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**Datasheet for the decision  
of 13 December 2016**

**Case Number:** T 0799/14 - 3.3.09

**Application Number:** 00964160.6

**Publication Number:** 1213971

**IPC:** A23K1/16, A23K1/175, A23K1/18

**Language of the proceedings:** EN

**Title of invention:**  
Improving condition of elderly pets

**Patent Proprietor:**  
Société des Produits Nestlé S.A.

**Opponent:**  
The Iams Company

**Headword:**

**Relevant legal provisions:**  
EPC Art. 53(c), 83, 56

**Keyword:**  
Sufficiency of disclosure and/or inventive step (no, all requests)

**Decisions cited:**

G 0002/08, T 0609/02

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 0799/14 - 3.3.09

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.09**  
**of 13 December 2016**

**Appellant:** The Iams Ccompany  
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**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
28 January 2014 maintaining European patent  
No. 1213971 in amended form.

**Composition of the Board:**

**Chairman** W. Sieber  
**Members:** J. Jardón Álvarez  
F. Blumer

## Summary of Facts and Submissions

- I. This decision concerns the appeal filed by the opponent against the interlocutory decision of the opposition division that European patent No. 1 213 971 as amended met the requirements of the EPC.
- II. The opponent had requested revocation of the patent in its entirety on the grounds of Article 100(a) (lack of novelty and inventive step), (b) and (c) EPC.

The documents cited during the opposition proceedings included:

D1: Innova: Lite Cat Food, August 1999, taken from internet page: <http://www.gnpd.com> (2 pages);

D7: US 5 141 755 A; and

D8: US 5 756 088 A.

- III. The opposition division maintained the patent in amended form on the basis of the set of claims 1 to 9 filed as auxiliary request 5 on 11 October 2013 during the oral proceedings. This request included 9 claims, claim 1 reading as follows:

"1. A nutritional composition comprising a calcium source, a source of an antioxidant, wherein the source of an antioxidant is the vitamin precursor  $\beta$ -carotene and vitamin E, a prebiotic and/or a probiotic micro-organism and a zinc source for use in increasing the longevity of an elderly pet, wherein the nutritional composition is formulated as a pet food for elderly pets, the pet food comprising a protein source, a lipid source, a calcium source, a

zinc source,  $\beta$ -carotene, vitamin E, a nutritional agent which promotes the growth of bifido- and lactic-bacteria in the gastrointestinal tract of the pet selected from the group comprising prebiotics and probiotic micro-organisms, wherein the pet food comprises at least 3g/1000 kcal of calcium, at least 50mg/1000 kcal of zinc, at least 5mg/1000 kcal of  $\beta$ -carotene, and at least 150 IU/1000 kcal of vitamin E."

IV. The opposition division's decision concerning the maintained request can be summarised as follows:

- The request was admitted into the proceedings and found to fulfil the requirements of Rule 80 EPC, Article 123(2) EPC, Article 84 EPC and Article 83 EPC.
- The opposition division considered claim 1 to be a product claim (suitable for) with respect to the feature "increasing the longevity of an elderly pet". It acknowledged novelty of the subject-matter of claim 1 over D1 due to the concentration limits introduced into the claim. As to inventive step, D1 was considered to represent the closest prior art. The opposition division accepted that an increase in the longevity of the test animals could be extrapolated from example 1, Diet C of the patent in suit to the claimed subject-matter and therefore the problem to be solved was to increase the longevity of elderly pets. The claimed solution, namely the nutritional composition according to claim 1, was not hinted at in the cited prior art, and the claimed subject-matter involved an inventive step.

V. On 2 April 2014 the opponent (in the following: the appellant) lodged an appeal and requested that the decision under appeal be set aside and that the patent be revoked in its entirety. The statement setting out the grounds of appeal, filed on 6 June 2014, included the following documents:

D23: US 6 310 090 B1;

D24: Recent Advances in Canine and Feline Nutrition, Volume II, 1998 Iams Nutrition Symposium Proceedings (First printing April 1998); pages 295 to 303;

D25: Recent Advances in Canine and Feline Nutrition, Volume II, 1998 Iams Nutrition Symposium Proceedings (First printing April 1998); pages 513 to 522;

D26: Calculating the mass of food in 1000 kcal of D1 pet food composition (1 page);

D27: Calculations demonstrating conversion of vitamin E content in D23 to IU/1000 kcal units (1 page);

D28: Calculating level of beta-carotene described in D23 & D25 in mg/1000 kcal units (1 page); and

D29: [http://www.myvaluevet.com/content/Calorie\\_tech\\_tip.pdf](http://www.myvaluevet.com/content/Calorie_tech_tip.pdf). "Average calorie requirements for dogs/cats" (2 pages).

VI. In its reply dated 8 October 2014, the patent proprietor (in the following: the respondent) disputed the arguments submitted by the appellant and requested that the appeal be dismissed (main request);

subsidiarily that the patent be maintained on the basis of the claims of one of auxiliary requests I to XVI as filed with the reply. Additionally, it requested that documents D23 to D29 not be admitted into the proceedings.

- VII. In a communication dated 22 August 2016, the board indicated the points to be discussed during the oral proceedings.
- VIII. Further submissions were filed by the respondent on 27 October 2016 and by the appellant on 30 November 2016.
- IX. On 13 December 2016 oral proceedings before the board were held. During the oral proceedings, after the board had decided that the main request was not allowable, the respondent filed an amended auxiliary request IV to replace its previous auxiliary request IV and requested that it be discussed before all other auxiliary requests. After the board decided that auxiliary request IV was also not allowable, the respondent declined to discuss the remaining requests as they would not overcome the reasons for the rejection of the main request and auxiliary request IV.

During the oral proceedings the appellant no longer relied on D23 to D29.

- X. The claims of the main request are the claims held allowable by the opposition division (see point III above).

Claim 1 of auxiliary request IV reads as follows (amendments over claim 1 of the main request are indicated in strike-through and in bold):

"1. A nutritional composition comprising a calcium source, a source of an antioxidant, wherein the source of an antioxidant is the vitamin precursor  $\beta$ -carotene and vitamin E, a prebiotic and/or a probiotic micro-organism and a zinc source for use in increasing the longevity of an elderly ~~pet~~ **cat**, wherein the nutritional composition is formulated as a pet food for elderly pets, the pet food comprising a protein source, a lipid source, a calcium source, a zinc source,  $\beta$ -carotene, vitamin E, **vitamin D, vitamin K, and** a nutritional agent which promotes the growth of bifido- and lactic-bacteria in the gastrointestinal tract of the pet selected from the group comprising prebiotics and probiotic micro-organisms, wherein the pet food comprises ~~at least~~ 3g/1000 kcal **to 6g/1000 kcal** of calcium, ~~at least~~ 50mg/1000 kcal **to 500mg/1000 kcal** of zinc, at least 5mg/1000 kcal of  $\beta$ -carotene, at least 150 IU/1000 kcal of vitamin E, **500 IU/1000 kcal to 190,000 IU/1000 kcal of vitamin D and above 0.07 mg/1000 kcal vitamin K.**"

Claim 1 of auxiliary request I is based on claim 1 of the main request, with the insertion as further components of vitamins D and K and their required amounts, namely:

"500 IU/1000 kcal to 190,000 IU/1000 kcal of vitamin D and above 0.07 mg/1000 kcal vitamin K."

Claim 1 of auxiliary request II is based on claim 1 of auxiliary request I, with the minimum amounts of calcium and zinc amended to the specified ranges of:



"3g/1000 kcal to 6g/1000 kcal of calcium, 50mg/1000 kcal to 500mg/1000 kcal of zinc".

Claim 1 of auxiliary request III is based on claim 1 of auxiliary request I, with the wording "an elderly pet" defined more precisely as:

"an elderly cat or an elderly dog".

Claims 1 of auxiliary requests V to X are based on claims 1 of auxiliary requests I to IV, respectively. Claim 1 was in all cases merely reformulated in order to overcome a clarity objection raised by the appellant with its statement of grounds of appeal.

Lastly, claims 1 of auxiliary requests XI to XVI are identical to claims 1 of auxiliary requests V to X.

XI. The arguments of the appellant, insofar as they are relevant for the present decision, may be summarised as follows:

- The claims of the main request did not comply with the requirements of Article 123(2) EPC, Article 84 EPC, Article 83 EPC, Article 54 EPC and Article 56 EPC.
- The appellant agreed with the opposition division's finding that the claims were not medical use claims. The examples of the patent could not demonstrate any effect at all because they did not relate to the claimed compositions, for at least the reason that they did not comprise a prebiotic or probiotic micro-organism or the claimed levels of zinc or vitamin E.

- In the absence of any technical effect associated with the claimed compositions, these were merely an obvious alternative to those compositions disclosed in D1 and/or D8 comprising all the ingredients required in the claims.
- Alternatively, if increasing longevity was seen as a therapeutical application, this effect was a functional technical feature of the claims and it had not been made plausible from the patent specification that it had been achieved. In this case, the claims would lack sufficiency of disclosure.
- Exactly the same arguments applied to the claims of auxiliary request IV, because the patent still did not demonstrate any effect for the compositions claimed in this request. The further ingredients now specified, namely vitamin D and vitamin K, were often used in nutritional compositions for pets, as shown for instance in D7. They could not justify an inventive step.

XII. The relevant arguments of the respondent may be summarised as follows:

- Contrary to the view of the opposition division and the appellant, the respondent insisted that methods of increasing the longevity of elderly pets constituted a therapeutic treatment and claim 1 had to be interpreted as a medical use claim.
- The claimed effect was demonstrated in the patent in suit. Diet C of example 1, even if not formally matching the values of the nutritional composition of claim 1 since zinc and vitamin E were provided

in lower amounts than claimed, achieved the claimed technical effect of increasing the longevity of an elderly cat. In fact, since the patent demonstrated that the composition according to Diet C led to the claimed technical effect with the lower amounts used, it was also plausible that the claimed effect would be achieved with the claimed higher values of zinc and vitamin E. Concerning the addition of a prebiotic or probiotic micro-organism, there was no evidence that the incorporation of such ingredients would have a deleterious effect. On the contrary, they were known to provide a further beneficial effect on the intestinal system.

- In any case, the claimed technical effect had to be acknowledged for the subject-matter of the claims of auxiliary request IV that was closer to the ingredients used in Diet C of example 1.

XIII. The appellant requested that the decision under appeal be set aside and that European patent No. 1 213 971 be revoked in its entirety.

The respondent requested that the appeal be dismissed (main request); or, subsidiarily, that the patent be maintained on the basis of the claims of any of auxiliary requests I to XVI, auxiliary requests I to III and V to XVI as filed on 8 October 2014 with the reply to the grounds of appeal, and auxiliary request IV filed on 13 December 2016 during the oral proceedings before the board. The respondent requested that auxiliary request IV be discussed before all other auxiliary requests.

## **Reasons for the Decision**

### MAIN REQUEST

#### 1. *Preliminary remark*

1.1 In its statement of grounds of appeal the appellant reasserted that the subject-matter of the claims of the main request did not comply with the requirements of Article 123(2) EPC, Article 84 EPC, Article 83 EPC, Article 54 EPC and Article 56 EPC.

1.2 During the oral proceedings the board decided that the claims of the main request fulfilled the requirements of Articles 123(2) EPC and 84 EPC.

1.3 The board is also satisfied that the claimed subject-matter is novel over the disclosures of D1 and D8, at least because neither D1 nor D8 discloses a nutritional composition having the amounts of calcium, zinc,  $\beta$ -carotene and vitamin E specified in the claims. Contrary to the view of the appellant, the claimed amounts cannot be seen as representing a selection within the disclosure of D1 or D8, because these documents are silent about the amounts present. This lack of information cannot be seen as constituting a disclosure of any given amount of the ingredients. Moreover, even if the argument of the appellant were accepted, the claimed subject-matter would still be novel because several (multiple) selections would be necessary to arrive at the claimed embodiment.

1.4 There is, however, no need to give detailed reasons for these issues since, as set out below, the patent is to be revoked for insufficiency of disclosure and/or lack of inventive step (see below points 4.2 and 5.2).

MAIN REQUEST

2. *The claimed invention*

2.1 The invention as defined in claim 1 of the main request is directed to nutritional compositions for increasing the longevity of elderly pets. It is said to be based upon the finding that the administration of an effective amount of certain minerals and vitamins improves the longevity of an elderly pet (see [0022]).

2.2 Interpretation of claim 1

2.2.1 The application in suit was filed on 8 September 2000 and granted on 15 June 2011. Since it was still pending on 13 December 2007 when the EPC 2000 entered into force, both Article 54(4) and (5) EPC 2000 apply (see transitional provision under Article 7 of the Act revising EPC of 29 November 2000, OJ EPO Special edition No. 1/2007, page 197).

2.2.2 Claim 1 is directed to "A nutritional composition comprising a calcium source, etc. **for use in increasing the longevity of an elderly pet**, wherein the nutritional composition is formulated as ...". It is thus drafted in accordance with Article 54(4) or (5) EPC and aims to protect a *per se* already known substance or composition in a first or second/further medical indication.

2.2.3 The question whether the intended use -"increasing the longevity of an elderly pet"- indeed represents a therapy method excluded from patentability by Article 53(c) EPC is crucial for the interpretation of

the claim and it was hotly disputed during the proceedings.

- The respondent maintained that the claimed method constituted a method of therapy within the meaning of established case law decisions. The examples in the specification convincingly demonstrated that the claimed compositions increased the longevity of elderly pets because they prevented an onset or progress of conditions which led to their earlier death.
- In contrast, the appellant argued that the claims were not medical use claims, essentially because increasing longevity should be regarded as the natural function, or the direct consequence, of properly feeding an elderly pet to avoid the negative impact on longevity caused by starvation and, therefore, it was implicit in any nutritional composition for a pet.

2.2.4 In the first case, the notional novelty of the claim and consequent non-obviousness, if any, is not derived from the substance or composition as such but from its intended therapeutic use (see G 2/08, OJ EPO 2010, 456, point 5. of the reasons).

In the second case, the claim is to be interpreted as being directed to the composition as such which is suitable for the intended use (see Guidelines for Examination in the EPO, November 2016, Part F - Chapter IV 4.13).

2.2.5 There is, however, no need for the board to decide whether or not the intended increase in longevity represents a therapy method excluded from patentability

by Article 53(c) EPC, because in any case the claim is not allowable.

3. *Effect of the invention: increasing the longevity of an elderly pet*

3.1 The first issue to be investigated is whether or not the alleged increase in longevity is achieved.

3.2 The respondent relied on example 1 of the patent (paragraphs [0058] to [0065]) that, in its opinion, convincingly demonstrated such an effect.

In this example thirty-six cats separated into four groups of nine cats each were fed with four different diets. The control diet contained 24.7% added water, about 73.7% meat, about 1% starch and flavours, minerals and vitamins, all by weight, the food containing normal levels of vitamins and minerals. The following ingredients were added to this control diet and constituted Diets A, B and C:

- Diet A: An additional 5 mg/1000kcal of  $\beta$ -carotene and 100 IU/1000 kcal of vitamin E;
- Diet B: An additional 3 g/100kcal calcium, 1500 IU/1000kcal vitamin D, 0.05 mg/1000kcal vitamin K and 40 mg/1000kcal zinc; and
- Diet C: An additional 5 mg/1000 kcal of  $\beta$ -carotene, 100 IU/1000 kcal of vitamin E, 3 g/100 kcal calcium, 1500 IU/1000 kcal vitamin D, 0.05 mg/1000 kcal vitamin K and 40 mg/1000 zinc.

The results after 6 months showed that all cats fed with Diet C had improved longevity (100% cats

survived). In contrast, cats fed with Diets A or B had a survival rate of 75% and 55%, respectively, which is on the level of the control diet or below. Moreover, the cats fed with Diets A and C also showed a significant improvement in hematocrit, hemoglobin and red blood cell levels (see [0064] and [0065]).

- 3.3 The appellant argued that these results did not demonstrate any increase in longevity due to the claimed compositions, essentially because Diet C did not correspond to an embodiment as claimed.
- 3.4 Diet C indeed does not represent a nutritional composition as claimed. There are several differences between the composition of Diet C and the subject-matter of claim 1, namely Diet C (i) does not comprise a prebiotic or a probiotic micro-organism, (ii) contains an amount of 100 IU/1000 kcal Vitamin E, which is lower than the claimed amount of at least 150 IU/1000 kcal, (iii) contains an amount of 40 mg/zinc, which is again lower than the claimed amount of at least 50 mg/zinc, and (iv) contains vitamins D and K, which are not required in the claim.
- 3.5 The respondent argued that Diet C resulted in all properties measured being better than the control diet and that only with Diet C were all cats still alive after six months. Moreover, the differences between Diet C and the nutritional composition used in the claims were, in its view, minor ones and it had not been demonstrated that adding a prebiotic or a probiotic micro-organism, or slightly increasing the amounts of vitamin E and zinc, would lead to a deleterious effect of the compositions. Concerning the amounts of vitamin E and zinc, the example showed that the beneficial effect was already attained with the



presence of lower amounts and there were no reasons to believe that the effect could be diminished by increasing the amounts of vitamin E and zinc to the values covered by the claim.

3.6 The board disagrees for the following reasons:

3.6.1 From the evidence on file, it can only be concluded that the increase in longevity is an effect dependent on the nutritional composition used. From the four diets exemplified only Diet C achieves an improvement in longevity although all the diets include ingredients that overlap in part. The suggestion of the respondent that amending Diet C by further adding a prebiotic and/or probiotic micro-organism and by increasing the levels of zinc and vitamin E can only have a negligible or beneficial effect cannot be followed by the board. In view of the overlapping ranges of the components and the absence of any corroborating evidence, the respondent's argument is a mere assertion.

3.6.2 The relationship between the individual components in the nutritional compositions appears to be quite complex. Thus, it is clear from the example that an increase in the amounts of calcium and zinc can have a deleterious effect. Although Diet B is supplemented *inter alia* with calcium and zinc, all the measured parameters associated with longevity were worse than for the control diet and showed the lowest survival rate. In addition, cats fed with Diet A had a significant improvement in hematocrit, hemoglobin, and red blood cell levels (i.e. parameters associated with longevity) compared with the control diet but showed no improvement of the survival rate.

3.7 In view of the above there is no room in the examples for an extrapolation of the results obtained with Diet C to other diets, in particular the ones claimed. No correlation can be established between the survival rate and the ingredients and/or the amounts used in the diet. The fact remains that none of the exemplified diets falls within the scope of the claim and consequently it cannot be assumed that the results attained with Diet C would also be obtained when using the claimed nutritional compositions.

3.8 In other words, due to the differences pointed out in point 3.4 above, Diet C cannot be relied on to support any effect or advantage of the nutritional compositions of claim 1. Under these circumstances, the board has to conclude that no increase in longevity has been demonstrated for the nutritional compositions used in the claims.

4. *Alternative 1: increasing the longevity of an elderly pet as therapeutic method*

4.1 In this case claim 1 is to be interpreted as directed to a medical use claim according to Article 54(4) and (5) EPC and the appellant argued inter alia that the invention was not sufficiently disclosed, contrary to the requirements of Article 83 EPC.

4.2 *Sufficiency of disclosure*

4.2.1 It is established case law that attaining the claimed effect - increased longevity in elderly pets - is a functional technical feature of a medical use claim. Accordingly, under Article 83 EPC, unless this is already known to the skilled person, the patent in suit must disclose the suitability of the product for the

claimed therapeutic application (see e.g. Case Law of the Boards of Appeal of the EPO 8th edition 2016, Section II.C.6.2 and decision T 609/02 cited therein).

4.2.2 As explained above, the evidence provided in the patent does not prove that the nutritional compositions used in the claim achieve increased longevity in elderly pets. It has also not been argued by the respondent that such evidence is derivable from any of the cited prior-art documents. Under these circumstances, the board has to conclude that the patent in suit fails to sufficiently disclose the claimed medical use as required by Article 83 EPC.

5. *Alternative 2: increasing the longevity of an elderly pet as non-therapeutic method.*

5.1 In this case claim 1 is to be interpreted as directed to a nutritional composition as such that it is suitable for increasing the longevity of an elderly pet. The appellant argued that the claims lacked inter alia an inventive step.

5.2 *Inventive step*

5.2.1 Closest prior art

D1 was relied on by both parties as the closest prior-art document. It discloses a cat food formulated to provide proper nutrition to older, overweight or less active cats (see page 1, "Product Description").

The cat food composition includes, among other ingredients (see pages 1 and 2 under "Ingredients"), dicalcium orthophosphate, calcium carbonate, and calcium pantothenate, i.e. sources of calcium; carrot

and carotenes, i.e. sources of  $\beta$ -carotene; tocopherol concentrate mixed and DL-alpha-tocopherol, i.e. vitamin E; mannan-oligosaccharides (prebiotic) and probiotics, inter alia, *Lactobacillus casei*; a zinc source (zinc proteinate), a protein source (turkey and chicken meat, and a lipid source (fish oil and sunflower seed oil).

#### 5.2.2 Problem to be solved and its solution

According to the respondent, the problem underlying the patent in suit was to provide a nutritional composition making it possible to increase the life-span of the pet.

As discussed in detail in point 3 above, the board does not recognise any improvement in longevity of the cats, with the consequence that the problem has to be reformulated in a less ambitious manner, not involving any increasing in longevity. Hence, the objective technical problem has to be seen in the provision of an alternative nutritional composition for elderly pets.

It is undisputed that this less ambitious problem is solved by the claimed compositions.

#### 5.2.3 Obviousness

In the absence of any improvement over the known compositions of D1, the claimed compositions containing the same ingredients, albeit in other amounts, have to be seen as an obvious alternative to those compositions known from D1. In fact, this finding was not disputed by the respondent, who relied only on the alleged improvement.

For these reasons the subject-matter of claim 1 of the main request lacks inventive step.

#### AUXILIARY REQUEST IV

##### 6. *Amendments*

- 6.1 Compared to claim 1 of the main request, claim 1 of auxiliary request IV is limited to elderly cats (instead of elderly pets), includes vitamin D and vitamin K as further ingredients of the nutritional compositions, and defines minimal amounts of calcium and zinc.
- 6.2 The respondent argued that these amendments made the claimed effect credible. The list of ingredients now includes all vitamins present in the Diet C and its use is limited to cats, the pets exemplified.
- 6.3 While the board acknowledges that the claims are now closer to those used in example 1 and that they overcome some of the objections raised by the appellant, the claims still suffer from the same fundamental deficiency discussed above for the main request, namely that the composition used in Diet C does not fall within the scope of the claim. Consequently Diet C cannot demonstrate any increase in longevity of cats as required by claim 1.
- 6.4 Under these circumstances, the reasoning above for the main request applies *mutatis mutandis* to the claims of auxiliary request IV, which is not allowable for exactly the same reasons as explained above for the claims of the main request.

AUXILIARY REQUESTS I TO III AND V TO XVI

7. *Auxiliary requests I to III*

7.1 As indicated above, after the board concluded that the main request was not allowable, the respondent requested it to deal with auxiliary request IV as the next request, because this request included all limitations of claims 1 of auxiliary requests I to III (see point X above).

7.2 As auxiliary request IV does not overcome the reasons for the rejection of the main request, it follows that claims 1 of auxiliary requests I to III - which are broader than claim 1 of auxiliary request IV - cannot be allowed for the same reasons as those given above for the main request and for auxiliary request IV. This was not disputed by the respondent.

8. *Auxiliary requests V to XVI*

8.1 As explained in point X above, the amendments in claims 1 of these requests aimed to overcome clarity objections raised by the appellant in the grounds of appeal. Since the board did not follow the appellant's arguments, these auxiliary requests eventually became superfluous, in particular because the subject-matter of claim 1 of these requests essentially corresponds to the subject-matter of claim 1 of auxiliary requests I to IV, respectively. Consequently, these requests are also not allowable.

## 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:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated