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Datasheet for the decision
of 8 February 2022

Case Number: T 2935/18 - 3.3.09

Application Number: 11804672.1

Publication Number: 2654458

IPC: A23L1/0524

Language of the proceedings: EN

Title of invention:
GEL COMPOSITION COMPRISING LOW-METHOXY PECTIN

Patent Proprietor:
Société des Produits Nestlé S.A.

Opponent:
UNILEVER N.V. / UNILEVER PLC

Headword:
Gel Composition/NESTLÉ

Relevant legal provisions:
EPC Art. 56

Keyword:
Admittance of experimental report to the proceedings - (yes)
Inventive step of the main request - (no)
Pending auxiliary request on appeal (no)

This datasheet is not part of the Decision.
It can be changed at any time and without notice.

Decisions cited:

Catchword:

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Beschwerdekammern

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Case Number: T 2935/18 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 8 February 2022

Appellant: (Opponent)	UNILEVER N.V. / UNILEVER PLC Weena 455/100 Victoria Embankment 3013 AL Rotterdam/London, Greater London EC4Y 0DY (NL)
Representative:	Tjon, Hon Kong Guno Unilever N.V. Unilevewr Patent Group Bronland 14 6708 WH Wageningen (NL)
Respondent: (Patent Proprietor)	Société des Produits Nestlé S.A. Entre-deux-Villes 1800 Vevey (CH)
Representative:	Mollet, Beat Max Société des Produits Nestlé S.A. Avenue Nestlé 55 1800 Vevey (CH)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 15 October 2018 concerning maintenance of the European Patent No. 2654458 in amended form.**

Composition of the Board:

Chairman	A. Haderlein
Members:	M. Ansorge
	E. Kossonakou

Summary of Facts and Submissions

I. The appeal was filed by the opponent (appellant) against the opposition division's interlocutory decision holding the main request allowable, in particular finding that the claimed subject-matter involved an inventive step in view of D4 as the closest prior art.

II. In the present decision, reference is made to the following documents:

D4: EP 06115093.4 (published priority document concerning international patent application No. PCT/EP2006/012061)
D11: Experimental report filed by the proprietor (17 October 2017)
D13: Experimental report filed by the opponent (19 October 2017)
D16: Experimental report filed by the opponent with the grounds of appeal (25 February 2019)
D20: WO 2014/009079 A1
D21: WO 2014/009155 A1
D22: WO 2014/005825 A1

III. Claim 1 of the main request reads as follows:

"A composition in the form of a gel for preparing a food product, the composition comprising:
a) water in the amount of 30 to 70 % (by weight of the total composition),
b) flavourings in the amount of 1 to 40 % (by weight of the total composition),
c) salt in the amount of 10 to 25 % (by weight of the total composition), and

d) gelling agent in the amount of 0.6 to 2.5 % (by weight of the total composition), wherein the gelling agent is low-methoxy pectin, preferably low-methoxy amidated pectin, and
e) calcium ions in the amount of 1.0 to 10 % (by weight of the pectin)."

IV. The board summoned the parties to oral proceedings and issued a communication pursuant to Article 15(1) RPBA, indicating its preliminary opinion that the subject-matter of claim 1 of the main request did not involve an inventive step in view of D4 as the closest prior art. Moreover, the board pointed out that D16 should be admitted into the proceedings and established that there was no auxiliary request on file.

V. With its letter dated 21 January 2022, the proprietor (respondent) announced that it would not be attending the oral proceedings.

VI. The oral proceedings were cancelled.

VII. The parties' relevant arguments, submitted in writing, are reflected in the reasons for the decision below.

VIII. Requests

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

The respondent requested that the appeal be dismissed (main request) or, as an auxiliary measure, that the board "considers also the auxiliary request filed during the opposition procedure".

Reasons for the Decision

MAIN REQUEST

1. Admittance of the experimental report D16

1.1 With respect to the admittance of D16, the following is stated in the communication pursuant to Article 15(1) RPBA:

"The respondent requested not to admit D16 into the proceedings.

At present, the board tends to see the filing of D16 as a legitimate and reasonable reaction to the decision under appeal. D16 focuses on challenging the experimental report D11, in particular its example 7, which seems to be of crucial importance for the assessment of inventive step. The board is thus presently inclined to admit D16 into the proceedings."

1.2 The respondent did not contest the board's finding on admittance of D16 and did not make any further submission (see point V. above). The board therefore confirms its preliminary finding above and adds the following observations for the sake of completeness.

D16 focuses on challenging the experimental report D11 filed by the respondent, in particular example 7 thereof, which in the respondent's opinion did not result in a gel. This is of crucial importance for the assessment of inventive step. The appellant has reworked example 7 of D11 (example B of D16) as well as the process of D4 (examples A and C of D16).

D16 demonstrates that a gel can be produced with an aqueous composition having only LMA pectin as the gelling agent when following the process conditions described in the examples of D4, whereas example 7 of D11 shows the opposite result. In the board's view, the process conditions applied in D16 are sufficiently in line with those required by the process of D4. Under these circumstances, the respondent failed to prove that D4 contains a non-enabling disclosure insofar as the use of LMA pectin as the sole gelling agent is concerned.

1.3 In view of the above, the filing of D16 is considered not only a legitimate and reasonable reaction to the decision under appeal, but is also considered to be *prima facie* highly relevant. Thus, it is admitted into the proceedings.

1.4 The respondent requested that, in the event of D16 being admitted, the board select an independent research institute to repeat the trials.

In the board's view, there is no apparent reason why the respondent could not have obtained and filed a report from an independent research institute of its choice. The board does not accede to this request.

2. Documents D20 to D22

2.1 With respect to admittance of documents D20 to D22, the following is stated in the communication pursuant to Article 15(1) RPBA:

"The appellant requested that D20 to D22 not be admitted into the proceedings.

This will be discussed during the oral proceedings, if necessary. In this context, the board is unable to see how the post-published patent applications D20 to D22 might reflect common general knowledge of a skilled person, as alleged by the respondent. Common general knowledge is typically not reflected by patent applications but is to be found in basic handbooks, monographs, encyclopedias, textbooks and reference books. Thus, even if admitted into the proceedings, the board does not see what D20 to D22 could contribute to the respondent's case."

2.2 No comments or further arguments were furnished by the respondent. Oral proceedings did not take place and there was thus no discussion on this issue. The board therefore confirms its preliminary opinion and does not admit the documents into the proceedings.

3. Inventive step

3.1 In its communication, the board gave a preliminary opinion on inventive step in view of D4 as the closest prior art. Among other things, the following was stated under point 4.6 of the board's communication:

"The appellant (in line with the opposition division) argues that D4 is the closest prior art in the present case. The respondent submitted that D1 is to be taken as starting point in the assessment of inventive step, without however giving any reasons for this choice; it merely referred to arguments submitted in the oral hearing before the opposition division and to arguments mentioned in the decision.

Under these circumstances, the board is unable to see why the opposition division might have been wrong that

D4 is the closest prior art. Thus, the question of inventive step will be assessed starting from D4.

The composition according to the examples of D4 (e.g. example 1) differs from the one of claim 1 in that:

- it does not use low-methoxy pectin as the gelling agent; and
- it does not mention anything about the amount of calcium ions.

As no effect resulting from the differences in view of D4 was shown, the objective technical problem seems to be the provision of an alternative gel composition for preparing a food product.

It then needs to be assessed whether the skilled person would have arrived at the composition according to claim 1 in an obvious manner.

Considering the claimed amount of calcium ions, the board shares the opposition division's conclusion that adding calcium ions in an amount of 1.0 to 10% (by weight of pectin) is obvious for a skilled person. This was not contested by the respondent. It seems that tap water (implicitly including calcium salts) is commonly used to produce compositions for food products.

The key point in the parties' argumentation lines appears to be whether, when starting from D4 using LMA (low-methoxy amidated) pectin as the sole gelling agent, the skilled person would have obtained a gel.

While the respondent submitted D11 and contests that this is possible when following the process conditions

described in the examples of D4, the appellant submitted D13 and D16 to show that this is possible.

In this context, the respondent referred to the post-published documents D20 to D22 (the appellant's own patent applications) to support that the appellant itself was aware that the process described in D4 is not working for making a gel with LMA pectin as sole gelling agent. As outlined above, the post-published documents D20 to D22 cannot be used and cannot support the respondent's case, since they do not reflect common general knowledge.

D4 relates to a packaged concentrate comprising, as one of the essential ingredients a polysaccharide-based gelling agent and having the appearance of a gel. This gelling agent is preferably locust bean gum (LBG), xanthan, carrageenan, alginate, gellan, agar, guar gum, pectins, or mixtures thereof (see page 3, lines 4 to 6, of D4). The required amount thereof is, amongst other things, dependant on the type of gelling agent chosen and the salt level and can easily be determined for a given formulation by the person of average skill in the art (see page 3, lines 6 to 8, of D4).

In the following passage on page 3, lines 8 to 11, of D4, it is indicated that typical ranges for the gelling agents can be 1-5% LMA pectin for 15% NaCl and 1.7-7% for 25% NaCl.

Example 5 of D11 does not follow the guidance that at 25% NaCl, 1.7-7% LMA pectin is to be used, since example 5 only uses 1 wt% pectin. Thus, this example cannot show that using only LMA pectin would not result in a gel.

While example 7 of D11 (trying to rework D4) fails to achieve a gel when using only LMA pectin as the gelling agent, D16 seems to demonstrate the opposite result, i.e. that a composition comprising LMA pectin as the only gelling agent leads to a gel when following the process conditions described in D4.

In view of the above contradictory results, the board is of the opinion that there is not sufficient evidence on file to prove that when using LMA pectin as the sole gelling agent and when following the process conditions of the examples of D4, it is impossible to achieve a gel. Rather, the evidence on file makes it credible that using LMA pectin as the sole gelling agent in D4 would result in a gel as required by claim 1.

Moreover, as stated above, D4 itself teaches that a range of 1-5% LMA pectin is a typical range for 15% NaCl and 1.7-7% LMA pectin is a typical range for 25% NaCl. Both salt concentrations (15% and 25%) are within the salt concentration required in claim 1 and both LMA pectin ranges overlap with the range of 0.6 to 2.5% (by weight of the total composition) required in claim 1. It is obvious for a skilled person to work within this range of overlap, as taught in D4.

In view of the above, the claimed composition is considered to be an obvious alternative in view of D4, so the subject-matter of claim 1 does not appear to involve an inventive step in view of D4 as the closest prior art."

3.2 The respondent did not contest the board's finding on lack of inventive step in view of D4 as the closest prior art and did not make any further submission (see point V. above).

3.3 The board has no reason to review its preliminary opinion and concludes that the subject-matter of claim 1 of the main request does not involve an inventive step in view of D4 as the closest prior art.

AUXILIARY REQUEST

4. The respondent made a request, as an auxiliary measure, for the board "to consider also the auxiliary request filed during the opposition procedure" (see point 2. of the respondent's reply to the grounds of appeal). It did not specify which one of the three auxiliary requests filed on 24 November 2017, the three auxiliary requests filed on 17 October 2017 or the three auxiliary requests filed on 9 August 2016 was meant.

In addition, the respondent did not give any explanation as to why one of the auxiliary requests filed during the opposition proceedings might be suited to overcome the appellant’s objections. No substantiation was filed in this respect. Even after receipt of the board's communication, the respondent did not comment on the negative preliminary opinion outlined by the board. Instead, it announced that it would not be attending the oral proceedings.

Under these circumstances, the board concludes that there is no auxiliary request on appeal.

5. In view of the above, there is no allowable request on file.

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