

Internal distribution code:

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

**Datasheet for the decision
of 12 May 2021**

Case Number: T 2613/19 - 3.3.09

Application Number: 13803782.5

Publication Number: 2861059

IPC: A23L33/12, C11C3/00, C12N15/52,
C12N15/82, A01H5/10

Language of the proceedings: EN

Title of invention:

PRODUCTION OF LONG CHAIN POLYUNSATURATED FATTY ACIDS IN PLANT
CELLS

Patent Proprietors:

Commonwealth Scientific and Industrial Research
Organisation
Grains Research And Development Corporation
Nuseed Pty Ltd

Opponent:

BASF SE

Headword:

Production of long chain polyunsaturated fatty acids/
COMMONWEALTH

Relevant legal provisions:

EPC Art. 112a(2)(c), 113(1), 116, 123(2)

EPC R. 106

RPBA 2020 Art. 15a

Keyword:

Right to be heard - oral proceedings before board of appeal
Oral proceedings held by video conference despite disagreement
of party (yes)

Amendments - added subject-matter (yes)

Decisions cited:

G 0003/19, T 0082/04, T 1451/10, T 1581/12, T 0389/13,

T 2320/16

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 2613/19 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 12 May 2021

Appellant: Commonwealth Scientific and Industrial Research
(Patent Proprietor 1) Organisation
Black Mountain Science and Innovation Park
Clunies Ross Street
Acton ACT 2601 (AU)

Appellant: Grains Research And Development Corporation
(Patent Proprietor 2) Level 4
4 National Circuit
Barton, ACT 2600 (AU)

Appellant: Nuseed Pty Ltd
(Patent Proprietor 3) 103-105 Pipe Road
Laverton Victoria 3028 (AU)

Representative: Ernest Gutmann - Yves Plasseraud S.A.S.
c/o Plasseraud IP
66, rue de la Chaussée d'Antin
75440 Paris Cedex 09 (FR)

Respondent: BASF SE
(Opponent) Carl-Bosch-Str. 38
67056 Ludwigshafen (DE)

Representative: BASF IP Association
BASF SE
G-FLP-C006
67056 Ludwigshafen (DE)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 2 July 2019
revoking European patent No. 2861059 pursuant to
Article 101(3)(b) EPC.**

Composition of the Board:

Chairman A. Haderlein
Members: C. Meiners
 D. Rogers

Summary of Facts and Submissions

- I. The appeal was filed by the patent proprietors (appellants) against the decision of the opposition division to revoke the European patent No. 2 861 059.
- II. With its notice of opposition, the opponent had requested revocation of the patent in its entirety, *inter alia*, on the ground under Article 100(c) EPC.
- III. In the decision under appeal, the opposition division concluded that none of the requests (i.e. the main request and auxiliary requests 1 to 8, all filed under cover of a letter dated 13 March 2019) met the requirements of Article 123(2) EPC.
- IV. On 15 December 2020, the parties were summoned to oral proceedings.
- V. In a communication by the board, the parties were informed that the board intended to hold the oral proceedings as a video conference.
- VI. In reply to this communication, the appellants stated that they did not give consent to the conduct of the oral proceedings by video conference.
- VII. The respondent agreed to the holding of the oral proceedings as a video conference.
- VIII. Oral proceedings took place on 12 May 2021 as a video conference.

IX. Wording of the relevant claims

Claim 1 of the main request reads:

"Extracted plant lipid, comprising fatty acids in an esterified form, the fatty acids comprising oleic acid, palmitic acid, ω 6 fatty acids which comprise linoleic acid (LA), ω 3 fatty acids which comprise α -linolenic acid (ALA) and docosahexaenoic acid (DHA), and optionally one or more of stearidonic acid (SDA), eicosapentaenoic acid (EPA), docosapentaenoic acid (DPA) and eicosatetraenoic acid (ETA), wherein the level of DHA in the total fatty acid content of the extracted lipid is 7% to 20%, and wherein the level of palmitic acid in the total fatty acid content of the extracted lipid is between 2% and 15%, and wherein the level of myristic acid (C14:0) in the total fatty acid content of the extracted lipid is less than 1%."

Claim 1 of the first auxiliary request is identical to claim 1 of the main request.

Claim 1 of the second auxiliary request comprises the additional feature "and wherein said lipid is obtained from a host plant cell comprising exogenous polynucleotides encoding a Δ 12-desaturase, a ω 3-desaturase, a Δ 6-desaturase, a Δ 5-desaturase, a Δ 4-desaturase, a Δ 6-elongase and an Δ 5-elongase".

Claim 1 of the third auxiliary request contains, in addition to the features of claim 1 of the second auxiliary request, the following feature: "and wherein the lipid is *Brassica sp.* oil, *Camelina sativa* oil or *Arabidopsis thaliana* oil".

Claim 1 of the fourth auxiliary request corresponds to claim 1 of the second auxiliary request and includes the further limitation "and wherein the lipid is *Brassica sp.* oil".

Claim 1 of the fifth auxiliary request corresponds to claim 1 of the main request, except for the additional following features:

"and wherein said lipid has all of the following features

- i. the level of oleic acid in the total fatty acid content of the extracted lipid is between 3% and 30%,
- ii. the level of linoleic acid (LA) in the total fatty acid content of the extracted lipid is between 4% and 35%,
- iii. the level of α -linolenic acid (ALA) in the total fatty acid content of the extracted lipid is between 4% and 40%,
- iv. the level γ -linolenic acid (GLA) in the total fatty acid content of the extracted lipid is less than 4%
- v. the level of stearidonic acid (SDA) in the total fatty acid content of the extracted lipid is less than 4%,
- vi. the level of eicosatetraenoic acid (ETA) in the total fatty acid content of the extracted lipid is less than 4%,
- vii. the level of eicosatrienoic acid (ETrA) in the total fatty acid content of the extracted lipid is less than 4%,

- viii. the level of eicosapentaenoic acid (EPA) in the total fatty acid content of the extracted lipid is less than 4%,
- ix. the level of docosapentaenoic acid (DPA) in the total fatty acid content of the extracted lipid is less than 4%,
- x. the level of DHA in the total fatty acid content of the extracted lipid is between 8% and 20%,
- xi. the level of total saturated fatty acids in the total fatty acid content of the extracted lipid is between 4% and 25%,
- xii. the level of total monounsaturated fatty acids in the total fatty acid content of the extracted lipid is between 4% and 35%,
- xiii. the level of total polyunsaturated fatty acids in the total fatty acid content of the extracted lipid is between 20% and 75%,
- xiv. the level of total ω 6 fatty acids in the total fatty acid content of the extracted lipid is between 35% and 50%, between 20% and 35% or less than 20%,
- xv. the level of new ω 6 fatty acids in the total fatty acid content of the extracted lipid is less than 10%,
- xvi. the level of total ω 3 fatty acids in the total fatty acid content of the extracted lipid is between 36% and 65%, between 20% and 35% or between 10% and 20%,
- xvii. the level of new ω 3 fatty acids in the total fatty acid content of the extracted lipid is between 9% and 33%,

- xviii. the ratio of total ω 6 fatty acids: total ω 3 fatty acids in the fatty acid content of the extracted lipid is between 1.0 and 3.0 or between 0.1 and 1,
- xix. the fatty acid composition of the lipid is based on an efficiency of conversion of oleic acid to DHA of at least 10%,
- xx. the fatty acid composition of the lipid is based on an efficiency of conversion of LA to DHA of at least 15%,
- xxi. the fatty acid composition of the lipid is based on an efficiency of conversion of ALA to DHA of at least 17%,
- xxii. the total fatty acid in the extracted lipid has less than 1% C20:1,
- xxiii. the triacylglycerol (TAG) content of the lipid is at least 70%,
- xxiv. the lipid comprises diacylglycerol (DAG),
- xxv. the lipid comprises less than 10%, free (non-esterified) fatty acids and/or phospholipid,
- xxvi. at least 70% of the DHA esterified in the form of TAG is in the sn-1 or sn-3 position of the TAG,
- xxvii. the lipid comprises tri-DHA TAG (TAG 66:18)."

Claim 1 of the sixth auxiliary request corresponds to claim 1 of the fifth auxiliary request and contains the additional feature "and wherein said lipid is obtained from a host plant cell comprising exogenous polynucleotides encoding a Δ 12-desaturase, a ω 3-desaturase, a Δ 6-desaturase, a Δ 5-desaturase, a Δ 4-desaturase, a Δ 6-elongase and an Δ 5-elongase".

Claim 1 of the seventh auxiliary request corresponds to claim 1 of the sixth auxiliary request and includes the further limitation "wherein the lipid is *Brassica sp.* oil, *Camelina sativa* oil or *Arabidopsis thaliana* oil".

Claim 1 of the eighth auxiliary request differs from claim 1 of the seventh auxiliary request in that the lipid is restricted to *Brassica sp.* oil.

- X. The arguments of the appellants, where relevant to the present decision, can be summarised as follows.

The appellants requested that the oral proceedings not be held by video conference. Different COVID-19 restrictions applied in different states, and the French restrictions had hindered the preparation of the appellants' case. The appellants had no objections in principle to holding the oral proceedings as videoconference. The appellants also referred to the referral to the Enlarged Board of Appeal in G 1/21. The appellants pointed out that the decision in this case could find that the holding of oral proceedings by video conference was not compatible with the EPC. The appellants thus raised an objection under Rule 106 EPC with reference to Article 112a(2)(c) EPC that their right to be heard was violated by the holding of oral proceedings by video conference in the current circumstances.

The claims of the main request and the auxiliary requests complied with the requirements of the EPC. In particular, amended claim 1 of the main request could be directly and unambiguously derived from the combination of claims 1 and 2 as originally filed. There was a pointer to the amendments in the original application. Claim 2 as filed disclosed the combination

of more than one of the recited features, and "more than one" was a range starting from "two". Page 87, lines 9 to 10 of the description as filed (in the following, the WO publication of the application is referred to) set out that "each possible combination of the features defining the lipids as described herein is also encompassed".

The selected two fatty acids were linked together and distinct from all other features of claim 2 as they were the only individual *saturated* fatty acids recited in claim 2 as filed. The structure of claim 2 reflected this, and the order of the acids in claim 2 was no coincidence. Myristic acid was a substrate for palmitic acid, and the levels of these fatty acids were linked and thus considered to be related. Moreover, these fatty acids were not substrate or product fatty acids for the enzymes shown in the pathway displayed in Figure 1 of the application as filed, in contrast to the other fatty acids listed in claim 2 as filed. This emphasised their singularity. Examples 5 and 6 showed that the claimed ranges of docosahexaenoic acid (DHA), palmitic acid and myristic acid were compatible. E.g. in tables 13 and 17, myristic and palmitic acid were linked and listed first.

What is more, claim 2 as filed would have the same information content as a set of claims comprising 40 dependent claims, each containing a feature of claim 2 as filed and dependent on "any one of the preceding claims". In such a situation, the inclusion of two dependent claims in claim 1 would have been considered acceptable under Article 123(2) EPC. Finally, the selected ranges were the narrowest ones disclosed for the corresponding acids and were reflected in examples

5 and 6 of the patent. There was thus a basis in the original application for the amendments.

These considerations applied *mutatis mutandis* to auxiliary requests 1 to 4.

Claim 1 of auxiliary request 5 also met the requirements of Article 123(2) EPC. In particular, the amendments relating to the ranges for oleic acid and stearidonic acid complied with these requirements. These considerations likewise applied to auxiliary requests 6 to 8.

XI. The arguments of the respondent/opponent can be summarised as follows.

The oral proceedings should be held by video conference since this was appropriate given the circumstances. There was no inequality of treatment.

There was no basis in the original application for the combination of the concentration of palmitic acid between 2% and 15% with a concentration of myristic acid in the total fatty acid content of less than 1% in the extracted or extractable lipid. Hence, independent claims 1 and 4 of the main request did not comply with Article 123(2) EPC.

Auxiliary requests 1 - 8 shared the objected feature combinations and thus neither met the requirements of Article 123(2) EPC.

XII. The requests

The appellants request that the contested decision be set aside and that the European patent be maintained on

the basis of the main request or one of auxiliary requests 1 to 8 filed under cover of the letter dated 13 March 2019.

The respondent requests that the appeal be dismissed.

Reasons for the Decision

1. Request to postpone the oral proceedings (Articles 112a(2)(c), 113(1) and Rule 106 EPC)

The appellants argued that their right to be heard was violated by the holding of the oral proceedings by video conference. The appellants put forward that the COVID-19 restrictions in France (where the appellants' representatives are located) were different from those in Germany (where the respondent's representatives are located) and that the French restrictions had a negative impact on the appellants' preparation of its case. Thus, the appellants implicitly argued that there was an inequality between the parties in that it was easier for the respondent to prepare its case due to the less onerous restrictions it faced. It is this inequality that is the cause of the violation of the right to be heard.

The appellants have not argued that oral proceedings held by video conference as such inevitably lead to a violation of the right to be heard or that they are not oral proceedings within the meaning of Article 116 EPC. Rather, they submitted that they had no objection in principle to the holding of oral proceedings by video conference if it was equitable to do so.

The above arguments were made by the appellants at the oral proceedings before the board. The appellants limited their arguments to generalities and neither carried out any specific analysis of the differences between French and German COVID-19 restrictions nor indicated how these differences had prejudiced their case preparation as compared to the respondent's case preparation.

The board is thus of the opinion that each party has had similar difficulties in preparing its case and that an "equality of arms" prevails between the parties. Such difficulties have not prevented the parties from presenting their cases to the board in the oral proceedings before it, and the appellants have not suggested that this was the case. The board thus finds that no violation of the appellants' right to be heard has taken place. The board thus dismisses the appellants' objection under Rule 106 EPC.

The appellants have not argued that the referral in Enlarged Board of Appeal case G 1/21 requires the postponement of the oral proceedings in this case. They only argued that the outcome of G 1/21 could affect the validity of the present decision. The board and all the parties were in agreement that oral proceedings held by video conference constitute oral proceedings under Article 116 EPC. At present, this understanding reflects the interpretation of this provision according to the case law (see T 2320/16, Reasons 1) and as codified in Article 15a RPBA. It may be that the Enlarged Board of Appeal at some future date will decide in case G 1/21 that this is not the case. Any such decision would involve a change in the interpretation of law. The Enlarged Board of Appeal normally seeks to ensure that such changes do not have

a retroactive effect (see G 3/19, Reasons XXIX). In light of these considerations, the board saw no reason to postpone the oral proceedings and its decision in this case until the Enlarged Board of Appeal had issued a decision in case G 1/21.

2. Main request - amendments (Article 123(2) EPC)

2.1 In accordance with the established case law of the boards, assessing whether the subject-matter of an amended claim extends beyond the content of the corresponding application as filed requires establishing whether the skilled person would have been presented with new technical information after the amendment. The amendments are only allowable if the skilled person would have derived the resulting claimed subject-matter directly and unambiguously, using common general knowledge, from the application as filed.

As correctly pointed out by the appellants, when analysing whether a claimed feature combination is allowable with respect to Article 123(2) EPC, the technical assessment of the case has to include an analysis of the various features defined in the amended claims and the relationship between the features as either explicitly or implicitly disclosed to the skilled person. Such an implicit disclosure of the technical relationship between these features can be based on their function and interaction, either apparent from the application as filed or in view of the conventional knowledge in the art (see T 389/13, Reasons 3.1 to 3.4).

2.2 The appellants asserted that the basis for the features of claim 1 had been found in claim 1 of the application as filed which had been amended to include the first

two features of claim 2 as filed, *i.e.* (i) the level of palmitic acid between 2% and 15% of the total fatty acid content of the extracted lipid and (ii) the level of myristic acid of less than 1% of the total fatty acid content of the extracted lipid. The features of claim 2 as filed could be combined due to the formulation "one or more or all". The only question to be answered was whether there was a pointer to the specific combination made. This question was to be answered in the positive.

2.3 However, the board does not see that the reference to (omega-3) long chain polyunsaturated fatty acid (LC-PUFA) oils as health-enhancing oils on page 1, lines 24 to 25 of the application as filed could be taken as a pointer to the exclusion of the saturated fatty acids palmitic and myristic acid from the claimed compositions of claim 1 as originally filed or to the minimisation of their content in these compositions.

2.4 According to the appellants, it was well-known that saturated fatty acids were detrimental to health. However, the board is of the opinion that, as pointed out by the respondent, original claim 2 includes the option that the level of total saturated fatty acids in the total fatty acid content of the extracted lipid can be up to 60%, and the chemical constitution of such saturated fatty acids is not limited. Thus, there is no disclosure of a preferred omission or minimisation of the content of these fatty acids for health concerns either as an explicit disclosure or an implicit teaching which could be extracted from the application as originally filed. Consequently, there is, in the opinion of the board, no basis for setting limits on the concentration of individual saturated fatty acids in the extracted plant lipid of claim 1 by

incorporating into claim 1 as filed the contents of the specific saturated fatty acids mentioned in original claim 2. Likewise, the text on page 4, lines 15 to 16 of the original application, in the opinion of the board, only reflects the aim underlying the patent to efficiently produce LC-PUFA and does not disclose the limitation of the content of specifically palmitic and myristic acid in the extracted plant lipids or genetically modified plants as their source.

- 2.5 The board also does not see the disclosure of a clear and unambiguous link between palmitic and myristic acid in the application as filed. As pointed out in the impugned decision of the opposition division, myristic acid is not mentioned in table 7 of the application as filed, while the contents of stearic and arachidic acid are displayed and were determined. The board does not see why the combination of palmitic and myristic acid at the specific concentrations recited in claim 1 as amended should be considered as a preferred feature combination which can be directly and unambiguously derived from the original application documents. The board also concurs with the conclusion of the opposition division that the tables and examples of the application as filed describe the presence of about 25 fatty acids in the lipids. Thus, the board sees no basis for the selection of features (i) and (ii) out of a list of alternative limitations, present in claim 2 as filed, in amended claim 1 which could be derived from the examples of the application as filed and the corresponding tables.

Hence, while examples can in theory support a specific feature combination as an amendment as found in the case law referred to by the appellants, this is not the case in the case at issue for the reasons set out

above.

2.6 Likewise, the distinction between "saturated fatty acids" and "unsaturated fatty acids" mentioned on page 48, lines 12 to 22 of the specification as filed does not serve as a basis for singling out exactly the palmitic and myristic acid content as the only features incorporated from original claim 2 into amended claim 1. The content of saturated fatty acids in general is not limited in any way in claim 1 as amended. The fact that myristic and palmitic acid are the only saturated fatty acids specifically mentioned in original claim 2 has no bearing on the fact that neither the reduction of saturated fatty acids in general nor specifically of myristic and palmitic acid is stressed as a goal in the application as filed.

2.7 Also, the argument that myristic acid is a precursor of palmitic acid in the biosynthetic pathway and that this thus establishes a biochemical and functional link between the two acids, which were not substrate or product fatty acids in the pathway shown in Figure 1 of the application as filed, does not convince the board. Claim 2 as filed comprises further intermediates (formed during the biosynthesis of DHA) at specific concentrations relative to the total fatty acid content. The argument of the appellants that the concentration of these intermediates would (unlike the concentration of the two specifically mentioned saturated fatty acids in claim 2 as filed) not be decisive and did not have to be defined in claim 1 as filed since they were intermediates in the synthetic pathway (as displayed in Figure 1) resulting in the final target LC-PUFA DHA is not convincing. All these compounds can be regarded as "intermediates" and can be contained in the extracted plant lipids. However, claim

2 characterises the concentration of the fatty acids in the *final* extracted plant lipid.

Consequently, the fact that myristic and palmitic acid are, as stressed by the appellants, upstream of the pathway for the biosynthesis of LC-PUFA represented in Figure 1 of the application as filed (and are hence not "substrate" or "product" fatty acids in this pathway) does not represent any basis for the isolated specification of their content in the final plant lipid extracts as claimed in amended claim 1.

Thus, there is no pointer to select only features (i) and (ii) from original claim 2 or any of the other passages cited by the appellants as a basis for the amendment in the description.

2.8 Also, the board is not convinced, as argued by the appellants, that the relative position of a list member of the list recited in claim 2 as filed indicates a corresponding relative preference for that member. Thus, the first two list members would not be considered as being the first two most preferred variants of claim 2 as filed. As stated by the appellants in their statement setting out the grounds of appeal, the skilled person would have been aware that the list of original claim 2 first mentions saturated fatty acids, then monounsaturated and lastly polyunsaturated fatty acids. The board does not see that the structuring of this list in terms of the chemical constitution of its constituents would give rise to a link to the purpose underlying the application, let alone the purpose defined by the appellants, i.e. to provide a healthy LC-PUFA composition neither comprising large amounts of saturated fatty acids as constituents which could be

detrimental to health.

Likewise, the statement on page 87, lines 9 to 10 of the description as filed that each possible combination defining the lipid as described in the application is also encompassed does not provide the basis for the combination of exactly the two features (i) and (ii) as specified in original claim 2. Consequently, the board concludes that the list of claim 2 as filed discloses 40 list members of an equal degree of preference. Hence, to arrive at claim 1 as amended, two independent selections have to be made in original claim 2.

- 2.9 None of the passages in the description as filed cited by the appellants as additional basis for the feature combination can, in the opinion of the board, serve as a direct and unambiguous base for the combination of features in amended claim 1.

Page 4, lines 30 to 35 and the following text of the specification as filed reflect the wording of original claim 2. The text passage on page 14, lines 20 to 24 discloses the specific ranges for the content of myristic and palmitic acid chosen in amended claim 1 but forms part of a longer list of features which comprises (as does original claim 2) many further features which have not been incorporated into amended claim 1. Thus, this passage of the description as filed does not provide a basis for the feature selection of claim 1 of the main request. Finally, the passage on page 27, lines 1 to 4, cited by the appellants as support for amended claim 1, also forms part of a longer list comprising 34 list members out of which only two have been incorporated into amended claim 1. Hence, there is again no basis for only singling out the two list members (i) and (ii), and the reasoning

for this point in relation to original claim 2 as support for the amendments to claim 1 of the main request equally applies.

2.10 Consequently, the board concludes that there is no pointer to the feature combination of claim 1 of the main request in the application as filed.

2.11 The appellants also put forward that the wording of claim 2 as filed was equivalent to a set of claims comprising 40 dependent claims, each dependent on "any of the preceding claims", with claim 2 comprising feature (i) and claim 3 comprising feature (ii) of claim 2 as filed. In such a situation, the inclusion of two dependent claims into claim 1 would have been acceptable under Article 123(2), according to the appellants.

As to this hypothetical consideration, the board notes that the application and the patent underlying the case at issue have to be analysed as to the fulfilment of the requirements of Article 123(2) EPC as they stand, i.e. taking their actual wording into account. In the current case, the basis for the amendment under scrutiny is claim 2 as filed (comprising 40 alternative limitations which can be selected separately or in any combination). Any further considerations on the alleged equivalence of the "real" claim 2 as filed and a virtual set of 40 dependent claims as suggested by the appellants are thus, in the opinion of the board, without merit. The board therefore also concurs with the finding in the impugned decision on this point.

2.12 Thus, the subject-matter of claim 1 does not meet the requirements of Article 123(2) EPC.

3. Auxiliary requests 1 to 4 - amendments (Article 123(2) EPC)

As the subject-matter of claim 1 of auxiliary requests 1 to 4 includes the feature combination of claim 1 of the main request (claim 1 of the first auxiliary request is identical to claim 1 of the main request, and the subject-matter of claim 1 of auxiliary requests 2 to 4 comprises additional features which do not form part of the mentioned list disclosed in original claim 2 or the partial lists disclosed on page 4, lines 30 to 35, page 14, lines 20 to 24 or page 27, lines 1 to 4 of the description of the application as filed), the findings as to a lack of a clear and unambiguous disclosure for the feature selection in relation to claim 1 of the main request apply *mutatis mutandis* to the subject-matter of claim 1 of auxiliary requests 1 to 4. Hence, the subject-matter of auxiliary requests 1 to 4 does not meet the requirements of Article 123(2) EPC.

4. Auxiliary request 5 - amendments (Article 123(2) EPC)

4.1 With respect to claim 1 as originally filed, claim 1 of auxiliary request 5 is amended in that, *inter alia*, the level of oleic acid in the total fatty acid content of the extracted lipid is between 3% and 30% (feature (i)) and the level of stearidonic acid (SDA) in the total fatty acid content of the extracted lipid is less than 4% (feature (v)).

4.2 The appellants put forward that the amendment of the range in feature (i) of claim 1 did not constitute a selection within a list of ranges but rather a limitation of a broader range disclosed in claim 2 as

originally filed. The board notes that feature (lxvii) of claim 2 as filed, which indeed may serve as a basis for the amendment, comprises alternative and non-convergent ranges for the level of oleic acid in the total fatty acid content. It discloses a first range of "between about 1% and about 30%" and other ranges within this range, including the range now called for in claim 1, and a second range of "between about 30% and about 60%" and other ranges within this range. While the range called for in claim 1 could be considered a limitation of the first range, it is not a limitation of the second range and, thus, the range called for in claim 1 amounts to a selection from a list of non-converging alternatives.

4.3 The same occurs with feature (v) of claim 1, corresponding to feature (lxxi) of claim 2 as filed. Original claim 2 again contains two distinct ranges for the level of stearidonic acid (SDA), namely a first range of "less than about 7%" followed by other ranges within this range, including the range now called for in claim, and a second range of "between about 0.05% and about 7%" followed by other ranges within this range. While the range called for in claim 1 could be considered a limitation of the first range, it is not a limitation of the second range (which would include the lower limit of 0.05%). Thus, the range called for in claim 1 amounts to a selection from a list of *non-converging* alternatives.

4.4 Consequently, the considerations of the appellants in relation to the conclusion in decision T 82/04 with respect to a restriction of a broader range to a disclosed sub-range of it do not apply to this case. Similar considerations apply with respect to decision T 1451/10, in which the amendments under scrutiny also

concerned the narrowing of broader disclosed ranges to sub-ranges of them (see Reasons 2.1 of the aforementioned decision). Furthermore, the case relating to T 1581/12, concerning, *inter alia*, the restriction of the claimed subject-matter to a specific fragment length of an amino acid sequence, with the fragment length being chosen from within a list of possible meanings, falls within this category of cases in which sub-ranges within a broader range have been established. However, these cases do not deal with amendments resulting from selections from lists of non-convergent alternative ranges.

- 4.5 Therefore, the board concurs with the decision of the opposition division that two selections have been made in claim 1 from lists of parameter ranges (here the fatty acid contents of oleic acid and SDA) disclosed in claim 2 as filed. However, such a two-fold selection is not pointed to in the application as filed, i.e. it is not directly and unambiguously derivable from it.
- 4.6 Therefore, the board concludes that the subject-matter of claim 1 of auxiliary request 5 does not meet the requirements of Article 123(2) EPC.

5. Auxiliary requests 6 to 8 - amendments (Article 123(2) EPC)

The subject-matter of claim 1 of auxiliary requests 6 to 8 comprises the feature combination of claim 1 of auxiliary request 5. The additional features contained in claim 1 of auxiliary requests 6 to 8 are not related to the features of claim 2 as filed (see above). Hence, the considerations made in relation to claim 1 of auxiliary request 5 that the combination of features is not directly and unambiguously derivable from the application documents as filed applies *mutatis mutandis* to claim 1 of auxiliary requests 6 to 8. Consequently, the subject-matter of claim 1 of auxiliary requests 6 to 8 also does not meet the requirements of Article 123(2) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



A. Nielsen-Hannerup

A. Haderlein

Decision electronically authenticated