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Datasheet for the decision of 8 December 2022

Case Number: T 1310/20 - 3.3.09

Application Number: 13710617.5

Publication Number: 2819528

IPC: A23L33/10

Language of the proceedings: EN

Title of invention:
ENERGY-RICH LIQUID NUTRITIONAL COMPOSITION HAVING IMPROVED ORGANOLEPTIC PROPERTIES

Patent Proprietor:
N.V. Nutricia

Opponents:
FrieslandCampina Nederland B.V.
Fresenius Kabi Deutschland GmbH
Arla Foods Amba
Société des Produits Nestlé S.A.

Headword:
Energy-rich liquid nutritional composition having improved organoleptic properties/NUTRICIA

Relevant legal provisions:
EPC Art. 56, 107
EPC R. 101(1)

Keyword:
Inventive step - (no)
Admissibility of patent proprietor's appeal - party not adversely affected by decision

Decisions cited:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Case Number: T 1310/20 - 3.3.09

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

Appellant: (Patent Proprietor)	N.V. Nutricia Eerste Stationsstraat 186 2712 HM Zoetermeer (NL)
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Appellant: (Opponent 4)	Société des Produits Nestlé S.A. Entre-deux-Villes 1800 Vevey (CH)
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Party as of right: (Opponent 1)	FrieslandCampina Nederland B.V. Stationsplein 4 3818 LE Amersfoort (NL)
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Party as of right: (Opponent 3)	Arla Foods Amba Sønderhøj 14 8260 Viby J (DK)
Representative:	Guardian IP Consulting I/S Diplomvej, Building 381 2800 Kgs. Lyngby (DK)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 9 April 2020 concerning maintenance of the European Patent No. 2819528 in amended form.**

Composition of the Board:

Chairman	A. Haderlein
Members:	C. Meiners
	N. Obrovski

Summary of Facts and Submissions

I. This decision concerns the appeals filed by the patent proprietor, opponent 2 and opponent 4 (appellants) against the interlocutory decision of the opposition division finding that on the basis of the main request filed during the oral proceedings before the opposition division on 23 January 2020, the patent in suit ("the patent") met the requirements of the EPC. Opponents 1 and 3 are parties as of right in the present appeal proceedings, but did not present any arguments or requests. As all of the actively involved parties are appellants, they will continue to be referred to as the patent proprietor and opponents 2 and 4, respectively.

II. In their notices of opposition, opponents 1 to 4 had requested that the patent be revoked in its entirety based, *inter alia*, on the ground for opposition under Article 100(a) EPC in combination with Article 56 EPC (lack of inventive step).

III. The following documents submitted during the opposition proceedings are relevant for the decision:

D1 WO 2010/140877 A1

D8 WO 2011/112087 A1

D9 Stability Data of Metal Chelates from T.E. Furia, Chapter 6 in "CRC Handbook of Food Additives", 2nd edition, CRC Press Inc., 1980, from http://www.coldcure.com/html/stability constants.html (26 October 2006).

D12 P. Walstra, J.T.M. Wouters, T.J. Geurts, "Dairy Science and Technology", 2nd edn., 2006, 140-57.

D14 O. Mekmene et al., "A model for predicting salt equilibria in milk and mineral-enriched milks", Food Chemistry, 2009, 116, 233-239.

IV. In its decision, the opposition division found, *inter alia*, that the main request pending at that time involved an inventive step in view of D1 as the closest prior art.

V. With its statement of grounds of appeal, the patent proprietor filed a main request and auxiliary requests I to VIII.

VI. With its reply to the statements of grounds of appeal of opponents 2 and 4, the patent proprietor filed main request A and auxiliary requests I-A to VII-A.

VII. Oral proceedings were held before the board. In the oral proceedings, the patent proprietor withdrew the main request and main request A and stated that the pending auxiliary request I, filed with the statement of grounds of appeal, was to be its new main request. For the sake of clarity, the board will continue to refer to the claim requests on file as auxiliary requests I to VIII and auxiliary requests I-A to VII-A.

VIII. Wording of the relevant claims

Auxiliary request I filed with the statement of grounds of appeal corresponds to the main request held allowable by the opposition division. Claim 1 thereof reads as follows:

"A liquid nutritional composition having a pH in a range of 6 to 8, comprising between 9 and 16 g/100 ml protein, said protein comprising micellar casein, wherein the amount of micellar casein is between 65 and

85 wt% based on total protein content, and wherein lactic acid is present in an amount between 0.05 and 1.0 g/100 ml."

Claim 1 of auxiliary request IV differs from claim 1 of auxiliary request I only in that lactic acid is present in the composition in an amount of between 0.1 and 1.0 g/100 ml, whereas in claim 1 of auxiliary request VII this range is between 0.2 and 0.5 g/100 ml.

Compared to claim 1 of auxiliary request IV, claim 1 of auxiliary request V comprises the additional limitation that the composition is packaged.

Claim 1 of auxiliary request II filed with the statement of grounds of appeal reads as follows (with the differences with respect to claim 1 of auxiliary request I being underlined or crossed out):
"A packaged liquid nutritional composition having a pH in a range of 6 to 8, comprising ~~between~~ 6 to 20 g/100 ml protein, said protein comprising micellar casein, wherein the amount of micellar casein is ~~between~~ at least 55 wt.% based on total protein content, and wherein lactic acid is present in an amount between 0.05 and up to 1.5 g/100 ml."

Claim 1 of auxiliary request III filed with the statement of grounds of appeal reads as follows:
"A liquid nutritional composition having an energy density of between 1.2 and 3.5 kcal/ml and a pH in a range of 6 to 8, comprising ~~between~~ 6 to 20 g/100 ml protein, said protein comprising micellar casein, wherein the amount of micellar casein is ~~between~~ at least 55 wt.% based on total protein content, and wherein lactic acid is present in an amount between 0.05 and up to 1.5 g/100 ml."

Claim 1 of auxiliary request VI filed with the statement of grounds of appeal reads as follows:
"A liquid nutritional composition having an energy density of between 1.2 and 3.5 kcal/ml and a pH in a range of 6 to 8, comprising between 9 and 16 g/100 ml protein, said protein comprising micellar casein, wherein the amount of micellar casein is between 65 and 85 wt% based on total protein content, and wherein lactic acid is present in an amount between 0.1 and 1.0 g/100 ml."

Claim 1 of auxiliary request VIII reads as follows:
"A liquid nutritional composition having a pH in a range of 6 to 8, comprising ~~between~~ 8 to 12 g/100 ml protein, said protein comprising micellar casein, wherein the amount of micellar casein is between 60 and 80 wt% based on total protein content, wherein caseinate is present in an amount between 20 and 40 wt% of total protein content, wherein said protein provides 12 to 24 en% of the total energy content of the composition, said composition having an energy density between 1.8 and 2.8 kcal/ml, and wherein lactic acid is present in an amount between 0.2 and 0.6 g/100 ml."

Claim 1 of auxiliary requests I-A to VII-A is identical to claim 1 of auxiliary requests I to VII, respectively.

IX. The patent proprietor's arguments, where relevant to the decision, can be summarised as follows:

- The claims of all of the requests involved an inventive step over D1 as the closest prior art. The subject-matter of claim 1 of auxiliary request I differed from the nutritional

compositions featured in Examples 1 to 7 of D1 firstly by the use of lactic acid and secondly by the use of amounts of this acid as specified in claim 1.

- The following conclusion could be drawn in view of the data provided in the patent and the supplemental data described on page 10 of the proprietor's statement of grounds of appeal and in the table on page 6 of its submission dated 7 January 2021: when adding similar amounts of potassium as potassium citrate or potassium lactate, no significant viscosity increase was observed when lactate was used as the exclusive or additional source of potassium. Each of the compositions described in the supplemental data and designated 'A' to 'C' comprised lactate plus citrate and had a lower viscosity than when using only citrate for reaching the same potassium content. As was explained in the patent, the addition of high amounts of (monovalent) metal ions such as potassium as a cation of citrate resulted in a substantial viscosity increase. By contrast, this viscosity increase was avoided when lactate was used as the exclusive or additional source of potassium/(monovalent) metal ion. Lactate could thus be used as a vehicle to allow the inclusion of higher levels of metal ions without effecting a viscosity increase as associated with the use of citrate as the sole counter-anion.

- In view of D1 as the closest prior art, this surprising effect resulted in the objective technical problem being to provide a liquid nutritional composition with a high micellar casein

content and high amounts of metal ions (such as potassium) while maintaining reduced viscosity.

- The solution to this problem, namely to use lactate exclusively or in addition to citrate, was not obvious in view of D1 as the closest prior art for the following reasons.

  D1 taught away from using lactate, preferring the use of citrate. Further, there was no indication in the prior art, such as in D1, that lactic acid was a promising viscosity-reducing agent to be included in nutritional compositions.

- The subject-matter of claim 1 of auxiliary request VII-A specified an even narrower range for the concentration of lactic acid. It was evident in view of Figure 1 of the patent that the effect of viscosity reduction with this acid concentration range was clearly observable when using lactate instead of citrate. Document D8 was closer to the subject-matter of claim 1 than document D1 and therefore represented the closest prior art.

The arguments of opponent 2 and opponent 4, where relevant to the decision, can be summarised as follows:

- The appeal of the patent proprietor was not admissible, as the patent proprietor had not been adversely affected by the decision of the opposition division.

- Independent claim 1 of auxiliary request I lacked an inventive step in particular in view of D1. Starting from D1 as the closest prior art to the subject-matter of claim 1 of auxiliary request I,

and in particular from the formulations disclosed in Examples 1 to 6 of D1, the difference resided in the presence of lactic acid in amounts as required by claim 1. Neither the patent nor the data subsequently submitted by the patent proprietor included comparisons with respect to Examples 1 to 6 of D1. Consequently, no technical effect was ascribable to this difference. As was reflected in D9 and D14, it was common general knowledge (prior to the priority date of the patent) that lactic acid was a much weaker chelator than citric acid. Starting from the formulations featured in the examples of D1, containing 0.021 g/100 ml of citrate, baseline viscosity values were to be expected at such low citrate levels in view of the data provided in Figure 1 of the patent.

No data had been provided for low lactate levels in the left-hand section of the graph displayed in Figure 1. Further, claim 1 allowed for the presence of very high amounts of citric acid/citrate.

For these reasons, it was not credible that adding to such compositions small amounts of the weak chelator lactic acid/lactate, such as the amounts stipulated in the main and auxiliary requests, had any effect (on the viscosity of the resulting nutritional compositions). Moreover, the presence of monovalent metal ions was not required by claim 1 of any of the requests, and the levels of monovalent metal ions disclosed in D1 fell in the middle of the preferred range called for in claim 6 of auxiliary request I.

- The objective technical problem was thus to provide alternative nutritional compositions. Further, D1

did not teach away from substituting citric acid/ citrate with lactic acid. If anything, D1 taught away from using citrate in view of the explanations provided in the last paragraph on page 5, according to which a further problem associated with the use of micellar casein in the production of liquid enteral compositions with a high protein content was the formation of calcium-acid complexes, in particular for citric acid. Alternative acids, such as lactic acid, were mentioned on page 14, line 11 *ff*, of D1, and D1 disclosed exactly the amounts of acid required in claim 1.

- Even when formulating a more ambitious objective technical problem, it was obvious to a skilled person to use levels of citric acid with the predictable effect of lactic acid addition, namely not to increase viscosity. No effect of lactic acid addition up to concentrations of 0.2 g/100 ml of nutritional composition had been substantiated. These considerations applied to all of the claim requests on file.

- Hence, the subject-matter of claim 1 of auxiliary request I was obvious in view of D1 and common general knowledge, without the need to consult secondary documents.

- The same conclusion applied to the subject-matter of claim 1 of auxiliary request VII-A. D1 remained a reasonable starting point for the assessment of inventive step, and it was untenable to propose replacing citric acid with lactic acid (instead of adding lactic acid). Again, no comparative data vis-à-vis D1 had been provided. The nutritional compositions of D1 contained 15 g/100 ml of protein

instead of 9.6 g/100 ml as in the examples of the patent. Despite this higher protein concentration, the viscosity value for Experiment 6, for example, was only 116 mPa·s in D1, while claim 7 allowed for viscosity values as high as "lower than 200 mPa·s".

X. Requests

The patent proprietor requested that the decision of the opposition division be set aside and that the patent be maintained on the basis of one of auxiliary requests I to VIII, filed with the statement of grounds of appeal, or one of auxiliary requests I-A to VII-A, filed with its reply to the statements of grounds of appeal of opponents 2 and 4.

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

Reasons for the Decision

1. Admissibility of the appeal of the patent proprietor (Article 107 and Rule 101(1) EPC)

In accordance with Article 107 EPC, "[a]ny party to proceedings adversely affected by a decision may appeal. Any other parties to the proceedings shall be parties to the appeal proceedings as of right." In the case at hand, however, the patent proprietor was not adversely affected by the opposition division's interlocutory decision. In that decision, the opposition division held the patent proprietor's main

request allowable. Therefore, the patent proprietor's appeal is inadmissible (Article 107 EPC and Rule 101(1) EPC). Thus, the proprietor only has the party status of a respondent.

2. Inventive step - auxiliary request I

2.1 The patent

The patent is concerned with the provision of liquid (enteral) nutritional compositions having low viscosity and high protein levels and micellar casein. The compositions should provide nutrition, either as a supplement or as a complete nutrition formula in a small volume of liquid. According to the patent, high amounts of protein and minerals increase the overall viscosity during processing and storage (see paragraphs [0001] and [0004] of the patent).

2.2 Closest prior art

It is common ground between the parties that document D1 can be taken as a suitable starting point for the assessment of whether the subject-matter of independent claim 1 involves an inventive step. D1 was also considered the closest prior art in the decision under appeal. Like the patent, D1 is concerned with the provision of liquid enteral nutritional compositions having a high protein content but a sufficiently low viscosity, in particular for the elderly and patients with certain diseases (page 3, line 29, to page 4, line 4; cf. paragraphs [0001],[0003] and [0005] of the patent). Consequently, D1 is a suitable starting point for the assessment of the inventive step of the subject-matter of independent claim 1.

2.3 Distinguishing features

The liquid nutritional compositions of claim 1 differ from Examples 1 to 6 of D1 (see Table 1 and the sections of text entitled "Preparation A" and "Preparation B") in that they comprise lactic acid in amounts of between 0.05 and 1.0 g/100 ml.

2.4 Technical effect and objective technical problem

2.4.1 The solutions prepared in Examples/Experiments 1 to 6 of D1 described in the section entitled "Preparation A" comprise about 0.021 g of citrate per 100 ml solution (see sections 59 and 116 of opponent 4's statement of grounds of appeal). According to Table 1 of D1, they have low viscosities of between 116 and 166 mPa·s with a protein content of 15 g/100 ml (instead of 9.6 g/100 ml as in the examples of the patent).

2.4.2 In view of the data provided in Figure 1 of the patent, it appears reasonable to assume that baseline viscosities would be observed at such low citrate contents when adding 0.05 to 0.5 g/100 ml of lactate as a weak calcium chelator to the compositions of D1. As argued by the opponents and as evidenced by the figure of the patent, especially with lactate contents below 0.25 g/100 ml no technical effect (such as a viscosity decrease) has been corroborated which could be causally ascribed to the presence of either lactate instead of citrate or lactate in addition to citrate, e.g. to 0.2 g/100 ml of lactate in the form of lactic acid being added to a nutritional composition having the remaining features of claim 1 and including, for example, 0.021 g/100 ml of citrate.

2.4.3 Further, the stability/association constants of calcium citrate and calcium lactate appear to differ by up to four orders of magnitude, as outlined by opponent 4 by reference to D14 (see Table 1). Hence, at a given pH between 6 and 8, citrate will bind calcium between 1 000 and 10 000 times stronger than lactate. It is therefore not plausible that an "extra" amount of lactate would have an impact on viscosity, as long as non-chelated citrate (not bound to calcium) is still present in the nutritional compositions as claimed in claims 1 and 4, as put forward by the opponents 2 and 4 (see, for example, sections 82 and 101 of opponent 4's grounds for appeal). The compositions of claim 1 can contain significant amounts of citrate (cf. claim 4).

2.4.4 Claim 1 does not define the concentration of (monovalent) metal cations in the claimed nutritional compositions at all. However, the patent proprietor argued that it was possible to include higher levels of metal ions, such as potassium and sodium, without the increased viscosity associated with the use of citrate as the (counter) anion (see paragraph [0102] of the patent).

2.4.5 The patent proprietor's data in the patent and the supplemental data described on page 10 of the proprietor's statement of grounds of appeal and in the table on page 6 of its submission dated 7 January 2021 do not relate to compositions as described in the examples of D1. Instead, a nutritional composition comprising a rather high amount of citrate (0.35 g/ 100 ml) and a significantly lower protein content is taken as a reference or starting point. A markedly higher viscosity is observed for this composition relative to compositions 'A' to 'C', which comprise at most 0.13 g/100 ml of citrate and additionally

potassium lactate to keep the potassium level constant (at 193 mg/100 ml of potassium stemming from potassium lactate and/or potassium citrate, see the table on page 10 of the proprietor's statement of grounds of appeal). Consequently, the scenario depicted in these experiments and the corresponding conclusion that when using lactate instead of or in addition to citrate as a carrier anion it is possible to introduce high amounts of potassium while keeping viscosities low do not reflect the fact that the exemplary nutritional compositions of D1, as the starting point for the assessment of inventive step, already exhibit rather low viscosities (e.g. 116 mPa·s with a markedly higher protein content than in the examples of the patent and the aforementioned supplemental data).

From the perspective of the reference composition comprising citrate only in rather high amounts, as featured in the patent and the supplemental data, the viscosity is *reduced* when substituting citrate with lactate either fully of partially.

By contrast, when starting from the examples of D1 as described in 'Preparation A', it is plausible that adding for instance 0.2 g/100 ml of lactic acid to these compositions, which comprise very low amounts of citrate, would *not* lead to a viscosity increase or at least not to a significant increase in view of the data points provided in the left-hand section of Figure 1 of the patent and the fact that lactate is a weak chelator.

2.4.6 In the absence of a substantiated technical effect associated with the addition of small amounts of lactate, such as 0.2 g/100 ml, to liquid nutritional compositions already comprising citrate in amounts of

0.021 g, for example, such as in the aforementioned examples of D1, the resulting objective technical problem credibly solved over the entire scope of claim 1 is to provide *alternative* liquid nutrient compositions.

2.5 Obviousness

2.5.1 The patent proprietor argues that the opposition division correctly concluded that D1 taught away from using lactate instead of citrate by indicating a preference for citrate. D1 was not focusing on using acids functionally, but was rather looking upon (for example) citrate in the context of calcium precipitation. Hence, the subject-matter of claim 1 was not obvious in view of D1.

2.5.2 Even when taking into account the fact that organic acids tend to react with calcium ions, this problem appears to be particularly associated with citrate/ citric acid. Hence, the corresponding teaching on page 6, first paragraph, of D1 suggests that the problem particularly arises when using citric acid. There is thus no prejudice described in this passage which would teach against the inclusion of a weak chelator, such as lactic acid, in the compositions of D1. On the contrary, the aforementioned passage of D1 instead appears to teach in the *opposite* direction, i.e. towards attempting to substitute citric acid with another acid suitable for adjusting the pH and calcium ion activity (see page 5, last paragraph, of D1) to avoid or reduce the formation of insoluble calcium citrate crystals. There is thus no teaching in D1 that would lead away from substituting citrate completely or partially or from adding additional amounts of lactate/ lactic acid in addition to citrate. Instead, D1 teaches

(see page 14, from line 11 onwards) including organic acids such as lactic acid.

2.5.3 The patent proprietor also stressed that there was no indication either in D1 or in the prior art in general that lactic acid was a promising viscosity-reducing agent, as was also asserted in the decision under appeal.

2.5.4 In view of the above, however, the board does not agree with this argument. Starting from the aforementioned examples of D1 or similar nutritional compositions of D1 having low levels of citrate, lactic acid cannot be considered to be a "viscosity-reducing agent". Similar (low) viscosities have to be expected when adding 0.2 g/100 ml of lactic acid, for example, to the compositions of D1.

2.5.5 Consequently, the person skilled in the art wishing in view of D1 to provide further/alternative liquid nutritional compositions having a high protein content and comprising micellar casein (while also having a low viscosity) would have applied the general teaching of D1 on page 14, lines 11 to 15, with a reasonable expectation of success. This would mean including 0.05 g/100 ml or 0.2 g/100 ml of lactic acid, for example, in the exemplary nutritional compositions of D1, having low citrate levels, or similar compositions having a low citrate content that are encompassed by the teaching of D1. Consequently, the subject-matter of claim 1 is obvious to a skilled person for these reasons alone.

2.5.6 In addition, as was put forward by opponent 2 in the oral proceedings before the board, it follows from document D9 that it was common general knowledge prior

to the priority date of the patent that lactic acid is a weak chelating agent for calcium. Opponent 2 referred to the table in D9 and pointed to the stability constants (expressed as log K_1) of the calcium complexes of these acids. The person skilled in the art would thus have been aware that lactic acid would have a weaker influence on calcium ion activity than citric acid. In D1, the calcium ion activity can be adjusted by a chelating acid (cf. page 5, last paragraph, of D1 and section 63 of opponent 4's statement of grounds of appeal). Similar information is provided in document D14 (see above).

2.5.7 According to D1, calcium ion activity influences the viscosity of liquid nutritional compositions comprising micellar casein. In particular, a certain Ca-ion activity is beneficial for preventing a viscosity increase during heating, and arriving at a proper viscosity can be a problem when using micellar casein (see page 6, first paragraph, of D1 and section 63 of opponent 4's statement of grounds for appeal). On the other hand, excess calcium would lead to an aggregation of the casein micelles, as reflected in Table 3.7 and page 152, first paragraph, of document D12, to which opponent 4 referred in section 64 of its statement of grounds of appeal. D12 is a textbook published prior to the priority date of the patent in the field of dairy science and technology and thus reflects common general knowledge at that time, as put forward by opponent 4.

2.5.8 The person skilled in the art equipped with this common general knowledge would thus have also expected that the addition of a weak calcium chelator (such as lactic acid) would have a less pronounced effect on the viscosity of liquid nutritional compositions comprising high amounts of protein and micellar casein than the

addition of a stronger calcium chelator. Thus, the subject-matter of claim 1 is also obvious when considering the expected influence of weak chelators, such as lactic acid, on calcium ion activity and thus on the viscosity of liquid nutritional compositions as featured in D1 and the patent.

2.5.9 Thus, the subject-matter of claim 1 lacks an inventive step and does not meet the requirement of Article 56 EPC.

3. Inventive step - auxiliary requests II to VIII and I-A to VII-A

The above conclusions regarding the subject-matter of claim 1 of auxiliary request I apply *mutatis mutandis* to the subject-matter of claim 1 of auxiliary requests II to VIII and I-A to VII-A. Therefore, these claim requests do not involve an inventive step and do not meet the requirement of Article 56 EPC.

Claim 1 of auxiliary request I-A is identical to claim 1 of auxiliary request I.

As to auxiliary requests II, II-A, V and V-A, D1 also discloses packaged liquid nutritional compositions (see page 21, first paragraph), and packaging of liquid nutritional compositions was well known prior to the priority date of the patent application underlying the patent in suit. Thus, this feature contained in claim 1 of these requests does not confer an inventive step either.

With regard to claim 1 of auxiliary request VIII, no effect has been substantiated for the marginally higher protein energy density of 25 en% as taught in the

examples of D1 versus 24 en% in claim 1 and a slight reduction of the protein content in the exemplified compositions of D1 (see Examples 1 to 6 in Table 1 as discussed above) to 12 g/100 ml, for example. Moreover, the compositions featured in the examples are considered to inherently have energy densities as required in claim 1 of auxiliary request VIII, and claim 18 of D1 explicitly discloses an energy density of 2.4 kcal/ml. Claim 1 of auxiliary request VIII is thus also obvious to the person skilled in the art in view of D1.

In view of the latter conclusion, the subject-matter of claim 1 of auxiliary requests III, III-A, VI and VIA, stipulating an energy density of between 1.2 and 3.5 kcal/ml, is also obvious in view of D1.

With regard to the discussion of the inventive step of claim 1 of auxiliary request VII-A (which also applies to the identical claim 1 of auxiliary request VII), the patent proprietor, while not contesting that D1 was a suitable starting point for assessing inventive step, submitted that document D8 was "closer" and should therefore be used as the closest prior art. However, the board notes that the conclusion of a lack of inventive step in view of D1 as the closest prior art renders moot any considerations of the patent proprietor as to whether D8 would represent an even better or "closer" closest prior art for the assessment of inventive step. The above-mentioned considerations in relation to the question of the inventive step of the subject-matter of claim 1 of auxiliary request 1 in view of D1 also apply to claim 1 of auxiliary requests VII and VIIA, respectively. In particular, the considerations made in section 2.4.2 apply *mutatis mutandis* to the narrower range of between 0.2 and

0.5 g/100 ml of lactic acid in the composition, as stipulated in claim 1 of auxiliary requests VII and VIIA.

Order

For these reasons it is decided that:

1. The patent proprietor's appeal is rejected as inadmissible.

2. The decision under appeal is set aside.

3. The patent is revoked.

The Registrar: The Chairman:

M. Schalow A. Haderlein

Decision electronically authenticated