

Internal distribution code:

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

**Datasheet for the decision
of 6 October 2021**

Case Number: T 0378/19 - 3.3.09

Application Number: 11745645.9

Publication Number: 2597963

IPC: A23K40/25, A23K50/42

Language of the proceedings: EN

Title of invention:

PET FOOD COMPOSITIONS HAVING ANTIMICROBIAL ACTIVITY

Patent Proprietor:

Hill's Pet Nutrition, Inc.

Opponent:

Société des Produits Nestlé S.A.

Headword:

Pet food/HILL'S

Relevant legal provisions:

EPC Art. 56, 123(2)

RPBA 2020 Art. 13(2)

Keyword:

Amendments - added subject-matter (no)

Inventive step - (yes)

Amendment after summons - inventive step objection based on a
new combination of documents - exceptional circumstances (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 0378/19 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 6 October 2021

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

Representative: Elkington and Fife LLP
Prospect House
8 Pembroke Road
Sevenoaks, Kent TN13 1XR (GB)

Respondent: Hill's Pet Nutrition, Inc.
(Patent Proprietor) 400 Southwest 8th Avenue
Topeka, KS 66603 (US)

Representative: Wichmann, Hendrik
Wuesthoff & Wuesthoff
Patentanwälte PartG mbB
Schweigerstraße 2
81541 München (DE)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 29 January 2019
rejecting the opposition filed against European
patent No. 2597963 pursuant to Article 101(2)
EPC.**

Composition of the Board:

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

Summary of Facts and Submissions

- I. The appeal was filed by the opponent (appellant) against the opposition division's decision to reject the opposition.
- II. In its notice of opposition, the opponent had requested revocation of the patent based on the grounds for opposition under Article 100(b) EPC and Article 100(a) EPC (lack of novelty and lack of inventive step).
- III. In the present decision, reference is made to the following documents:
- D1: R. Stonerock, "Possibilities of *Salmonella* control with the aid of acidifiers", in *Acidifiers in Animal Nutrition, A Guide for Feed Preservation and Acidification to Promote Animal Performance*, Nottingham University Press, 2007, chapter 3, pages 21 to 29
- D3: WO 00/10405 A1
- D8: G.J. Rokey, "Pet food production. Process description", <http://en.engormix.com/feed-machinery/articles/pet-food-production-t33431.htm>, 2006
- D10: WO 2004/019683 A2
- D14: L. Jørgensen et al., "Effect of pelleting and use of lactic acid in feed on *Salmonella* prevalence and productivity in weaners", in *Proceedings of the 4th International Symposium on the Epidemiology and Control of *Salmonella* and other Food Borne Pathogens in Pork*, Leipzig, Germany, September 2 to 5, 2001, pages 109 to 112.

IV. Claims 1 and 4 as granted read as follows:

"1. Use of lactic acid to impart antimicrobial activity against *Salmonella* in a dry cat food composition or in a dry dog food composition, wherein the lactic acid is present in the composition in an amount of from 0.1% to 3%."

"4. A method for making a pet food composition having antimicrobial activity against *Salmonella* comprising the following steps:

- a. preconditioning by mixing wet and dry ingredients at elevated temperature to form a kibble dough;
- b. extruding the kibble dough at a high temperature and pressure;
- c. drying the extruded kibble; and
- d. enrobing the dried kibble with topical liquid and/or dry ingredients;

wherein an ingredient which imparts an antimicrobial effect on the composition is applied to the kibble at step a and/or d in an amount of 0.1% to 3% by weight of the composition,

wherein the antimicrobial ingredient has activity against *Salmonella*, the composition is a dry cat food or dry dog food, and wherein the ingredient is lactic acid."

V. The opposition division decided that the subject-matter of the claims as granted met the requirements of sufficiency of disclosure, novelty over D10 and inventive step in view of D1 as the closest prior art.

- VI. In its reply to the grounds of appeal, the proprietor (respondent) requested that the appeal be dismissed (main request) and filed auxiliary requests as possible fall-back positions.
- VII. By letter dated 16 August 2021, the respondent filed, *inter alia*, a new auxiliary request 4 to replace the previously filed auxiliary request 4.
- VIII. During the oral proceedings before the board, the respondent declared auxiliary request 4 filed on 16 August 2021 to be its main request.

Claim 1 of auxiliary request 4 is based on claim 4 as granted (see point IV above) and differs therefrom only in that the numerical range "0.1% to 3%" is limited to "1% to 3%".

Claim 2 of auxiliary request 4 reads as follows:

"The method of claim 1 wherein the composition has a pH of from about 4 to about 5."

- IX. The parties' relevant arguments, submitted in writing and during the oral proceedings before the board, are reflected in the reasoning below.
- X. Requests

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

The respondent requested that the patent be maintained on the basis of auxiliary request 4 filed by letter dated 16 August 2021 as its main request or, in the

alternative, on the basis of one of the other auxiliary requests.

Reasons for the Decision

AUXILIARY REQUEST 4 (16 August 2021)

1. Article 123(2) EPC

1.1 The appellant argued that the subject-matter of claim 1 of auxiliary request 4 did not meet the requirement of Article 123(2) EPC. In its view, there is no basis in the application as filed for creating the range "1 to 3%" for the amount of lactic acid in the dry cat food composition or the dry dog food composition. Paragraph [0069] of the application as filed merely discloses point values without indicating a preference and without stating whether these point values, such as the point value 1%, should be a lower or an upper limit for limiting the claimed range. The statement "A minimum concentration threshold of about 1% is demonstrated efficacious" in paragraph [0128] of the application as filed is only disclosed in the context of the specific example 6, which deals with the production of kibble coated with lactic acid. In the appellant's view, a skilled person would see that this disclosure of the minimum concentration threshold is tied to example 6, which related only to dry canine food, a specific cocktail of *Salmonella* and specific process conditions.

1.2 The board has concluded that the method of claim 1 of auxiliary request 4 does meet the requirement of Article 123(2) EPC for the following reasons.

1.2.1 Insofar as claim 1 of auxiliary request 4 is concerned, the only contentious point among the parties was whether there is a basis in the application as filed for amending the broadest and clearly disclosed lactic acid range of "0.1% to 3%" (see paragraph [0069] and in particular method claim 13 of the application as filed) to the more restricted range of "1% to 3%".

1.2.2 The following passages of the application as filed are relevant in this respect:

"[0069] In another embodiment, the ingredient which imparts an antimicrobial effect is present in the composition in an amount of about 0.01%, about 0.1%, about 0.13%, about 0.15%, about 0.2%, about 0.25%, about 0.3%, about 0.4%, about 0.5%, about **1%**, about 2%, about 3%, from **about 0.1% to about 3%**, by weight of the composition." (emphasis added)

"[0127] Lactic acid (1%, 2% and 3%) is also efficacious against *Salmonella* at all points of processing points [*sic*]."

"[0128] **Lactic acid** is thus effective against ***Salmonella*** in the formulations. It has an immediate effect on the viability of the *Salmonellae* cocktail. A **minimum** concentration threshold of **about 1%** is demonstrated efficacious." (emphasis added)

1.2.3 Firstly, it is noted that paragraph [0069] of the application as filed provides an explicit disclosure of the point value of "1%" (as well as "2%" and "3%" and the range "0.1% to 3%").

In this context, the appellant argued that it is not clear whether this point value "1%" should be a lower

limit or an upper limit. While this is formally correct when assessing paragraph [0069] alone, paragraph [0128] provides, however, in the context of example 6 of the application as filed, a clear pointer that at least 1% lactic acid is efficacious against *Salmonella*, i.e. 1% or more is a preferred lower limit for the lactic acid concentration. This is further supported by the fact that paragraph [0127] of the application as filed (also directed to example 6) mentions that using 1%, 2% and 3% lactic acid is efficacious against *Salmonella* at all points of processing.

Thus, the board has concluded that the application as filed, when taking paragraphs [0069], [0127] and [0128] into account, discloses 1% lactic acid as a preferred lower limit within the broadest range of "0.1% to 3%" disclosed in the application as filed.

- 1.2.4 Secondly, the board is of the opinion that a skilled person would not consider the statement that "A minimum concentration threshold of about 1% is demonstrated efficacious" in example 6 to apply only to dog food (canine food) and only to the *Salmonellae* cocktail explicitly mentioned.

There is no plausible reason to assume that lactic acid would only be suitable for preventing *Salmonella* contamination in dog food and not in cat food. As a consequence, a skilled person derives from the entirety of the application as filed, and in particular from paragraph [0128] thereof, that at least 1% lactic acid in a dry dog food composition or dry cat food composition is efficacious in imparting antimicrobial activity.

Similarly, there is no reason to assume that lactic acid may be used to prevent contamination against the specific *Salmonella* cocktail as tested in example 6, but not against other *Salmonellae*. This is also supported by paragraph [0127] of the application as filed, which mentions that lactic acid (1%, 2% and 3%) is also efficacious against *Salmonella* at all points of processing.

1.2.5 Thirdly, it is noted that example 6 of the application as filed relates, like claim 1 of auxiliary request 4, to a method for making kibbles containing lactic acid as the ingredient imparting antimicrobial activity against *Salmonella*. Example 6 also applies the crucial process steps (see steps a. to d. of claim 1) and adds lactic acid in the preconditioning step or topically or in the preconditioning step and topically. Thus, example 6 also realises the crucial process steps required in claim 1 of auxiliary request 4.

1.2.6 In view of the above, there is no inadmissible intermediate generalisation when combining the feature "1% or more lactic acid" from example 6 with the general context of the application as filed. In the board's view, this feature is not inextricably linked to the features of example 6 and, in this particular case, the overall disclosure of the application as filed justifies the generalisation of this feature and its introduction into claim 1.

Thus, for the reasons given above, the method according to claim 1 of auxiliary request 4 meets the requirement of Article 123(2) EPC.

1.3 The appellant also argued that claim 2 of auxiliary request 4 violates Article 123(2) EPC, since the pH

range of about 4 to about 5 is only disclosed in the application as filed in combination with the range "0.13% to 3% lactic acid", and not in combination with the newly created range of "1% to 3% lactic acid".

For the following reasons, the board does not share the appellant's view in this respect.

For the reasons given under point 1.2 above, the board has concluded that there is a basis in the application as filed for the lactic acid range of "1% to 3%". Although it is formally correct that the pH range of about 4 to about 5 is only mentioned in combination with "about 0.13% to about 3% lactic acid", the board is of the opinion that the pH range of 4 to 5 is not only validly linked with the broader lactic acid range of 0.13% to 3%, but also with the more restricted disclosed range of 1% to 3%. The board sees no reason why the pH range of about 4 to about 5 should be specifically linked only to the broader (specifically mentioned) lactic acid range and not to the restricted range, which is also disclosed and which lies entirely within the broader range. Thus, the board cannot agree with the appellant in this respect.

In view of the above, the subject-matter of claim 2 of auxiliary request 4 also meets the requirement of Article 123(2) EPC.

2. Article 83 EPC

The appellant raised a sufficiency objection relating only to the claimed subject-matter of those claims comprising the broad lactic acid range of 0.1% to 3% as mentioned in claims 1 and 4 as granted. However, no such objection was raised against claims containing the

restricted lactic acid range of 1% to 3% as present in claims 1 and 2 of auxiliary request 4. In its sufficiency argument against the claims as granted, the appellant even admitted that a minimum concentration of 1% lactic acid is efficacious in imparting antimicrobial activity against *Salmonella*.

Under these circumstances, there is no reason to doubt that the claimed method can be carried out over the whole claimed range.

3. Inventive step

3.1 Both parties agreed that D1 qualifies as an appropriate closest prior-art document in the present case. The board sees no reason to disagree.

3.2 The appellant raised an inventive-step objection in view of D1 as the closest prior art in combination with D3 and D8.

3.3 For the following reasons, the method of claim 1 of auxiliary request 4 is not rendered obvious in view of this combination of documents.

3.3.1 D1 relates to feed preservation and acidification to promote animal performance. More precisely, D1 describes possibilities of *Salmonella* control in feed and in animal production with the aid of acidifiers, in particular organic acids. In the chapter of D1 entitled "Efficacy of different acidifiers against *Salmonella* in animal production", it is reported that a dietary inclusion of 2.8% of lactic acid reduced the number of *Salmonella*-positive faecal samples in weaned piglets (see page 25, lines 19 and 20 from the bottom, of D1, which refers to and summarises the results of D14).

- 3.3.2 The appellant conceded that claim 1 of auxiliary request 4 differs from D1 in that it requires that lactic acid is used to impart antimicrobial activity against *Salmonella (in vitro)* in a food composition in order to preserve it from *Salmonella* contamination, whereas D1 discloses the use of lactic acid only (*in vivo*) in weaned piglets having a recognised *Salmonella* problem (see page 25, lines 19 and 20 from the bottom, of D1, which refers to and summarises the results of D14). In addition, the appellant conceded that D1 does not disclose a process for producing pet food which comprises the specific process steps a. to d. stipulated in claim 1 of auxiliary request 4.
- 3.3.3 In the appellant's view, the effect resulting from these differences is that *Salmonella* can be decreased not only in animals having a recognised *Salmonella* problem, but also in the feed itself, which can thereby be preserved from contamination with *Salmonella*. It identified the problem to be solved as providing another use of lactic acid within a dry food composition. In its view, claim 1 of auxiliary request 4 merely contains well-known process steps which were obvious to a skilled person in view of D3 and D8.
- 3.3.4 As set out below, even if the problem formulated by the appellant is adopted as the problem to be solved over D1, the claimed subject-matter does involve an inventive step. The reasons for this are as follows.

D1 alone neither discloses nor suggests any method for making a pet food composition. In particular, it does not disclose the specific process steps a. to d. as defined in claim 1 of auxiliary request 4. A skilled

person cannot derive any teaching from D1 alone as to how to produce a dry cat food composition or a dry dog food composition, let alone how to mix and specifically process the ingredients. Thus, D1 alone cannot render the claimed method obvious.

A skilled person trying to find a solution to the problem to be solved as formulated by the appellant would not be guided by D3 and D8 to the solution. In the board's view, a skilled person would not consider these documents, since they belong to different technical fields. The board is unable to agree that a skilled person, starting from D1 and trying to find another use for lactic acid, would consider D3 and D8, which do not deal with the problem to be solved as formulated by the appellant or with microbial contamination, let alone uses of lactic acid. In the board's view, considering D3 and D8 and extracting the missing distinguishing features of claim 1 would only be possible with hindsight.

No reasons were provided by the appellant as to why a skilled person confronted with the above technical problem would consider D3 and D8 in the first place. While it might be true that D3 and D8 describe typical process steps for producing pet food, there is simply no suggestion in D3 or D8 towards solving the problem to be solved as formulated by the appellant. Thus, the board is not convinced by the inventive-step objection raised by the appellant.

A lack of inventive step of the subject-matter of claim 1 of auxiliary request 4 has not therefore been demonstrated in view of D1 as the closest prior art. The same applies to dependent claim 2 of auxiliary request 4.

3.4 During the oral proceedings before the board, the appellant for the first time raised an inventive-step objection in view of D10 as the closest prior art in combination with D3 and D8. The respondent requested that this objection not be admitted into the proceedings.

Although D10 was used in an alternative inventive-step objection in the grounds of appeal against the claims as granted, no objection using the specific combination of documents D10, D3 and D8 was raised against the more restricted claims of previous auxiliary request 4 in the written proceedings. Since claim 1 of the previous auxiliary request 4 is identical to claim 1 of the present auxiliary request 4, this assessment equally applies to the present auxiliary request 4. The specific combination of D10 with D3 and D8 was not raised by the appellant in writing, but only during the oral proceedings before the board and therefore it amounts to an amendment of the appellant's case.

No exceptional circumstances justified by cogent reasons were argued by the appellant (Article 13(2) RPBA). In the absence of any such arguments from the appellant, the board is unable to see any reason which could justify admitting this late-raised inventive-step objection into the proceedings.

Thus, the inventive-step objection in view of D10 in combination with D3 and D8 is not admitted (Article 13(2) RPBA).

4. In view of the above, auxiliary request 4 is allowable.

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 with the following claims and a description to be adapted:

Claims:

Nos. 1 and 2 of auxiliary request 4 filed under cover of a letter dated 16 August 2021.

The Registrar:

The Chairman:



A. Nielsen-Hannerup

A. Haderlein

Decision electronically authenticated