used for the manufacture of FP-C; and wherein FP-A, FP-B, FP-C and FP-D are infant nutrition or plant puree and wherein FP-A, FP-B, FP-C and FP-D comprise at least 50 wt.% plant material from a single plant species based on dry weight of the food product, wherein said plant material in FP-A, FP-B, FP-C and FP-D is vegetable plant material."

"5. A kit of parts suitable for sensoric imprinting of different tastes in an infant, said kit comprising 4 to 100 containers comprising food product and at least one container with one portion food product A (FP-A) and one container with one portion food product B (FP-B) and one container with one portion food product C (FP-C) and one container with one portion food product D (FP-D), wherein:

a. FP-A and FP-B and FP-C and FP-D are (a1) in a form suitable for administration to an infant or (a2) in a form suitable for administration to an infant after admixing with an aqueous liquid;

b. FP-A comprises a plant material;

c. FP-B comprises a plant material from a plant species other than the plant species used for the manufacture of FP-A;

d. FP-C comprises a plant material from a plant species other than the plant species used for the manufacture of FP-A and other than a plant species used for the manufacture of FP-B

e. FP-D comprises a plant material from a plant species other than a plant species used for the manufacture of FP-A, other than a plant species used for the manufacture of FP-B and other than a plant species used for the manufacture of FP-C

f. FP-A, FP-B, FP-C and FP-D comprise at least 50 wt.% plant material from a single plant species based on dry weight of the food product; and

g. one portion of food product is:

(i) 2 to 50 ml liquid or semiliquid food product;

(ii) 2 to 50 gram dry infant nutrition; and/or

(iii) 150 to 250 ml liquid infant nutrition,

wherein said plant material in FP-A, FP-B, FP-C and FP-D is vegetable plant material."

XII. Claim 1 of auxiliary request 2 reads as follows (amendments compared to claim 5 of auxiliary request 1 in bold type):

"1. A kit of parts suitable for sensoric imprinting of different tastes in an infant, said kit comprising 4 to **25** containers comprising food product, **said kit comprising 4 to 15 different food products comprising different vegetable plant**

materials, and at least one container with one portion food product A (FP-A) and one container with one portion food product B (FP-B) and one container with one portion food product C (FP-C) and one container with one portion food product D (FP-D), wherein:

a. FP-A and FP-B and FP-C and FP-D are (a1) in a form suitable for administration to an infant or (a2) in a form suitable for administration to an infant after admixing with an aqueous liquid;

b. FP-A comprises a plant material;

c. FP-B comprises a plant material from a plant species other than the plant species used for the manufacture of FP-A;

d. FP-C comprises a plant material from a plant species other than the plant species used for the manufacture of FP-A and other than a plant species used for the manufacture of FP-B

e. FP-D comprises a plant material from a plant species other than a plant species used for the manufacture of FP-A, other than a plant species used for the manufacture of FP-B and other than a plant species used for the manufacture of FP-C

f. FP-A, FP-B, FP-C and FP-D comprise at least 50 wt.% plant material from a single plant species based on dry weight of the food product; and

g. one portion of food product is:

(i) 2 to 50 ml liquid or semiliquid food product;

(ii) 2 to 50 gram dry infant nutrition; and/or

(iii) 150 to 250 ml liquid infant nutrition,

wherein said plant material in FP-A, FP-B, FP-C and FP-D is vegetable plant material."

XIII. So far as relevant to the present decision, the appellant's arguments can be summarised as follows:

- Main request

The opposition division's decision to admit the new ground under Article 100(a)/53(c) EPC into the proceedings should be set aside. T 1635/09 did not represent a change in case law and thus was not a valid excuse for filing this ground late in the opposition proceedings.

Claim 1 met the requirements of Article 53(c) EPC since granted claim 6, which referred to therapeutic effects, had been deleted. Claim 1 covered a non-therapeutic part, namely improving the intake of vegetables to get a healthier food pattern. This was not inextricably linked to therapeutic benefits; on the contrary, it was just about providing nutrition.

- Auxiliary request 1

The respondent's objection under Article 123(2) EPC against the feature of stimulating consumption of vegetables and increasing familiarisation with

multiple plant tastes should not be admitted into the proceedings. This objection had never been raised before, even though the attacked feature had already been present in several requests filed during the opposition proceedings.

D16, which had been filed by the respondent with its response to the statement of grounds of appeal, should not be admitted into the proceedings. This document was not about the problem with the publication date of D2 but constituted new prior art on which a new inventive step attack was based. If it was the respondent's intention to react to the opposition division's decision that D2 was not prior art, it should have filed proper evidence about the publication date of D2. Furthermore, D16 did not constitute prior art. It only bore a copyright date, which - in line with decision T 1257/04 - could not constitute proof that this document had even been printed, let alone distributed, before the priority date of the patent in suit. It was important in this respect that, since D16 came from the respondent, the very strict standard of proof "up to the hilt" be applied.

The subject-matter of claims 1 and 5 was inventive over D1. These claims differed from D1 (i) in that the different food products were present in a kit of parts, (ii) in terms of the portion size of the food products and (iii) in that the claims required the stimulation of the consumption of a new vegetable, while D1 dealt with the stimulation of the consumption of a vegetable that had already been part of a previous feeding regime. The problem to be solved over D1 was the provision of

a means to better implement a 5-a-day feeding regime. There was no incentive in D1 or D16 to provide the different food products in the form of a kit of parts with a portion size as required by claims 1 and 5.

- Auxiliary request 2

The new upper limits for the number of containers and food products as introduced into claim 1 of auxiliary request 2 were based on page 4, line 25 and page 13, lines 10 to 11 of the application as filed. By way of these upper limits, claim 1 no longer covered embodiments with a lot of containers containing the same type of vegetable. The incentive for carers to feed different vegetable products was thereby higher than in D1, so that the claimed subject-matter was now clearly inventive.

XIV. So far as relevant to the present decision, the respondent's arguments can be summarised as follows:

- Main request

The opposition division's decision to admit the new ground under Article 100(a)/53(c) EPC should not be set aside. This ground had been filed in reaction to decision T 1635/09, which had been published after the expiry of the opposition period. Furthermore, this ground was *prima facie* relevant. The description of the patent attributed therapeutic effects to the claimed method. The claimed method was thus inextricably linked with these effects and hence not patentable under Article 53(c) EPC.

- Auxiliary request 1

Claim 1 did not meet the requirements of Article 123(2) EPC since the achievement of both the stimulation of the consumption of vegetables and an increase in familiarisation with multiple plant tastes was not disclosed in the application as filed. This objection should be admitted into the proceedings since any new claim request had to be examined with regard to all requirements of the EPC.

D16 should be admitted into the proceedings since it constituted a reaction to the opposition division's change in opinion as regards the public availability of D2. This brochure gave instructions to parents and was thus clearly intended for publication, as corroborated by D17. In view of its copyright date (2002), it was publicly available before the priority date of the patent.

The subject-matter of claims 1 and 5 was not inventive in view of D1 alone or in combination with D16. These claims differed from D1 in that the food products were present in a kit of parts, and in terms of the portion size of these food products. Contrary to the appellant's assertion, the stimulation of the consumption of new vegetables was not an additional distinguishing feature since claims 1 and 5 merely required the stimulation of the consumption of vegetables rather than new vegetables. There was no technical effect shown for the distinguishing features. The problem to be solved over D1 was thus the

provision of an alternative use of feeding.
Varying the portion size of food products and putting them together into a kit of parts was a matter of routine and thus not inventive.

- Auxiliary request 2

Auxiliary request 2 should not be admitted into the proceedings. It constituted a new request that had never been filed during the opposition or written appeal proceedings. The added features came from two different parts of the description and thus created a new case. They did not address the inventive-step objection against auxiliary request 1 and furthermore the amendments created new problems under Article 123(2) EPC.

XV. The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the claims of the main request, filed as auxiliary request 2 with letter dated 3 February 2014, or on the basis of the claims of either of auxiliary requests 1 or 2, filed during the oral proceedings before the board.

The appellant furthermore requested that D16 not be admitted into the proceedings and that the opposition decision's decision to admit the new ground for opposition under Article 100(a)/53(c) EPC be set aside.

The respondent requested that the appeal be dismissed.

The respondent furthermore requested that auxiliary request 2 not be admitted into the proceedings.

Reasons for the Decision

Main request

1. The ground under Article 100(a)/53(c) EPC
 - 1.1 The ground under Article 100(a)/53(c) EPC was filed during the opposition proceedings after the expiry of the opposition period. The opposition division decided to admit it. The appellant requested that this decision be set aside.
 - 1.1.1 As set out in G 7/93 (point 2.6), the board should set aside a discretionary decision of the first instance if the first instance did not exercise its discretion in accordance with the right principles, or if it exercised its discretion in an unreasonable way, thus exceeding the proper limits of its discretion.

The reasons why the opposition division admitted the late-filed ground for opposition in the present case were that it had been filed as a reaction to the publication of decision T 1635/09 after the expiry of the opposition period, and that this ground was *prima facie* pertinent.

Even if, as argued by the appellant, it is accepted that T 1635/09 did not bring about a change in the relevant case law, it was nevertheless published in the Official Journal of the EPO, thereby acquiring prominence in highlighting certain important aspects in the field of therapeutic-use claims that are relevant to the present case (see point 2.2 below). It was thus reasonable on the part of the opposition division to consider the late filing of the ground under

Article 100(a)/53(c) EPC to be a reaction to the publication of this decision. Furthermore, as will be explained below (point 1.2), this ground is indeed *prima facie* prejudicial to the maintenance of the patent. Hence, the opposition division applied the correct principles in a reasonable way.

- 1.1.2 The board therefore decided not to set aside the opposition division's decision to admit this ground into the proceedings.

- 1.2 The relevance of this ground for the allowability of claim 1 of the main request therefore needs to be examined.

Claim 1 refers to "A non-therapeutic method for sensoric imprinting of different tastes in an infant, said method comprising stimulating the consumption of vegetables later in life and/or increasing familiarization with multiple vegetable tastes".

It is explained in the patent that sensoric imprinting makes it possible to prevent an infant from acquiring a dislike for the taste of different plant materials. The acceptance or liking of the taste of different plant materials and/or their consumption later in life is thereby stimulated or improved. Due to the resulting healthier lifestyle, junk-food-related health problems such as obesity and diabetes are prevented (paragraphs [0005] and [0028]). Hence, the method of sensoric imprinting of different tastes in an infant as referred to in claim 1 is inextricably linked in the description of the opposed patent with the prevention of certain diseases later in life.

It is not possible to define such a method, i.e. one that is inextricably linked with a therapeutic effect, as non-therapeutic simply by way of the disclaimer "non-therapeutic". On the contrary, whether a claimed use is therapeutic or not has to be decided exclusively on the basis of the activities carried out during the claimed use, and the effects obtained thereby (T 1635/09; OJ EPO 2011, 542; catchword 2). Therefore, the disclaimer "non-therapeutic" in claim 1 does not change the therapeutic nature of the claimed method.

In this respect it is not relevant that the therapeutic nature is no longer explicitly expressed in a dependent claim. What matters is whether the method as claimed, taking into account the patent as a whole, is inextricably linked to any therapeutic effects. Therefore, contrary to the appellant's argument, the deletion of granted dependent claim 6, which referred to the reduction of the occurrence of diseases later in life, does not change the above finding.

Consequently, the ground under Article 100(a)/53(c) EPC prejudices the maintenance of the patent on the basis of the main request.

Auxiliary request 1

2. Amendments - Article 123(2) EPC

2.1 Claim 1 of auxiliary request 1 (see point XI above) differs from claim 2 as granted (see point III above) *inter alia* in that the feature "said use comprising stimulating the consumption of vegetables later in life **and/or** increasing familiarization with multiple plant tastes" has been added (emphasis inserted by the board). Claim 1 of auxiliary request 1 thus covers an

embodiment where both consumption of vegetables is stimulated and familiarisation with multiple plant tastes is increased.

- 2.2 The respondent argued that this embodiment was not based on the application as filed, since stimulated consumption and increased familiarisation were disclosed on page 10, lines 8 to 10 of the application as filed only as two alternatives.

The appellant requested that this objection not be admitted into the proceedings, since it had been raised for the first time in the oral proceedings before the board.

- 2.3 Claim 1 of *inter alia* auxiliary request 7 before the opposition division (see point III above) and of auxiliary request 6 filed with the statement of grounds of appeal already contained this contested feature. Thus, the respondent could have raised the above objection already during the opposition proceedings and at the latest in response to the statement of grounds of appeal. Nevertheless, neither during the opposition proceedings nor in the written appeal proceedings was any such objection made. The board therefore decided not to admit this objection into the proceedings (Article 13(1) RPBA).

- 2.4 In any case, the board notes that obtaining both the stimulation of consumption of vegetables and increased familiarisation with multiple plant tastes is directly and unambiguously derivable from claim 16 as filed ("*...for stimulating the consumption of plant material such as vegetables and fruit later in life; for increasing familiarization with multiple plant tastes, **and/or** for reducing the occurrence of diseases later in*

life", emphasis added by the board). The attacked amendment thus does not contravene Article 123(2) EPC.

3. Document D16

3.1 Admissibility

3.1.1 The respondent filed D16 with its response to the statement of grounds of appeal. The appellant requested that D16 not be admitted into the proceedings since the respondent was raising a new inventive-step attack based on this document for the first time in the appeal proceedings.

3.1.2 The board does not find the appellant's argument convincing. D16 was not filed to raise a new inventive-step attack but to prove that the teaching of D2, filed during the opposition proceedings, was publicly available before the priority date of the patent. The disclosure of D16 is very similar to that of D2 but the copyright date of D16 is much earlier than the date of D2. This proof became necessary after the opposition division changed its mind and decided at the oral proceedings that D2 was not in fact prior art. Hence, D16 was filed at the earliest possible opportunity, namely with the response to the statement of grounds of appeal as a reaction to the opposition division's decision.

3.1.3 The appellant argued that if the respondent wanted to react to the opposition division's decision that D2 was not prior art, it should have filed direct evidence about the publication date of D2, rather than filing D16.

The board concurs with the appellant that if the public availability of a certain document is questioned, it is an appropriate reaction to file direct evidence as to when it was published. At least in the present case, however, it is considered equally appropriate to file evidence that the teaching in this document, rather than the document itself, was available to the public before the priority date of the patent.

- 3.1.4 The board therefore decided to admit D16 into the proceedings.
- 3.2 Publication date of D16
 - 3.2.1 The copyright date indicated in D16 is 2002, which is about four years before the priority date of the patent (7 February 2006).
 - 3.2.2 The appellant argued that, as set out in T 1257/04, a copyright date was of little value as evidence of public availability on that date. A copyright date was in particular not sufficient to show that this document was actually printed, let alone distributed, before the relevant date. Moreover, the appellant argued that the applicable standard of proof had to be "up to the hilt", i.e. absolute certainty rather than merely the balance of probabilities, since D16 originated from a company (Gerber) which was now a subsidiary of the respondent.
 - 3.2.3 In cases of public prior use having taken place in the opponent's company or exclusive sphere of influence, the boards have indeed applied the very strict criterion of proof "up to the hilt". More specifically, as stated by the board in T 472/92 (point 3.1), in these cases "... an opponent must prove his case up to

the hilt, for little if any evidence will be available to the patentee to establish the contradictory proposition that no prior public use had taken place".

3.2.4 T 472/92 did not specify precisely the conditions to be fulfilled in order for a party to prove its case "up to the hilt". However, when discussing the disputed issues, the board stated that its conclusions were based on "... an extremely high degree of certainty", which is thus clearly the yardstick - rather than "absolute certainty" - for "up-to-the hilt" proof. It is thus evident that the standard of "up to the hilt" does not require absolute certainty but that "an extremely high degree of certainty" suffices.

3.2.5 In subsequent decisions T 97/94, T 55/01 and T 2/09, this standard of proof was consistently interpreted to mean "beyond reasonable doubt":

"According to this decision [T 472/92], where practically all the evidence lies within the power of the opponent, the assessment of probability which normally underlies the boards' opinion must cede to a stricter criterion close to absolute conviction. In other words there should be a degree of certainty which is beyond all reasonable doubt" (T 97/94, point 5.1, insertion in square brackets by the present board).

"It is true that, in cases where only one party has access to information about an alleged public prior use, the case law has tended towards expecting that the public prior use be proved beyond any reasonable doubt ("up to the hilt"), answering the typical questions "What?", "When?", "Where?", "How?" and "To whom?", since the other

party was reduced to merely pointing out inconsistencies or gaps in the chain of evidence; see T 472/92, reasons, point 3.1 (OJ EPO 1998, page 161)" (T 55/01, point 4.1).

"However, especially in cases where only one party had access to information about an alleged public prior use, the case law has tended toward expecting that the public prior use be proved beyond any reasonable doubt or "up to the hilt" (see e.g. T 55/01, point 4.1 of the Reasons, and T 472/92, OJ 1998, 161, point 3.1 of the Reasons)" (T 2/09, point 3.2).

Also in T 782/92, where a public prior use by the opponent had occurred, the standard of proof of "beyond reasonable doubt" was applied (point 2.2).

Lastly, in decision T 1553/06 (point 6.3.3), which dealt with the public availability of internet disclosures, it was stated that "Contrary to the opponent, the board regards the terms "beyond reasonable doubt" and the more colloquial term "up to the hilt" as being equivalent".

- 3.2.6 The board agrees with the appellant that the standard "up to the hilt" also applies to the present case. Document D16 originates from a company (Gerber) which is now a subsidiary of the respondent. Therefore, all the evidence about the publication date of D16 is essentially in the hands of the respondent.

It thus has to be examined whether the respondent has proven beyond reasonable doubt that D16 was available to the public before the priority date of the patent.

D16 addresses parents and gives them instructions on how to feed their infants. In view of this, it would be contrary to life experience to assume that D16 was not published but rather kept by Gerber in the drawer for about 4 years, i.e. until at least (after) the priority date of the patent. This is corroborated by D17, which is an advertisement of Gerber in the spring 2002 edition of the journal PediatricBasics. In this advertisement, Gerber gives the same recommendations to parents and, in part, uses the same pictures as in D16. The board is therefore convinced that it is not only more likely than not, but quite clearly beyond reasonable doubt that D16 was published before the priority date of the patent.

3.2.7 This finding is not at variance with T 1257/04 cited by the appellant. This decision concerns the question whether a document showing a date "9/94" could be assumed to have been printed within five months, namely before 24 February 1995, which was the priority date of the patent. That is a much shorter period than the four years in the present case. In fact, in decision T 743/89 (point 3) the board considered it reasonable to assume that the publication of a commercial brochure took place within 7 months and in decision T 804/05 (point 2) within 18 months after the date indicated in the document.

3.2.8 D16 thus constitutes prior art under Article 54(2) EPC.

4. Inventive step

4.1 The invention concerns a method of stimulating the consumption of plant material such as vegetables and fruit later in life (paragraph [0001]).

4.2 In the same way as the invention, D1 is about a method to increase acceptance of vegetables (page 1080, right-hand column, lines 21 to 22 in conjunction with the left-hand column, lines 20 to 22). As agreed by both parties and as decided by the opposition division, D1 can therefore be considered to represent the closest prior art.

4.2.1 D1 describes three experiments. In the first experiment, a group of infants was fed carrots during 10 consecutive days. In the second experiment, a group of infants was fed carrots on the first day and potatoes on the next nine consecutive days. In the third experiment, a group of infants referred to as the "variety group" was fed four different vegetables, namely carrots on the first day, peas on the second day, potatoes on the third day, squash on the fourth day, peas on the fifth day, potatoes on the sixth day, squash on the seventh day, peas on the eighth day, potatoes on the ninth day and squash on the tenth day. Thereafter, all three groups of infants were fed carrots on the eleventh day and chicken on the twelfth day (see figure 1 of D1). All vegetables were contained in jars, implying that for the variety group eleven jars with four types of vegetables, each jar containing a single type of vegetable, were used for feeding on the first to eleventh day. The maximum amount of vegetables that could be extracted from one jar was 68 g (last sentence before the chapter "Monell test sessions" on page 1081 in D1).

It was found in D1 that the variety group ate significantly more carrots and chicken on the eleventh and twelfth day compared to the second group that had been fed potatoes on nine consecutive days (last paragraph in the right-hand column on page 1082 and

figure 2 on page 1083). From that it was concluded that exposure to flavour variety facilitates infants' subsequent acceptance of novel food and of carrots (first and second sentence in the chapter "Discussion" on page 1084). According to D1, a diversity of flavours sets the pattern for a diversified diet later in life (fourth paragraph of the item "Discussion" on page 1084 and last paragraph on page 1085). D1 thus discloses the sensoric imprinting of different tastes in an infant and the stimulation of the consumption of vegetables later in life.

4.2.2 As acknowledged by both parties, the subject-matter of claims 1 and 5 differs from D1 in that the four food products, i.e. carrots, peas, potatoes and squash, are present in a kit of parts and in that the portion size is limited to 2 to 50 ml liquid or semiliquid food product, while that in D1 is 68g.

4.2.3 The appellant argued that D1 did not disclose the feature of claims 1 and 5 of stimulating the consumption of a **new** vegetable not consumed so far. That was therefore an additional distinguishing feature over D1.

However, claim 1 only requires the simulation of the consumption of vegetables rather than new vegetables later in life. Furthermore, claim 5 is not restricted at all to any stimulation of the consumption of vegetables, let alone new vegetables, later in life. The appellant's argument is therefore not convincing.

4.3 Based on the two distinguishing features established in point 4.2.2 above, the appellant saw two problems to be solved in view of D1.

4.3.1 The appellant acknowledged that a 5-a-day feeding regime was commonly known. The appellant argued however that, as acknowledged in D17, only one in five US children followed such a feeding regime consistently (second paragraph in the left-hand column of this third page of D17). Therefore, the appellant saw one problem to be solved over D1 as the provision of a means to better implement this 5-a-day or generally varied vegetable feeding regime. This problem was solved by the subject-matter of claims 1 and 5. By way of providing the different vegetables in the form of a kit of parts, carers were helped in actually applying such a feeding regime. More specifically, with the different vegetables being in the form of a kit of parts, carers "would have more drive" when shopping to pick vegetable products that were different.

The board agrees that providing different vegetables in the form of a kit of parts helps carers to feed their infants with different vegetables. However, the same is achieved by the teaching of D1. Carers would learn from D1 that feeding the four different vegetables (carrots, peas, potatoes and squash) would stimulate the consumption of carrots later on (page 1083, lines 7 to 9 below the caption of figure 2 and lines 3 to 7 in the right-hand column of page 1084). They would furthermore be taught by D1 that experience with a diversity of flavours sets the pattern for a diversified diet and - because flavour variety is often related to a greater variety in the nutritional content of foods - a preference for varied flavours ultimately increases the range of nutrients consumed and thus increases the likelihood of a well-balanced diet (last paragraph in the left-hand column of page 1085). After reading D1 they would thus be motivated to buy a variety of jars with different vegetables in order to

stimulate the infant's consumption of vegetables later in life. In the same way as with the kit of parts, the carer would thus implement a varied vegetable feeding regime.

This finding is not changed by the fact that, according to D17, four out of five infants in the US are not fed with different vegetables in a consistent manner. What matters is what the carer who has read the closest prior art D1 would do, rather than any feeding practice applied in the US.

- 4.3.2 The appellant furthermore argued that the smaller portion size required by claims 1 and 5 would prevent overfeeding and thus the development of aversions to certain types of vegetable. As a result, the success rate in stimulating the consumption of vegetables later in life would be higher than in D1, where a larger portion size of 68 g was applied. Furthermore, with a larger portion size some food would be left in the jar after feeding the infant, which was less economical. A second problem to be solved over D1 was thus to increase the success rate in stimulating vegetable consumption later in life in an economical manner.

The board does not agree with this line of argument either. The appetite of an infant depends on its age. Hence while for an infant of a specific age, the portion size of at most 50 ml, as required by claims 1 and 5, might be adequate, for an older infant it would need to be larger. A carer would have to open a second food container to feed the still hungry infant. Overfeeding is thus not necessarily avoided by the claimed kit of parts. Moreover, if a second jar is opened, food may be left over, in the same way as in D1.

- 4.3.3 None of the problems referred to by the appellant is thus the objective technical problem. This has therefore to be formulated in a less ambitious manner as the provision of at least four different vegetable products in a different form.
- 4.4 As a solution to this problem, the patent proposes the provision of the four different vegetable products in containers of at most 50 ml with the containers being packaged together (kit of parts).
- 4.5 There is no reason to assume that this problem is not solved by the subject-matter of claims 1 and 5. This problem therefore constitutes the objective technical problem.
- 4.6 Putting more than one jar of food together in a package is a matter of routine and thus cannot involve an inventive step. Varying the size of food containers likewise belongs to the routine tasks of the skilled person. Furthermore, a portion size as required by claims 1 and 5 is already known from D16. More specifically, this document, which equally aims at stimulating vegetable or fruit intake later in life by administering to infants five different types of vegetables or fruits (paragraph beginning with "Starting a 5 A Day eating pattern" in the left-hand column of page 2), discloses a portion size of 1 to 2 tablespoons (first paragraph in the right-hand column of page 3). Therefore, the subject-matter of claims 1 and 5 is obvious in view of D1 alone or in combination with D16. Auxiliary request 1 is thus not allowable.

Auxiliary request 2

5. Admissibility

5.1 Auxiliary request 2 was filed during the oral proceedings before the board. The respondent requested that this request not be admitted into the proceedings.

5.2 In claim 1 of auxiliary request 2, the upper limit for the number of containers is now 25, and that for the number of different food products is 15.

5.3 The new upper limits introduced into claim 1 come from the description, namely page 4, line 25 (upper limit for the number of containers) and page 13, lines 10 to 13 (upper limit for the number of food products) of the application as filed. No request containing these upper limits had ever been filed during the opposition or written appeal proceedings. The claim amendment thus creates a fresh case which the respondent was confronted with for the first time during the oral proceedings before the board.

Furthermore, the introduction of the new upper limits does not create an additional distinguishing feature over D1, which discloses feeding from eleven containers with four types of vegetables (point 4.2.1 above). Hence, for the same reasons as given above when discussing auxiliary request 1, the subject-matter of claim 1 is not inventive over D1 alone or in combination with D16.

Finally, these amendments create new deficiencies under Article 123(2) EPC. Specifically, the application as filed does not disclose the combination of the specific

upper limit of 25 containers with the specific upper limit of 15 different food products.

Therefore, the board decided not to admit auxiliary request 2 into the proceedings (Articles 13(1) and (3) RPBA).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated