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**Datasheet for the decision
of 9 December 2021**

Case Number: T 1819/18 - 3.3.07

Application Number: 05803644.3

Publication Number: 1802273

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A23K20/00, A23K50/00, A23L33/17

Language of the proceedings: EN

Title of invention:
HYPOALLERGENIC FOOD COMPOSITION

Patent Proprietor:
Hill's Pet Nutrition, Inc.

Opponent:
Mars, Incorporated

Headword:
Hypoallergenic pet food composition/ HILL

Relevant legal provisions:
EPC Art. 56, 123(2)
RPBA 2020 Art. 13(2)

Keyword:

Main request and auxiliary request 1 - Inventive step (No)

Auxiliary requests 2-14 - Amendments (No)

Admission of objections against auxiliary requests 11-14 (Yes)



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Case Number: T 1819/18 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 9 December 2021

Appellant: Mars, Incorporated
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 16 May 2018
rejecting the opposition filed against European
patent No. 1802273 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman A. Uselli
Members: D. Boulois
A. Jimenez

Summary of Facts and Submissions

- I. European patent No. 1 802 273 was granted on the basis of a set of 24 claims.

Independent claim 1 as granted read as follows:

"1. A hypoallergenic pet food composition comprising a hydrolysate in a semi-solid formulation, wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons; and the hydrolysate comprises an animal protein hydrolysate."

- II. The patent was opposed under Article 100(a), (b) and (c) EPC on the grounds that its subject-matter lacked inventive step, was not sufficiently disclosed and extended beyond the content of the application as filed.
- III. The appeal lies from the decision of the opposition division to reject the opposition.
- IV. The documents cited during the opposition proceedings included the following:
D2: WO 01/84950
D3: N.J. Cave & Guilford, W.G., 2004, "A method for in vitro evaluation of protein hydrolysates for potential inclusion in veterinary diets", Research in Veterinary Science, 77(3), 231-238
D3a: Abstract of D3

D4: US 6.403.142 B1

D7: Guide to Protein Purification, pages 317-341

D8: US 4,444,796

- V. According to the decision under appeal:
- Granted claim 1 was based on a combination of claims 1 and 15. The claimed subject-matter did not extend beyond the content of the application as filed.
 - The patent in suit contained sufficient information to enable the skilled person to carry out the invention, especially with regard to the issue of the average molecular weight.
 - Lack of novelty in view of D2 was not admitted as new ground of opposition.
 - D2 was the closest prior art for the assessment of inventive step. The distinguishing features were the semi-solid form and the claimed molecular weight. Although no comparative tests were provided, the opposition division considered that the examples of the patent showed that palatable pet food compositions were provided. The technical problem was the provision of a hypo-allergenic pet food composition which is more palatable than the pet food compositions known from D2. The solution was not obvious in view of D2 or D3.
- VI. The opponent (hereinafter the appellant) filed an appeal against said decision.
- VII. With a letter dated 22 January 2019, the patent proprietor (hereinafter the respondent) filed auxiliary requests 1 to 14.

The subject-matter of claim 1 of the auxiliary requests read as follows, the difference with respect to the main request (patent as granted) being indicated in **bold**:

Auxiliary request 1

In comparison to claim 1 of the main request, the subject-matter of claim 1 was further restricted by the feature "**wherein the composition further comprises at least about 15% water by weight**".

Auxiliary request 2

"1. A hypoallergenic pet food composition comprising a hydrolysate in a semi-solid formulation, **wherein the composition comprises the hydrolysate in an amount of from at least 55% by weight up to 85% by weight on a dry matter basis**, wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons; and the hydrolysate comprises an animal protein hydrolysate; **wherein the composition further comprises at least about 15% water by weight.**"

Auxiliary request 3

"1. A hypoallergenic pet food composition comprising a hydrolysate in a semi-solid formulation, wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons **and wherein at least 90% of the polypeptides and free amino acids have an average molecular weight of less than about 3,000 daltons**; and the hydrolysate comprises an animal protein hydrolysate; **wherein the composition further comprises at least about 15% water by weight.**"

Auxiliary request 4

"1. A hypoallergenic pet food composition comprising a hydrolysate in a semi-solid formulation, **wherein the composition comprises the hydrolysate in an amount of from at least 55% by weight up to 85% by weight on a dry matter basis**, wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons **and wherein at least 90% of the polypeptides and free amino acids have an average molecular weight of less than about 3,000 daltons**; and the hydrolysate comprises an animal protein hydrolysate; **wherein the composition further comprises at least about 15% water by weight.**"

Auxiliary request 5

In comparison to claim 1 of the main request, the subject-matter of claim 1 was further restricted by the feature "**wherein the composition further comprises at least about 50% water by weight**".

Auxiliary request 6

"1. A hypoallergenic pet food composition comprising a hydrolysate in a semi-solid formulation, **wherein the composition comprises the hydrolysate in an amount of from at least 55% by weight up to 85% by weight on a dry matter basis**, wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons; and the hydrolysate

comprises an animal protein hydrolysate; **wherein the composition further comprises at least about 50% water by weight.**"

Auxiliary request 7

"1. A hypoallergenic pet food composition comprising a hydrolysate in a semi-solid formulation, wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons **and wherein at least 90% of the polypeptides and free amino acids have an average molecular weight of less than about 3,000 daltons;** and the hydrolysate comprises an animal protein hydrolysate; **wherein the composition further comprises at least about 50% water by weight.**"

Auxiliary request 8

"1. A hypoallergenic pet food composition comprising a hydrolysate in a semi-solid formulation, **"wherein the composition comprises the hydrolysate in an amount of from at least 55% by weight up to 85% by weight on a dry matter basis"**, wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons **and wherein at least 90% of the polypeptides and free amino acids have an average molecular weight of less than about 3,000 daltons;** and the hydrolysate comprises an animal protein hydrolysate; **wherein the composition further comprises at least about 50% water by weight.**"

Auxiliary request 9

"1. A hypoallergenic pet food composition comprising a hydrolysate in a semi-solid formulation, **wherein the composition comprises the hydrolysate in an amount of from at least 55% by weight up to 65% by weight on a dry matter basis**, wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons; and the hydrolysate comprises an animal protein hydrolysate; **wherein the composition further comprises at least about 50% and no greater than 85% water by weight.**"

Auxiliary request 10

"1. A hypoallergenic ~~pet~~ **feline** food composition comprising a hydrolysate in a semi-solid formulation, **wherein the composition comprises the hydrolysate in an amount of from at least 55% by weight up to 65% by weight on a dry matter basis**, wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons; and the hydrolysate comprises an animal protein hydrolysate; **wherein the composition further comprises at least about 50% and up to 78% water by weight, and up to 20% carbohydrate by weight on a dry matter basis.**"

Auxiliary request 11

"1. **A method of making** a hypoallergenic pet food composition comprising a hydrolysate in a semi-solid formulation, **wherein the composition comprises the hydrolysate in an amount of from at least 55% by weight up to 85% by weight on a dry matter basis**, wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons; and the hydrolysate comprises an animal protein hydrolysate; **wherein the composition further comprises at least 15% water by weight; comprising forming a semisolid mixture comprising a) a hydrolysate, wherein the hydrolysate is present in the mixture in an amount of at least 55% by weight up to 85% by weight on a dry matter basis, and b) at least 15% water by weight, wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons, and the hydrolysate comprises an animal protein hydrolysate.**"

Auxiliary request 12

1. **A method of making** a hypoallergenic pet food composition comprising a hydrolysate in a semi-solid formulation, **wherein the composition comprises the hydrolysate in an amount of from at least 55% by weight up to 85% by weight on a dry matter basis**, wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons; and the hydrolysate comprises an animal protein hydrolysate; **wherein the composition**

further comprises at least 50% water by weight;
comprising
forming a semisolid mixture comprising a) a
hydrolysate, wherein the hydrolysate is present in the
mixture in an amount of at least 55% by weight up to
85% by weight on a dry matter basis, and b) at least
50% water by weight, wherein the hydrolysate comprises
a plurality of polypeptides and free amino acids
wherein from about 60% to about 95% of the polypeptides
and free amino acids have an average molecular weight
of less than about 6,000 Daltons, and the hydrolysate
comprises an animal protein hydrolysate."

Auxiliary request 13

"1. **A method of making** a hypoallergenic pet food
composition comprising a hydrolysate in a semi-solid
formulation, **wherein the composition comprises the
hydrolysate in an amount of from at least 55% by weight
up to 85% by weight on a dry matter basis,** wherein the
hydrolysate comprises a plurality of polypeptides and
free amino acids wherein from about 60% to about 95% of
the polypeptides and free amino acids have an average
molecular weight of less than about 6,000 Daltons; and
the hydrolysate comprises an animal protein
hydrolysate; **wherein the composition further comprises
at least 50% and no greater than 85% water by weight;
comprising
forming a semisolid mixture comprising a) a
hydrolysate, wherein the hydrolysate is present in the
mixture in an amount of at least 55% by weight up to
85% by weight on a dry matter basis, and b) at least
50% and no greater than 85% water by weight, wherein
the hydrolysate comprises a plurality of polypeptides
and free amino acids wherein from about 60% to about
95% of the polypeptides and free amino acids have an**

average molecular weight of less than about 6,000 Daltons, and the hydrolysate comprises an animal protein hydrolysate."

Auxiliary request 14

"1. **A method of making** a hypoallergenic pet food composition comprising a hydrolysate in a semi-solid formulation, **wherein the composition comprises the hydrolysate in an amount of from at least 55% by weight up to 65% by weight on a dry matter basis**, wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons; and the hydrolysate comprises an animal protein hydrolysate; **wherein the composition further comprises at least 50% and up to 78% water by weight, and up to 20% carbohydrate by weight on a dry matter basis; comprising forming a semisolid mixture comprising a) a hydrolysate, wherein the hydrolysate is present in the mixture in an amount of at least 55% by weight up to 65% by weight on a dry matter basis, b) at least 50% and up to 78% water by weight, and c) up to 20% carbohydrate by weight on a dry matter basis, wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons, and the hydrolysate comprises an animal protein hydrolysate."**

VIII. The arguments of the appellant may be summarised as follows:

Main request - Inventive step

D2 was the closest prior art. It was not possible to conclude that the distinguishing features provided a technical effect of palatability or improved palatability relative to D2. The examples of the patent did not identify the hydrolysate by its average molecular weight and no technical effect for hydrolysates having the average molecular weight required by claim 1 had been suggested or demonstrated in the patent. In the absence of any data allowing a comparison with D2, the objective technical problem had therefore be defined merely as the provision of an alternative hypoallergenic pet food composition. The solution was obvious in view of D3, which was directed to hydrolysed chicken liver for pet foods, D8 and D4.

Auxiliary request 1 - Inventive step

The same arguments applied.

Auxiliary request 2-10 - Amendments

In the auxiliary requests, the patentee had combined features which, for the most part, were the subject of dependent claims. However, there was no teaching in the application as filed that the features of the originally filed dependent claims could be combined. Thus, the subject-matter which resulted from the combination of certain dependent claims resulted in the singling out of new embodiments which were not directly and unambiguously derivable from the application as filed.

Admission of the objections under Article 123(2) EPC
against auxiliary requests 11-14

The appellant had submitted in its statement of grounds of appeal that none of the auxiliary requests filed in the opposition proceedings complied with the requirements of Article 123(2) EPC. This requests corresponded to the requests on file in the appeal proceedings.

Auxiliary requests 11-14 - Amendments

In view of the points raised for the previous requests relating to added subject-matter as a result of combining features of separate embodiments, auxiliary requests 11 to 14 also added subject-matter which extended beyond the content of the application as filed for the same reasons.

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

Main request - Inventive step

D2 was the closest prior art. This document did not disclose a semi-solid formulation and the claimed hydrolysate. The effect of these differing features was that they provided for the technical effect of rendering the hypoallergenic pet food composition organoleptically acceptable. This technical effect was confirmed by the teaching of D4. Likewise, document D8 confirmed the role of the food format, here semi-solid, on the palatability. Therefore, both distinguishing features contributed to the palatability of hypoallergenic pet food compositions. The technical

problem was solved by the proposed solution. With regard to the palatability, examples 1-4 demonstrated that the claimed solution plausibly solved the objective problem. Accordingly, while examples 1-4 of the Patent did not provide a direct comparison of the compositions of D2, the examples nevertheless plausibly demonstrated that the distinguishing features resulted in a more palatable hypoallergenic pet food composition vis-a-vis the hypoallergenic pet food compositions of the prior art . Starting from D2, the skilled person aiming at providing a palatable hypoallergenic pet food composition, would not have been guided to the claimed subject-matter in light of D3, which was silent about palatability and which disclosed a different hydrolysate.

Auxiliary request 1 - Inventive step

Auxiliary request 1 further accentuated the higher water content in the pet food compositions of the present invention as compared to D2.

Auxiliary request 2-10 - Amendments

All these requests were amended by preferred embodiments and the combination thereof was derivable from the original application.

Admission of the objections under Article 123(2) EPC against auxiliary requests 11-14

The method claims had never been objected by the appellant, in particular not in the statement of grounds of appeal, while auxiliary requests 11-14 were already part of the opposition proceedings. These new objections were raised for the first time by the

appellant in its letter of July 2020, after the Board issued its preliminary opinion. These objections brought a further level of complexity to the case and were detrimental to the procedural economy. They should not be admitted.

Auxiliary requests 11-14 - Amendments

Auxiliary requests 11-14 corresponded to auxiliary requests 2, 6, 9 and 10 but had been limited to the method claims only.

X. Requests

The appellant requested that the decision under appeal be set aside and the patent be revoked.

The respondent requested that the appeal be dismissed, alternatively that the decision under appeal be set aside and the patent be maintained according to the set of claims filed as auxiliary requests 1-14 with the reply to the statement of grounds of appeal of 22 January 2019. The respondent also requested that the appellant's objections against the method claims not be admitted into the appeal proceedings.

Reasons for the Decision

1. Main request - Inventive step

1.1 The invention is directed to semi-solid hypoallergenic compositions for animal consumption.

1.2 D2 was considered to be the closest prior art by the opposition division in its decision, and is also the choice of the appellant and the respondent.

D2 discloses a dietary composition for managing food allergies in companion animals, which uses hydrolysed proteins as the sole protein source. The composition comprises a source of protein, a source of fat and a source of carbohydrates, wherein the source of protein comprises from about 20 to 30% by weight on a dry basis of a hydrolysed protein preferably chicken liver, with at least 99% of the protein having a molecular weight of less than 1,500 Da (see page 2, last par.). The dietary composition may be provided in any suitable form, and may be extruded and canned or provided in biscuit form (see page 4, 2nd par.). Examples 1 and 2 illustrate such dry compositions, and example 2 gives in particular the exact composition of the hydrolysate according to the molecular weight of the polypeptides comprised therein. D2 discloses in example 1 a hydrolysate having 99.8% of the polypeptide with a molecular weight of less than 1,400 Da, which is slightly more than the claimed 95% of less than 6,000 Da; the polypeptides disclosed in D2 are therefore more hydrolysed.

The distinguishing features of the claimed subject-matter over D2 are the semi-solid state of the formulation and that about 60% to 95% of the polypeptides and free amino acids have an average molecular weight of less than 6,000 daltons.

1.3 According to the opposition division, the problem was defined as the provision of a hypoallergenic pet food composition which is more palatable than the pet food compositions known from D2.

The respondent considered that the problem was the provision of a more palatable hypoallergenic pet food composition.

According to the appellant, the problem was the provision of an alternative hypoallergenic pet food composition.

- 1.4 The respondent relied on paragraph [0041] and examples 1-4 of the contested patent, and also on documents D4 and D8 to demonstrate that the claimed composition was a more palatable hypoallergenic pet food composition.
- 1.4.1 Paragraph [0041] of the patent specification mentions that a semi-solid food composition comprising a protein hydrolysate, with the exception of a gruel, is more palatable than a dried composition comprising a protein hydrolysate. Such semi-solid pet food composition might be in the form of a slurry, a gravy, a gel, a hash, a purée or a semi-moist pet food formulation. Even if this passage in paragraph [0041] remains a simple statement without any concrete evidence, the Board does not see any reason to question this point, all the more since it is also confirmed concretely by the disclosure of document D8. Document D8 mentions indeed that semi-moist products and products with high water content have a palate close to meat and are generally preferred by animals (see column 1 lines 29-42). An improvement on palatability linked with the semi-solid state of the claimed composition is therefore credible.
- 1.4.2 Examples 1-4 of the patent show the preparation of food composition comprising a protein hydrolysate. Example 3 provides a comparison between the compositions of example 1 and some commercial wet or dry food

compositions. Said examples 1-4 are however silent with regard to the animal or plant nature of the hydrolysate used and of its molecular weight. In view of the disclosure of the application as filed, it does not appear possible to conclude that the hydrolysates of the examples have necessarily the composition and molecular weight as claimed. Indeed the application as filed was not limited to the hydrolysate defined in claim 1 of the patent. It rather related more broadly to hydrolysates of protein with a molecular weight of less than 15,000, 18,000 or even 50,000 Daltons (see the original application WO 2006/036766, paragraphs [0015], [0030], [0033]), with either animal or plant origin (see claims 15 or 16 of the original application). Consequently, it is not possible to attribute any effect shown in said examples to the presence of the claimed protein hydrolysate. These examples do not provide further evidence in addition to the statement of paragraph [0041] with regard to palatability.

- 1.4.3 Accordingly, the problem has to be defined as the provision of a more palatable hypoallergenic pet food composition. The Board is convinced that the claimed composition presents an improvement in palatability over the closest prior-art compositions for the reason discussed in point 1.4.1 above.
- 1.5 It remains to determine whether the claimed solution is obvious.
 - 1.5.1 Document D2 mentions that the dietary compositions disclosed therein may be provided in any suitable form, i.e it may be extruded and canned or provided in a dry biscuit form (see page 4, lines 5-8). While it is clear from the general disclosure of D2 that the dry form is

preferred, it appears that the alternative extruded form might be seen as a semi-solid form, and therefore that the document D2 suggests explicitly this alternative.

- 1.5.2 It is in any case known from document D8 that semi-moist products and products with high water content are readily acceptable to animals because these products have a palate close to meat. D8 indicates that such kind of semi-moist product encompasses soft and wet pet foods which have generally a water content of 20 to 40% by weight, as well as pet foods which have a high water content of more than 45% by weight, which are generally sold in canned form (see column 1, lines 10-42); D8 mentions that, from the standpoint of palatability to pets, the semi-moist products are much preferred to the dry products. While this document was cited by the respondent to show that the technical problem was solved, it shows also that the solution to use a semi-solid composition was known and obvious.
- 1.5.3 With regard to the claimed hydrolysate, D3 discloses a chicken protein hydrolysate which has a suitable molecular weight profile with 96.9% having a molecular weight of less than 10 kDa and 92.9% less than 5 kDa for inclusion in a hypoallergenic diet (see Abstract and page 236). The molecular weight distribution is given in following Table 1 of D3:

Table 1
Molecular weight distribution of a chicken-protein hydrolysate

MW range (kDa)	% of Total sample (w/w)
<0.5	67.6
0.5-1	10.8
1-3	10.8
3-5	3.7
5-10	4.0
>10	3.1

According to the respondent, this hydrolysate is different from the claimed hydrolysate, since more than 95% (96.9%) of the chicken protein hydrolysate described in table 1 of D3 has an average molecular weight well below 6,000 Da (< 1398 Da) as illustrated by the following Table and the skilled person would not have arrived at a pet food composition having the MW characteristics required by claim 1 of the Main Request.

MW range of fraction ¹	weight-% ¹	weight contribution ²	cumulative weight-%	cumulative weight-average MW ³
<0.5 kDa	67.6	< 338	67.6	< 500 Da
0.5-1 kDa	10.8	54-108	78.4	< 569 Da
1-3 kDa	10.8	108-324	89.2	< 863 Da
3-5 kDa	3.7	111-185	92.9	< 1028 Da
5-10 kDa	4.0	200-400	96.9	< 1398 Da
> 10 kDa	3.1	> 310	100	

¹ as indicated in Table 1 of D3

² calculated from the MWs of the respective peak fraction and its weight-%

³ calculated from the weight contributions of the included fractions and their cumulative weight-%

The respondent's analysis of the disclosure of D3 was disputed by the appellant. The Board observes that the respondent's letter of 17 August 2020 containing the table reported above, does not provide any detail of

the calculations made to determine the "weight contribution" and the "cumulative weight-average MW". In the Board's view, even assuming that the calculations made by the appellant are correct, it still hold true that the hydrolysate disclosed in D3 contains 92.9% of polypeptides having an average molecular weight below 5000 Daltons (and therefore below 6000 Daltons) and 96.9% of polypeptides having a molecular weight of less than 10 kDa. Such a hydrolysate would be very similar, if not identical, to the hydrolysate defined in claim 1 of the patent which can contain up to about 95% of polypeptides having an average molecular weight of less than 6000 Daltons.

As explained above, there is no evidence on file supporting the respondent's position that a hydrolysate containing from about 60% to about 95% of polypeptides and free amino acids having molecular weight of less than about 6000 Dalton is characterised by an improved palatability. Accordingly, the Board takes the view that providing such a hydrolysate which has a molecular weight distribution very similar if not identical to a protein hydrolysate already in use in veterinary diets does not involve any inventive activity.

1.6 Consequently, the main request does not meet the requirements of inventive step (Article 56 EPC).

2. Auxiliary request 1 - Inventive step

The subject-matter of claim 1 was further restricted by the feature **"wherein the composition further comprises at least about 15% water by weight"**.

This features does not have any incidence on the assessment of inventive step, since D8 discloses that

soft and wet pet foods which have a water content of 20 to 40% by weight, as well as pet foods which have a high water content of more than 45% by weight, have a palate close to meat and are preferred by animals (see column 1, lines 10 to 42).

Consequently, as for the main request, the subject-matter of claim 1 of auxiliary request 1 lacks inventive step over D2 combined with D8 and D3.

3. Auxiliary request 2-10 - Amendments

- 3.1 The subject-matter of claim 1 of auxiliary request 2 has been amended *inter alia* by the feature **"wherein the composition comprises the hydrolysate in an amount of from at least 55% by weight up to 85% by weight on a dry matter basis"**.

The range of "at least 55% by weight up to 85% by weight" is not disclosed explicitly in the application as filed, which disclosed several possible alternative ranges in paragraphs [0020], [0025] and [0041], namely respectively:

- "a mixture can comprise a hydrolysate in an amount of from at least about 0.5% by weight to about **85%** by weight, from at least about 5% by weight to about 70% by weight, from at least about 4% by weight to about 14% by weight, from at least about 6% by weight to about 14% by weight, or from at least about **55%** by weight to about 65% by weight" (emphasis added in bold).
- "the hydrolysate content of a hypoallergenic pet food can be in an amount of from about 0.5% by weight hydrolysate to about **85%** by weight hydrolysate, from about 4% by weight hydrolysate to about 30% by weight hydrolysate, from about 4% by weight hydrolysate to

about 14% by weight hydrolysate, from about 6% by weight hydrolysate to about 14% by weight hydrolysate, or from about **55%** by weight hydrolysate to about 65% by weight hydrolysate on a dry matter basis".

- "a hydrolysate in an amount of from at least about 0.5% by weight to about **85%** by weight...In some configurations, the hydrolysate content of a hypoallergenic pet food can be at least about 4% by weight hydrolysate to about 70% by weight hydrolysate, at least about 4% by weight hydrolysate to about 14% by weight hydrolysate, at least about 6% by weight hydrolysate to about 14% by weight hydrolysate, or at least about **55%** by weight hydrolysate to about 65% by weight hydrolysate".

Said passages disclose therefore a general range of "0.5 to 85% by weight", numerous sub-ranges and in particular two main non-convergent sub-ranges of 4-30% by weight and 55-65% by weight. Said sub-ranges are alternative possibilities, non-convergent, specific and correspond to different embodiments.

The claimed range of 55% to 85% by weight results from the selection of the lower limit 55% of one alternative sub-range and the upper limit 85% of the general range. The original application does not contain any pointer towards this specific combination of limits.

The subject-matter of claim 1 of auxiliary request 2 is further restricted by the feature "**the hydrolysate comprises an animal protein hydrolysate**" which is a selection among two equivalent alternatives disclosed in the application as filed, namely "animal protein" or "plant protein", disclosed in original claims 15 and 16, or paragraph [0015]. Since the animal source of protein is not presented as a preferred embodiment, but

as an equal alternative to plant proteins, this feature constitutes a further selection among two equal alternative possibilities.

The same has to be stated for the feature **"wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons"**

which is a selection among at least two overlapping alternatives disclosed in original dependent claims 12 and 14, namely "wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons" and "wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein at least 90% of the polypeptides and free amino acids have an average molecular weight of less than about 3,000 Daltons". Further possible molecular weight distribution are disclosed in paragraph [0033] of the original application.

Hence, the combination of these features, namely **"the hydrolysate comprises an animal protein hydrolysate"** with **"wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons"** and **"wherein the composition comprises the hydrolysate in an amount of from at least 55% by weight up to 85% by weight on a dry matter basis"** cannot be derived directly and unambiguously from the original application.

Accordingly, auxiliary request 2 does not meet the requirements of Article 123(2) EPC.

3.2 The subject-matter of claim 1 of auxiliary request 3 comprises the feature "**wherein at least 90% of the polypeptides and free amino acids have an average molecular weight of less than about 3,000 daltons**". As mentioned above, this feature originates from original dependent claim 14 and is a selection among at least two alternative possibilities, the second being claimed in original claim 12 and also included in claim 1 of auxiliary request 3, namely "**wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons**". The combination of these two alternative embodiments which were presented in the original application as equal and non-convergent alternatives, even if partially overlapping, creates a new sub-group of the hydrolysate which is not derivable directly and unambiguously from the application as filed.

It follows that also the further combination of these features with the feature "**animal protein hydrolysate**" is not derivable directly and unambiguously from the original application.

Consequently, auxiliary request 3 does not meet the requirements of Article 123(2) EPC.

3.3 As in claim 1 of auxiliary request 3, the subject-matter of claim 1 of auxiliary request 4 comprises the added feature "**wherein at least 90% of the polypeptides and free amino acids have an average molecular weight of less than about 3,000 daltons**" in combination with

the feature **"wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons"**. As for auxiliary request 3, the combination of these two alternative embodiments is not derivable directly and unambiguously from the application as filed (see point 3.2 above).

Claim 1 of auxiliary request 4 comprises furthermore the feature **"wherein the composition comprises the hydrolysate in an amount of from at least 55% by weight up to 85% by weight on a dry matter basis"**, which is not derivable directly and unambiguously from the original application, and is restricted to an **"animal protein hydrolysate"**, the combination of all these features being neither derivable from the original application (see point 3.1 above).

Consequently, auxiliary request 4 does not meet the requirements of Article 123(2) EPC.

- 3.4 Claim 1 of auxiliary request 5 comprises the features **"wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons"** in combination with **"an animal protein hydrolysate"**.

As explained under point 3.1 above, both features have been selected among equivalent alternatives. The combination of these features is not derivable directly and unambiguously from the application as filed.

Accordingly, auxiliary request 5 does not meet the requirements of Article 123(2) EPC.

- 3.5 Claim 1 of auxiliary request 6 comprises the same amended features and combination of features as auxiliary request 2, namely **"wherein the composition comprises the hydrolysate in an amount of from at least 55% by weight up to 85% by weight on a dry matter basis", "wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons" and "an animal protein hydrolysate"**.

Auxiliary request 6 does not meet the requirements of Article 123(2) EPC for the same reasons as for auxiliary request 2.

- 3.6 The same conclusion applies for auxiliary request 7, in which claim 1 comprises the same unallowable combination of features as auxiliary request 3, namely **"wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons", "wherein at least 90% of the polypeptides and free amino acids have an average molecular weight of less than about 3,000 daltons" and "an animal protein hydrolysate"**.

Auxiliary request 7 does not meet the requirements of Article 123(2) EPC for the same reasons as for auxiliary request 3.

3.7 Claim 1 of auxiliary 8 comprises the same combination of features as auxiliary request 4, namely **"wherein the composition comprises the hydrolysate in an amount of from at least 55% by weight up to 85% by weight on a dry matter basis", "wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons", "wherein at least 90% of the polypeptides and free amino acids have an average molecular weight of less than about 3,000 daltons", and "an animal protein hydrolysate"**.

Auxiliary request 8 does not meet the requirements of Article 123(2) EPC for the same reasons as for auxiliary request 4.

3.8 The subject-matter of claim 1 of auxiliary requests 9 and 10 comprises the combination of the features **"wherein the composition comprises the hydrolysate in an amount of from at least 55% by weight up to 65% by weight on a dry matter basis", "wherein the hydrolysate comprises a plurality of polypeptides and free amino acids wherein from about 60% to about 95% of the polypeptides and free amino acids have an average molecular weight of less than about 6,000 Daltons"** and **"the hydrolysate comprises an animal protein hydrolysate"**. Each of these features constitutes a selection among at least two possibilities and their combination is not derivable directly and unambiguously from the original application (see point 3.1 above).

Auxiliary requests 9 and 10 do not meet the requirements of Article 123(2) EPC.

4. Admission of the objections under Article 123(2) EPC against auxiliary requests 11-14

4.1 The subject-matter of claim 1 of auxiliary request 11-14 relates to a "method of making hypoallergenic pet food composition".

4.2 According to the respondent, the method claims had never been objected by the appellant, in particular not in the statement of grounds of appeal, while auxiliary requests 11-14 were already part of the opposition proceedings. These new objections were raised for the first time by the appellant in its letter of July 2020, after the Board issued its preliminary opinion and should not be admitted (Article 13(2) 2020).

4.3 The Board notes that claim 1 of the main request was objected under Article 123(2) EPC by the appellant in its statement of grounds of appeal, and that the appellant further mentioned that "the same objections arise against independent method claim 17 and independent product claim 24". As there is no pointer to the particular combinations of features in the granted claims either in the claims as originally filed or the description as a whole, these particular embodiments now claimed are not directly and unambiguously derivable from the application as filed" (see points 3.6 and 3.7 of the statement setting out the grounds of appeal).

This objection under Article 123(2) EPC was repeated by the appellant in the part of the grounds of appeal devoted to the auxiliary 1-14 submitted during the opposition proceedings and which were then maintained during the appeal proceedings. This objection was raised through the following general terms: "none of

the auxiliary requests satisfy Article 123(2) EPC because the Patentee relies on the claims as originally filed as a reservoir of features, and by selecting particular features from the dependent claims and combining these features the Patentee has artificially created embodiments which are now the subject-matter of the claims of the auxiliary requests" (see point 7.2 of statement setting out the grounds of appeal).

Accordingly, the method claims and the corresponding subject-matter of auxiliary requests 11-14 were objected under Article 123(2) EPC at the earliest stage of the appeal proceedings. Hence, these objections form part of the appellant's appeal case and the Board has no discretion not to admit them in the appeal proceedings under Article 13(2) 2020.

5. Auxiliary requests 11-14 - Amendments

The subject-matter of claim 1 of auxiliary requests 11-14 relate to the preparation of the pet food compositions defined in of claim 1 of auxiliary requests 2, 6, 9 and 10. These requests do not meet the requirements of Article 123(2) EPC for the same reasons as discussed above in respect to auxiliary requests 2, 6, 9 and 10.

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:



B. Atienza Vivancos

A. Uselli

Decision electronically authenticated