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**Datasheet for the decision
of 26 July 2018**

Case Number: T 1755/14 - 3.3.09

Application Number: 02788615.9

Publication Number: 1454534

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A23K1/16, A23L1/00, A23G3/00,
A61K9/16

Language of the proceedings: EN

Title of invention:

MICROCAPSULES AND ORAL COMPOSITIONS CONTAINING THE SAME

Patent Proprietor:

SAN-EI GEN F.F.I., INC.

Opponent:

Symrise GmbH & Co. KG

Headword:

Relevant legal provisions:

EPC Art. 99(1), 107

EPC R. 77(2), 101(1), 139

Keyword:

Transfer of opposition (no)

Correction of opponent's name (yes) - objective intention
(yes)

Admissibility of opposition - (yes)

Admissibility of appeal - (yes)

Decisions cited:

G 0001/12, J 0008/80, J 0027/96, J 0003/01, T 0525/94,

T 0353/95, T 0015/01, T 2334/08, T 2045/09, T 1551/10,

T 2357/12, T 0615/14, T 0603/15

Catchword:



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Case Number: T 1755/14 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 26 July 2018

Appellant: Symrise AG
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 6 June 2014
rejecting the opposition filed against European
patent No. 1454534 as inadmissible.**

Composition of the Board:

Chairman W. Sieber
Members: N. Perakis
F. Blumer

Summary of Facts and Submissions

- I. The present appeal lies from the opposition division's decision to reject the opposition filed by **Symrise GmbH & Co. KG** (in the following **SymKG**) as inadmissible on the basis of Article 99(1) and Rule 77(2) EPC in view of Rules 76(2) and 41(2)(c) EPC.
- II. **SymKG**, the entity which filed the opposition on 8 October 2010, was a KG (Kommanditgesellschaft; limited partnership) then consisting of **Symrise AG** (in the following **SymAG**) and Symrise Verwaltungs GmbH. On the same day, the resignation of Symrise Verwaltungs GmbH from **SymKG** ("Ausgeschieden als Persönlich haftender Gesellschafter") and the dissolution of **SymKG** was published in the commercial register.
- III. In a letter of 25 April 2013, filed after receipt of the summons to oral proceedings before the opposition division, the opponent requested the transfer of the opposition to **SymAG**. A notarial declaration was filed which stated that **SymKG** had been merged into **SymAG** by way of universal succession with commercial effect from 1 October 2010. The patent proprietor (respondent) objected to the transfer of the opponent status and requested that the opposition be rejected as inadmissible.
- IV. In the decision under appeal of 6 June 2014, the opposition division held that the opposition could not be transferred since it was filed after the transfer of rights from **SymKG** to **SymAG** became commercially effective. No opposition on behalf of **SymKG** was pending which could form part of a universal succession. It also found that the conditions for correction of the

opponent's name from SymKG to SymAG under Rule 139 EPC were not met.

- V. Notice of appeal was filed by SymAG (in the following also referred to as the appellant) on 4 August 2014. The appeal fee was paid on the same day and the statement setting out the grounds of appeal was filed on 16 October 2014. The appellant requested that the decision of the opposition division be set aside and that the patent be revoked in its entirety.
- VI. By letter of 10 February 2015 the patent proprietor (in the following the respondent) filed observations on the appeal accompanied by the following documents (some of which had already been filed during opposition proceedings):
- Annex A: Extract from the commercial register for Symrise GmbH & Co. KG (SymKG, HRA 110566)
 - Annex B: Extract from the commercial register for Symrise AG (SymAG, HRB 200436)
 - Annex C: Extracts from the commercial register for Symrise Verwaltungs GmbH (HRB 110881)
 - Annex D: Extract from the commercial register for Symrise Beteiligungs GmbH (HRB 110625)
 - Annex E: Extract from the commercial register for Symrise MPP Beteiligungs GmbH (HRB 110905)
 - Annex F: Extracts from the commercial register for Symrise US-Beteiligungs GmbH (HRB 201437)

The respondent requested that the appeal be dismissed because the opposition was inadmissible and, should the appeal be allowed, that the case be remitted to the opposition division.

- VII. In a letter of 28 May 2015, the appellant presented further arguments, in particular arguments supporting the disputed universal succession from SymKG to SymAG.
- VIII. On 22 May 2018 the board issued a communication in preparation for the oral proceedings.
- IX. By letter of 26 June 2018 the appellant submitted observations on the preliminary opinion of the board as regards the issues of universal succession and correction of the name of the opponent under Rule 139 EPC.
- X. By letter of 24 July 2018 the respondent acknowledged the universal succession from SymKG to SymAG, but pointed out that the effective date of this succession was 1 October 2010 (not 8 October 2010). It also disputed the admissibility of the appeal. In support of its arguments the respondent submitted, *inter alia*, the following document:
- Annex G: Joint notification of SymAG and Symrise Verwaltungs GmbH (partners of SymKG) to the District Court of Hildesheim dated 1 October 2010
- XI. Oral proceedings were held before the board on 26 July 2018 as scheduled.
- XII. The relevant arguments put forward by the appellant in its written submissions and during the oral proceedings may be summarised as follows:

- The opposition was admissible and should have been transferred to SymAG since, on the date of filing of the opposition (8 October 2010), SymKG still existed. The universal succession might have occurred on 1 October 2010 (see Annex G), but any third party could assume that SymKG still existed when the opposition was filed. The extract from the commercial register for SymKG (Annex A) showed that the SymKG limited partnership was not dissolved until 8 October 2010 and that SymKG was not deleted from the Commercial Register until that date. Furthermore, the public could not, in practice, have noted the deletion of SymKG until after that date. Thus, as far as the public were concerned, SymKG was still in existence on the date of filing of the opposition, so the request for transfer of the opposition to SymAG, the universal successor to SymKG, should have been granted.

- Should the transfer not be allowed, then the opponent's name should be corrected under Rule 139 EPC. It was obvious that SymKG was not the correct name of the appellant, because SymKG legally no longer existed at the date of filing of the notice of opposition. In view of the universal succession, the only possible correction was to SymAG. Moreover, SymAG was the only operative "Symrise" company having the same seat of business as SymKG and SymAG and the only one which would have filed an opposition. Thus the objective intention was to file an opposition on behalf of SymAG. The other companies mentioned in Annexes C to F were entrusted with corporate activities other than immediate operational activities in the market, which included the filing of oppositions against

granted patents. Only SymAG undertook such operational tasks, as could be demonstrated by the EP Register in relation to other oppositions. It was the objective intention to file an opposition in the name of SymAG after the dissolution and deletion of SymKG. The name of the opponent should therefore be corrected under Rule 139 EPC. If the name of the opponent was corrected, all the requirements for the admissibility of the opposition would be fulfilled (Article 99(1) and Rule 77(2) EPC in view of Rules 76(2) (a) and 41(2) (c) EPC).

XIII. The relevant arguments put forward by the respondent in its written submissions and during the oral proceedings may be summarised as follows:

- The opposition filed on 8 October 2010 on behalf of SymKG was inadmissible. On the one hand this company no longer existed on the filing date of the opposition, and thus no transfer of opposition could have taken place. On the other hand no correction of the opponent's name was possible under Rule 139 EPC, first sentence, essentially because it was not unambiguously clear that the objective intention was to file the opposition on behalf of SymAG.

- The universal succession took effect on 1 October 2010 (Annex G), and not on 8 October 2010, the date of registration in the Commercial Register of the dissolution of the limited partnership and the deletion of SymKG. Even if the public would not have been aware of this fact on 8 October 2010, because of the later publication of the dissolution, it should have become aware of

this fact at the end of the time limit for filing an opposition, which was 13 October 2010. Thus the public would have known at that date that SymKG had ceased to exist on 1 October 2010 and that an opposition filed on 8 October 2010 by SymKG was inadmissible and could not be transferred to SymAG.

- Correction of the name of the opponent under Rule 139 EPC, first sentence, was not possible. Even if it was admitted that there was an error in the name of the opponent, because SymKG did not exist on the date of filing of the opposition, correction of the name to SymAG could not be accepted, because it was not unambiguously clear that the objective intention was to file the opposition on behalf of SymAG. There were four other companies with the same seat of business and with the term "Symrise" in their name which could also have filed the opposition (Annexes C to F) by virtue of Article 99(1) EPC, which states that any person can file an opposition.
- The appeal filed by SymAG was inadmissible, since SymAG was not a party to the first instance proceedings.

XIV. The appellant requested that the decision under appeal be set aside and that the patent be revoked in its entirety.

XV. The respondent requested that the appeal be dismissed as inadmissible, alternatively that the appeal be dismissed.

Reasons for the Decision

1. Admissibility of the appeal
 - 1.1 The opposition was filed on behalf of SymKG and the opponent was referred to as "SymKG" throughout the opposition proceedings. The respondent challenged the admissibility of the appeal filed by SymAG, arguing that the requirements of Article 107 EPC were not met since SymAG had not been a party to the opposition proceedings.
 - 1.2 Since no other issues concerning the admissibility of the appeal have been raised by the respondent or identified by the board, the admissibility of the appeal depends solely on the identity of the opponent. If SymAG was recognised as the opponent, it would be adversely affected by the decision under appeal and its appeal would be admissible.
2. Universal succession from SymKG to SymAG
 - 2.1 For both the transfer of the opponent status and the requested correction of the opponent's name the appellant has relied on the universal succession which took place when SymKG was dissolved. As proof of the universal succession, the appellant filed a notarial declaration with its letter of 25 April 2013 during opposition proceedings (see Facts and Submissions, point III above). In the appeal proceedings, the appellant filed further evidence and arguments in support of its position that the universal succession occurred through "Anwachsung" (accrual) under § 738 BGB (Bürgerliches Gesetzbuch; German Civil Code). While the universal succession was disputed by the respondent, in

its communication of 22 May 2018 the board gave its preliminary view that it considered, regardless of the specifics of German law, that there was a universal succession in view of the case law of the boards of appeal (reference was made, in particular, to T 2357/12).

2.2 In its letter of 24 July 2018 and during oral proceedings before the board, the respondent acknowledged the universal succession but emphasised that it had taken place, and that SymKG had ceased to exist, on 1 October 2010. In a joint notification, filed as Annex G with the respondent's letter of 24 July 2018, SymAG and Symrise Verwaltungs GmbH declared that SymKG had been dissolved and SymAG had taken over the business of SymKG with all assets and liabilities by accrual ("Anwachsung"). The notification was notarised on 1 October 2010 (Annex G, last two pages). The appellant, who had always relied on the universal succession, argued that the public could not have taken note of the universal succession until after it had been published on 8 October 2010. However, the appellant itself argued in the grounds of appeal that the universal succession had taken place *ipso iure* (i.e. that it had occurred by law as an automatic effect of the dissolution of SymKG and not by means of any registration). The question of whether and when the succession became known to the public is a different issue which may have a bearing on the request for correction of the error (see point 4.4 below).

2.3 The board is therefore satisfied that a universal succession from SymKG to SymAG took place on 1 October 2010.

3. Transfer of opposition

3.1 Since the universal succession took place on 1 October 2010, SymKG ceased to exist on the same date. As the opposition filed by SymKG was not filed until 8 October 2010, it appears that SymKG did not exist when the opposition was filed and that, as a consequence, no opposition status was acquired by SymKG which could be transferred in the course of pending opposition proceedings.

3.2 However, as the request for correction of the error is allowable (see below point 4), the opposition and the appeal are admissible regardless of the transfer of opposition, and no final decision is needed on the allowability of the transfer of opposition.

4. Correction of an error under Rule 139 EPC

4.1 After it was held in G 1/12 (OJ EPO 2014, A114) that the name of an appellant may be corrected under Rule 139 EPC, it was clarified in subsequent decisions that the name of an opponent in opposition proceedings may also be corrected under said provision (T 615/14, Reasons 1.4; see also T 2045/09 and T 1551/10).

4.2 Referring to J 8/80 (OJ EPO 1980, 293) and other decisions, the Enlarged Board in G 1/12 (Reasons 37) summarised the principles for corrections under Rule 139, first sentence, EPC. These are, in particular, that (i) the correction must introduce what was originally intended, (ii) the requester bears a heavy burden of proof and (iii) a request for correction must be filed without delay.

- 4.3 With respect to the first principle, it must be demonstrated that the requested correction expresses the true intention of the person on whose behalf it was filed. The correction of an error may not be used to enable a person to give effect to a change of mind or subsequent development of his plans (J 8/80, Reasons 4 and 6).
- 4.4 SymKG, the party wrongly named as the opponent in the notice of opposition, was no longer in existence when the opposition was filed. The only successor to SymKG (universal successor) was SymAG. All documents concerning the dissolution of SymKG and the universal succession by SymAG, including Annex G, were accessible to the public (a fact which was confirmed by the respondent during oral proceedings). They became public on 8 October 2010 or, at any event, on 13 October 2010, when the time limit for filing the opposition expired.
- 4.5 There is nothing to indicate that the true intention was to file the opposition in the name of a person other than the only successor of the person who originally instructed its representative to file the opposition. The board is convinced that the representative (who may not have been aware of the succession on 8 October 2010) had intended to file the opposition on behalf of the entity which had acquired all the assets and liabilities of the entity that gave him the instruction to file the opposition (see also T 15/01, OJ EPO 2006, 153, Reasons 15).
- 4.6 The facts of the present case are almost the same as in the case underlying T 1551/10 (where the opposition was filed in the name of an entity which had been deleted from the commercial register before the opposition was filed but where the time span between the deletion and

the filing of the opposition was more than two months). The board in T 1551/10 found that on the basis of the commercial register data the opponent could clearly and unambiguously be identified before the end of the opposition period as the universal successor of the deleted entity and that the name of the opponent could be corrected accordingly under Rule 139 EPC (Reasons 1.2, 1.3). The board intends not to deviate from T 1551/10.

4.7 The respondent argued that the facts in the present case differed from T 1551/10 insofar as not only SymAG but four other companies having "Symrise" as part of their company name and being registered at the same seat of business as SymKG and SymAG could have filed an opposition under Article 99 EPC ("any person"). In the board's judgment, this argument and the appellant's counter-argument that only SymAG was active on the market are not relevant, because an unambiguous choice was made to file the opposition on behalf of SymKG and not on behalf of any other entity of the Symrise group of companies. Since SymAG was the universal successor to SymKG, the true intention could not have been to file the opposition in the name of any other Symrise entity.

4.8 The respondent further relied on case law denying the admissibility of appeals filed by entities which ceased to exist before the appeal was filed (T 525/94). In contrast to the present case, there was no indication of any legal successor to the liquidated party named as the appellant in T 525/94. While an entity which has ceased to exist cannot be a party to proceedings before the EPO, it needs to be established on a case-by-case basis whether there is a successor to that entity (see, for example, T 353/95 and T 2334/08). In the present

case, there is no doubt about the existence and identity of a legal successor. Moreover, a correction under Rule 139, first sentence, EPC means that SymAG is deemed to be named as opponent *ab initio* (see J 27/96, Reasons 3.2; J 3/01, Reasons 7), which means that the opposition was not filed by a non-existent legal entity.

- 4.9 In order to prove the existence of the mistake concerning the opponent's name and what the correction should be, the appellant relies on extracts from the commercial register and another publicly available document filed with the commercial register authorities (Annex G). These documents were also filed by the respondent (see Facts and Submissions, points VI and X above). The board is satisfied that the heavy burden of proof required by the case law (principle (ii) as referred to above in point 4.2) is met.
- 4.10 As far as the last principle is concerned (timely request for correction; principle (iii) in point 4.2 above), the board notes that the issue of the opponent possibly having the wrong name only arose after the parties were summoned for oral proceedings before the opposition division (see Facts and Submissions, point III above). The issue was then discussed and decided during oral proceedings. The board is therefore satisfied that the request for correction was filed without delay in view of G 1/12 (Reasons 37, alinea (d)). The present case clearly differs from T 603/15, where the request for correction was filed four years after the mistake concerning the name of the opponent became apparent (T 603/15, Reasons 3.3).

4.11 The board thus came to the conclusion that the request for correction of the opponent's name can be allowed in view of the principles established under Rule 139 EPC.

5. Conclusion

5.1 As the correction of the opponent's name to SymAG is allowable under Rule 139 EPC, SymAG was the opponent throughout the opposition proceedings and SymAG was adversely affected by the decision to refuse the opposition as inadmissible. With respect to the admissibility of the opposition and the appeal, no issues other than those related to the non-existence of SymKG at the date of filing of the opposition have been raised by the respondent or are apparent to the board. Consequently, both the opposition and the appeal filed by SymAG are admissible (see point 1.2 above).

5.2 The decision under appeal did not address the grounds for opposition (Articles 100(a), (b) and (c) EPC), and the arguments of the parties in the appeal proceedings related solely to admissibility of the opposition and the appeal. As indicated in its communication of 22 May 2018, the board finds it appropriate to remit the case to the opposition division for examination of the grounds for opposition.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The name of the appellant (opponent) is to be corrected to Symrise AG.
3. The case is remitted to the opposition division for further prosecution.

The Registrar:

The Chairman:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated