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**Datasheet for the decision
of 26 April 2022**

Case Number: T 0789/18 - 3.3.01

Application Number: 09721748.3

Publication Number: 2273995

IPC: A61K31/715, C02F3/34, C12Q1/00

Language of the proceedings: EN

Title of invention:

DESTRUCTION OF MICROBIAL PRODUCTS BY ENZYMATIC DIGESTION

Patent Proprietor:

Baxter International Inc.
Baxter Healthcare SA

Opponent:

McNab, Donald C.

Relevant legal provisions:

EPC Art. 123

Keyword:

New request - allowable



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0789/18 - 3.3.01

D E C I S I O N
of Technical Board of Appeal 3.3.01
of 26 April 2022

Appellants:

(Patent Proprietors)

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(

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(Opponent)

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Representative:

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
11 January 2018 concerning maintenance of the
European Patent No. 2273995 in amended form.**

Composition of the Board:

Chair	M. Pregetter
Members:	R. Hauss
	M. Blasi

Summary of Facts and Submissions

- I. European patent No. 2 273 995 (patent in suit) was granted with a set of 26 claims.
- II. Claims 1, 2 and 4 as granted (identical to claims 1, 2 and 4 in the application as filed) read as follows:
- "1. A method of treating a dialysis component, the method comprising:*
- providing a dialysis component;*
- contacting the dialysis component with an enzyme; and*
- allowing the enzyme to break down microbial contaminants in the dialysis component.*
- 2. The method of claim 1 further comprising separating the enzyme from the dialysis component to provide a purified dialysis component.*
- 4. The method of claim 1, wherein the enzyme is lysozyme."*
- III. The patent in suit was opposed under Article 100(a) and (b) EPC on the grounds that the claimed subject-matter lacked novelty and inventive step and was not disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.
- IV. The decision under appeal is the opposition division's interlocutory decision, announced on 24 November 2017 and posted on 11 January 2018. The decision:
- (a) rejected the patent proprietors' main request that the opposition be rejected

(b) rejected the patent proprietors' first to fourth auxiliary requests

(c) found that the patent as amended in the form of the fifth auxiliary request met the requirements of the EPC

V. The patent proprietors and the opponent filed appeals against this decision.

VI. Independent claim 1 of the request held allowable in the decision under appeal reads as follows:

*"1. A method of treating a dialysis component, the method comprising:
providing a dialysis component;
contacting the dialysis component with an enzyme; and
allowing the enzyme to break down microbial contaminants in the dialysis component,
wherein the dialysis component is icodextrin, the enzyme is lysozyme and the microbial contaminants are peptidoglycan."*

VII. Oral proceedings before the board of appeal took place on 26 April 2022.

In the course of the oral proceedings, the patent proprietors filed an amended set of claims according to auxiliary request "B". They withdrew their appeal and all higher-ranking claim requests.

The appellant-opponent stated that it had no objection to the claims of auxiliary request B.

VIII. The set of claims according to auxiliary request B consists of independent claim 1 and eleven dependent claims. Claim 1 reads as follows:

*"1. A method of treating a dialysis component, the method comprising:
providing a dialysis component;
contacting the dialysis component with an enzyme; and
allowing the enzyme to break down microbial contaminants in the dialysis component,
wherein the dialysis component is icodextrin, the enzyme is lysozyme and the microbial contaminants are peptidoglycan,
and wherein the method further comprises separating the enzyme from the dialysis component to provide a purified dialysis component."*

Claim 1 differs from claim 1 of the request held allowable by the opposition division (see point VI. above) only on account of the additional method step of enzyme removal. The dependent claims of auxiliary request B correspond to claims 3 to 12 of the request held allowable.

IX. The parties' final requests were as follows:

The patent proprietors requested that the patent be maintained in amended form on the basis of the claims of auxiliary request B filed at the oral proceedings before the board.

The appellant-opponent requested that the decision under appeal be set aside and that the patent be maintained in no other form than with the claims of auxiliary request B filed at the oral proceedings before the board.

Reasons for the Decision

1. Neither the appellant-opponent nor the board had any procedural or substantive objection to the claims of auxiliary request B.
2. The required basis for the claims of auxiliary request B in the application as filed is as follows.
 - 2.1 Dependent claim 4 of the application as filed specifies that the enzyme is lysozyme. The microbial contaminant to be broken down by the enzyme is accordingly a substrate of lysozyme, i.e. peptidoglycan (see paragraph [0025] of the description). A general disclosure of icodextrin, a dialysis component which may contain a peptidoglycan contaminant, is found in paragraph [0010] of the description.
 - 2.2 A general disclosure of the method step requiring the enzymes to be separated from the dialysis component is found in paragraph [0003] of the application as filed; this embodiment is also individualised in claim 2 as filed. This purification step would be clearly preferred if the treated product were to be used in dialysis, as envisaged in the application as filed.
 - 2.3 The only combination of dialysis component, enzyme and microbial contaminant exemplified in the application as filed (see examples 1 to 3) is that of icodextrin, lysozyme and peptidoglycan. These components are also specified individually in the claims (see claims 4, 20 and 21 as filed) and the description (see paragraphs [0010] (icodextrin) and [0025] (peptidoglycan as the contaminant/substrate of lysozyme)). This combination is therefore readily identified as a preferred combination.

- 2.4 The basis for the features of the dependent claims is found in claims 2, 7 and 9 to 17 of the application as filed and the corresponding general disclosures in the description (paragraphs [0005] to [0008]).
- 2.5 In conclusion, the claims of auxiliary request B meet the requirements of Article 123(2) EPC.
3. Claim 1 is the only independent claim of auxiliary request B. In comparison with claim 1 of the patent as granted, its scope is restricted by an additional method step and by limitations regarding the enzyme, the dialysis component and the microbial contaminant (see points II. and VIII. above). Hence, the amendments do not broaden the scope claimed and the requirements of Article 123(3) EPC are met.
4. In conclusion, the claims of auxiliary request B are allowable.
5. As the patent proprietors withdrew their appeal before the decision terminating the appeal proceedings was announced at the oral proceedings before the board, the requirements pursuant to Rule 103(4)(a) EPC for a reimbursement of the patent proprietors' appeal fee at 25% were met.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent in amended form with the following claims, and a description and drawings to be adapted thereto:

claims 1 to 11 of auxiliary request B filed at the oral proceedings before the board
3. The patent proprietors' appeal fee is to be reimbursed at 25%.

The Registrar:

The Chair:



I. Aperribay

M. Pregetter

Decision electronically authenticated