

Internal distribution code:

- (A) [-] Publication in OJ
- (B) [-] To Chairmen and Members
- (C) [-] To Chairmen
- (D) [X] No distribution

**Datasheet for the decision
of 19 April 2021**

Case Number: T 0781/16 - 3.3.09

Application Number: 10782533.3

Publication Number: 2477503

IPC: A23C9/13

Language of the proceedings: EN

Title of invention:

PROCESS FOR PREPARING A PASTEURISED AND FERMENTED DAIRY
PRODUCT SUPPLEMENTED WITH CALCIUM AND VITAMIN D

Patent Proprietor:

Danone, S.A.

Opponent:

Société des Produits Nestlé S.A.

Headword:

Process for preparing a dairy product/DANONE

Relevant legal provisions:

EPC Art. 100(a), 56

Keyword:

Inventive step - (no)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 0781/16 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 19 April 2021

Appellant: Société des Produits Nestlé S.A.
(Opponent) Entre-deux-Villes
1800 Vevey (CH)

Representative: Rupp, Christian
Mitscherlich PartmbB
Patent- und Rechtsanwälte
Sonnenstraße 33
80331 München (DE)

Respondent: Danone, S.A.
(Patent Proprietor) Buenos Aires 21
08029 Barcelona (ES)

Representative: Gerbino, Angelo
Jacobacci & Partners S.p.A.
Corso Emilia 8
10152 Torino (IT)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
8 February 2016 concerning maintenance of the
European Patent No. 2477503 in amended form.**

Composition of the Board:

Chairman A. Haderlein
Members: M. Ansorge
D. Rogers

Summary of Facts and Submissions

- I. The opponent (appellant) filed the appeal against the opposition division's interlocutory decision finding that, on the basis of the auxiliary request filed during the oral proceedings before the opposition division, the patent in suit met the requirements of the EPC.
- II. With its notice of opposition, the opponent had requested revocation of the patent on the basis of, *inter alia*, the ground for opposition under Article 100(a) EPC (lack of inventive step).
- III. In the present decision, reference is made to the following documents:
- D4: WO 99/00021 A1
D5: EP 0 449 354 B1
D6: Document describing properties and common names of calcium citrate, 1975
D8: "Calcium, vitamin D, milk consumption, and hip fractures: a prospective study among postmenopausal women", D. Feskanich et al.; Am. J. Clin. Nutr., 2003, vol. 77, pages 504 to 511
- IV. Claim 1 of the request held allowable by the opposition division and the sole request on appeal reads as follows:
- "A process for preparing a pasteurised and fermented dairy product, involving pasteurising milk, said milk being optionally introduced in the form of a powder then mixed with water, then allowing a fermentation after addition of ferments, and adding calcium and

vitamin D additives after fermentation, characterised in that the pasteurized and fermented dairy product includes the following amounts of calcium and vitamin D, for each 100 g of the product:

- at least 320 mg of calcium and at least 4 µg of vitamin D, or
 - $150 \text{ mg} \leq \text{calcium} < 320 \text{ mg}$ and $4 \text{ µg} \leq \text{vitamin D} < 10 \text{ µg}$,
- and in that calcium is introduced in the form of tricalcium citrate."

- V. The opposition division decided, *inter alia*, that the subject-matter claimed in this request met the requirements of the EPC. In particular, it involved an inventive step when starting from D4 as the closest prior art because the skilled person would not have replaced calcium phosphate with calcium citrate.
- VI. The board issued a communication under Article 15(1) RPBA indicating its preliminary opinion that the claimed subject-matter did not involve an inventive step in view of D4 as the closest prior art.
- VII. The proprietor (respondent) did not react to the board's preliminary opinion on the matter, but informed the board that it withdrew its request for oral proceedings. Subsequently, the oral proceedings were cancelled.
- VIII. The parties' relevant arguments are reflected in the reasoning below.

IX. Requests

The appellant requests that the decision be set aside and that the patent be revoked in its entirety.

The respondent requests that the appeal be dismissed.

Reasons for the Decision

1. Inventive step

1.1 The appellant raised an inventive-step objection in view of D4 as the closest prior art in combination with D8. Both parties agree that D4 represents the closest prior art. The board sees no reason to disagree.

1.2 D4 discloses a method of producing a fermented dairy product fortified with a calcium salt, comprising the steps of:

A. providing a fermented dairy product having a viscosity of at least 1500 centipoise (at 5°C) and,
B. adding with minimal shear a calcium phosphate salt into the yoghurt base, in an amount effective to provide a total calcium content of up to 1500 mg per 170 g serving to form a calcium-enriched fermented dairy product, said calcium phosphate salt having a particle size of less than 150 microns.

1.3 Both parties agree that the method of claim 1 differs from the method of D4 in that the fermented dairy product includes vitamin D in an amount of at least 4 µg for each 100 g of the product (or at least 4 µg and less than 10 µg for each 100 g of the product) instead of an amount of up to 1.02 µg for

each 100 g of the product as disclosed in D4 ("first distinguishing feature").

In addition, the board shares the respondent's opinion that the method in claim 1 of the request further differs from the method of D4 in that the calcium additive is introduced in the form of tricalcium citrate instead of calcium phosphate ("second distinguishing feature"). While calcium citrate ("tricalcium citrate" being simply another name for it; see D6 as technical background) is mentioned on page 11, lines 3 to 11 of D4, it is at least not unambiguously disclosed in combination with the other features of the fermented dairy product.

- 1.4 From the experiments reported in paragraphs [0091] and [0092] of the patent, the rather vague statement "Good bone health is promoted" is given for products according to claim 1 comprising tricalcium citrate and vitamin D, obtained by the process of claim 1. The appellant seems to concur with this statement, so the board sees no reasons to disagree.

In the board's view, there is no example in the patent which shows that satisfactory organoleptic properties are achieved over the whole claimed range. In the absence of any evidence, it is not credible that satisfactory organoleptic properties, i.e. at least as good as in D4, are achieved over the whole claimed range. An effect in relation to satisfactory organoleptic properties therefore cannot be acknowledged.

- 1.5 In view of the above, the technical problem in view of D4 is to be considered that of providing a process for

preparing a further dairy product useful for promoting bone health.

- 1.6 The question to be answered is whether the skilled person would have contemplated applying the distinguishing features on the expectation of solving the objective technical problem.
- 1.6.1 With regard to the first distinguishing feature, the skilled person faced with the above technical problem would consider it obvious to increase the amount of vitamin D from 1.02 µg per 100 g of the product (as mentioned in D4) to at least 4 µg per 100 g of the product. A skilled person would be prompted to increase the content of vitamin D by D8, which teaches that women receiving at least 12.5 µg of vitamin D per day from food and supplements have a significantly lower risk of osteoporotic hip fractures, a clear indication of improved bone health.
- 1.6.2 In this context, the respondent argued that while D8 was the most relevant secondary reference, it merely disclosed daily doses of vitamin D which, even if as high as 12.5 µg per day, did not necessarily entail adopting a threshold amount of at least 4 µg of vitamin D for each 100 g of product.

The board does not agree. It is irrelevant whether a skilled person realises the importance of the lower threshold value. The only thing that matters is whether a skilled person is prompted to adopt an amount of vitamin D falling within the claimed range on the expectation that they would solve the stated problem in the process. As outlined above, this is the case here.

1.6.3 Concerning the second distinguishing feature, the board notes the following.

While it is true, as correctly pointed out by the opposition division and the respondent, that D4 mentions that calcium citrate leads to undesirable organoleptic properties as it creates a chalky product and imparts an unpleasant aftertaste (page 11, from line 3 onwards), calcium citrate is nevertheless mentioned as a known calcium source in D4. In this context, it is also noted that achieving acceptable organoleptic properties is not an objective technical problem to be solved in the case in hand.

In this regard, it is noted that D4 discloses a fermented dairy product fortified with a calcium salt having improved organoleptic properties, without the need for a fruit ingredient, which typically masks or compensates for an unpleasant aftertaste. Therefore, D4 is concerned with a significantly higher level of organoleptic properties and provides a related solution without requiring any fruit ingredients. However, in cases where the addition of fruit ingredients or the like is acceptable, as in the contested patent, a skilled person would recognise that there is no problem if one ingredient has an undesirable aftertaste. The same applies to cases where no high-quality organoleptic properties are mandatory.

Claim 1 of the request does not exclude embodiments having unsatisfactory organoleptic properties. In addition, claim 1 of the request does not require calcium citrate to be used in the absence of any taste-improving ingredient or another calcium salt.

1.6.4 The skilled person's understanding that various calcium salts may be used in fermented products without any particular problem with respect to the organoleptic properties is supported, for instance, by D5, which discloses that a calcium citrate-containing dairy product may lead to a stable and acceptable product (see e.g. example III). The calcium-enriched fermented dairy product according to D5 remains stable for a long time, i.e. without any substantial physical and chemical changes. The calcium salt usable in D5 may be selected from a list including calcium citrate, calcium phosphate, etc. Calcium citrate is used in the product of example III of D5 in admixture with other ingredients such as saccharose and lactose, and there is no mention of any unacceptable organoleptic properties.

1.6.5 In this context, the respondent argued that D5 relates to pasteurised and fermented dairy products and that example III of D5 discloses using calcium citrate in combination with calcium gluconate and calcium lactate. According to the respondent, this confirms the prior-art teaching against using calcium citrate as the sole calcium source.

The board does not agree with the respondent since claim 1 does not require calcium citrate to be the only calcium source added. According to claim 1 further calcium salts may be added in addition to calcium citrate.

1.6.6 In view of the above, a skilled person faced with the aforementioned less ambitious objective technical problem would not discount calcium citrate as a possible calcium source. Instead, a skilled person would consider adding calcium citrate to a fermented

dairy product since it is a commonly used calcium source useful for promoting bone health. Accordingly, a skilled person would also contemplate the second distinguishing feature on the expectation of solving the objective problem.

The subject-matter of claim 1 of the request thus does not involve an inventive step.

2. In view of the above, the sole request on file is 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:



A. Nielsen-Hannerup

A. Haderlein

Decision electronically authenticated