**Internal distribution code:**

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

# Datasheet for the decision of 21 October 2025

**Case Number:** T 0749/23 - 3.3.04

**Application Number:** 16176713.2

**Publication Number:** 3165087

**IPC:** A01K67/033

**Language of the proceedings:** EN

**Title of invention:**
Mite composition, carrier, method for rearing mites and uses related thereto

**Patent Proprietor:**
Koppert B.V.

**Opponents:**
Katz Biotech AG
Biobest Belgium NV

**Headword:**
Mite composition/KOPPERT

**Relevant legal provisions:**
EPC Art. 100(a), 54(3), 56, 84, 113(1)
EPC R. 103(1)(a)
RPBA 2020 Art. 12(6)

**Keyword:**

Grounds for opposition - lack of novelty (yes)
Claims - clarity (no)
Late-filed evidence - should have been submitted in first-instance proceedings (yes)
Inventive step - obvious alternative
Right to be heard - opportunity to comment (yes) - substantial procedural violation (no)
Partiality of a member of the first instance (no)
Reimbursement of appeal fee - (no)

**Decisions cited:**

G 0005/91, G 0001/03, G 0001/16, G 0001/23, T 0286/06, T 2759/17, T 1126/19, T 2140/22, T 2001/23, T 0004/00

Europäisches Patentamt
European Patent Office
Office européen des brevets

**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

**Case Number: T 0749/23 - 3.3.04**

# D E C I S I O N
# of Technical Board of Appeal 3.3.04
# of 21 October 2025

| | |
|---|---|
| **Appellant I:** (Patent Proprietor) | Koppert B.V.<br>Veilingweg 14<br>2651 BE Berkel en Rodenrijs (NL) |
| **Representative:** | Patentwerk B.V.<br>P.O. Box 1514<br>5200 BN 's-Hertogenbosch (NL) |
| **Appellant II:** (Opponent 1) | Katz Biotech AG<br>An der Birkenpfuhlheide 10<br>15837 Baruth/Mark (DE) |
| **Representative:** | Sacht-Gorny, Gudrun<br>Patentanwaltskanzlei Dr. Sacht-Gorny<br>Sonnenuhrweg 17<br>70499 Stuttgart (DE) |
| **Appellant III:** (Opponent 2) | Biobest Belgium NV<br>Ilse Velden 18<br>2260 Westerlo (BE) |
| **Representative:** | Gevers Patents<br>De Kleetlaan 7A<br>1831 Diegem (BE) |
| **Decision under appeal:** | **Interlocutory decision of the Opposition Division of the European Patent Office posted on 24 February 2023 concerning maintenance of the European Patent No. 3165087 in amended form.** |

**Composition of the Board:**

| | |
|---|---|
| **Chairwoman** | M. Pregetter |
| **Members:** | R. Morawetz |
| | L. Bühler |

## Summary of Facts and Submissions

I. Appeals were filed by the patent proprietor (appellant I), opponent 1 (appellant II) and opponent 2 (appellant III) against the interlocutory decision of the opposition division finding that European patent No. 3 165 087 (the patent), amended according to auxiliary request 3, met the requirements of the EPC. Auxiliary request 3 was originally filed as auxiliary request 6 on 24 September 2021 and re-numbered and corrected during oral proceedings on 1 December 2022.

II. The opposition division also found that the main request (patent as granted) and auxiliary request 1, filed on 24 September 2021, contravened Article 54(3) EPC and that auxiliary request 2A, filed on 30 September 2022, lacked inventive step.

III. Since all parties are appellants, they are referred to in this decision as the patent proprietor and as opponent 1 and opponent 2, collectively referred to as the opponents.

IV. With their grounds of appeal, the patent proprietor maintained the patent as granted as their main request and auxiliary requests 1, 2A and 3 to 15. In addition, they re-submitted sets of claims of auxiliary requests 2B, 2C and 2D, previously submitted in the proceedings before the opposition division and submitted document D18 in support of their reasoning on inventive step of claim 1 of auxiliary request 3.

V. With their respective grounds of appeal, the opponents submitted arguments to the effect that the subject-matter of claim 1 of auxiliary request 3 did not

involve an inventive step. In addition, opponent 2 argued that multiple substantial procedural violations occurred in the first-instance proceedings.

VI. In reply to the opponents' appeals, the patent proprietor provided additional arguments why the subject-matter of claim 1 of the auxiliary request 3 involved an inventive step.

VII. In reply to the patent proprietor's appeal, opponent 1 and opponent 2 submitted arguments to the effect that claim 1 of the main request lacked novelty (Article 54(3) EPC) and claim 1 of auxiliary request 2A lacked clarity (Article 84 EPC). Opponent 1 provided additional arguments why the subject-matter of claim 1 of the auxiliary request 3 lacked an inventive step. Additional documents not relevant to this decision were submitted by the opponents.

VIII. The parties were summoned to oral proceedings and subsequently the board issued a communication under Article 15(1) RPBA.

IX. In a letter dated 10 September 2025, filed in reaction to the board's communication, the patent proprietor provided additional arguments on the selection of the starting point for the assessment of inventive step.

X. Opponent 2 commented on the submissions made by the patent proprietor on 10 September 2025 in a letter dated 19 September 2025.

XI. Oral proceedings before the board were held as scheduled. During the oral proceedings, the patent proprietor withdrew auxiliary requests 2B, 2C, 2D and 4 to 15. At the end of the oral proceedings, the

Chairwoman announced the decision of the board.

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

"1. Mite composition comprising:
- a population of individuals (1) of a mite species, preferably a mite species selected from *Mesostigmatid* mite species or *Prostigmatid* mite species;
- a food source for the mite individuals;
- and a carrier for the individuals of the mite species comprising stacked carrier elements selected from millet husks wherein the carrier elements comprise shelters for mite individuals."

Claim 1 of auxiliary request 1 is identical to claim 1 of the main request, with the exception of the addition of a comma after "*millet husks*".

Claim 1 of auxiliary request 2A reads as follows:

"1. Mite composition comprising:
- a population of individuals (1) of a mite species, preferably a mite species selected from *Mesostigmatid* mite species or *Prostigmatid* mite species;
- a food source for the mite individuals;
- and a carrier for the individuals of the mite species comprising stacked carrier elements selected from millet husks, wherein the carrier elements comprise shelters for mite individuals;
and wherein, if the individuals of the mite species are from a predatory mite species, the food source for the mite individuals does not comprise a micro-encapsulated food substrate comprising microcapsules having a solid shell substantially made of natural polymers and having a diffusion barrier layer."

Claims 1, 6 and 7 of auxiliary request 3 read as follows:

"1. Mite composition comprising:
- a population of individuals (1) of a mite species selected from a Phytoseiid mite species, with the exception of *Phytoseiulus* species;
- a food source for the mite individuals selected from rearing prey from the suborder Astigmata;
- and a carrier for the individuals of the mite species comprising stacked carrier elements selected from millet husks, wherein the carrier elements comprise shelters for mite individuals."

"6. Method for rearing a population of a mite species comprising:
(i) providing a composition according to claims 1-5;
(ii) allowing individuals of the mite population to feed on the food source.

7. Method for biological pest control in a crop comprising, providing to said crop a composition according to any of the claims 1-5."

XIII. The following documents are referred to in this decision:

D1 EP 2 415 356

D2 Wendorf D. *et al.*, Best Practice in Disease, Pest and Weed Management, Proceedings of an international symposium held at Humboldt University, Berlin, Germany, 10 to 12 May 2007, 122-123

D3 WO 2006/057552

D5 Declaration of Timmer R., 22 March 2018, 7 pages

D6 Wendorf D. *et al.*, 2009, Comm. Appl. Biol. Sci., vol 74, 397-400

D9 WO 2006/071107

D18 Carrier Choice Experiment, no date, no signature, 3 pages

XIV. *The patent proprietor's submissions relevant to the decision are summarised as follows.*

*Main request - claim 1*
*Novelty*

The claim was novel over the disclosure in document D1. A twofold selection was necessary to arrive at the combination of millet husks with predatory mites. The opposition division's analysis was incorrect, since it had not accepted that a twofold selection was required to arrive at the subject-matter of claim 1.

*Auxiliary request 1 - claim 1*
*Novelty*

The arguments in favour of novelty of the main request also applied to auxiliary request 1.

*Admittance and consideration of document D18*

Document D18 showed that the selection of millet husks provided a surprising effect over the cited prior art. It had been filed in direct response to the statements made in point 14.3.1 of the opposition division's decision. From this part of the decision, it was clear

that the opposition division did not take into account that the selection of millet husks resulted in a surprising technical effect.

*Auxiliary request 3 - claim 1*
*Claim construction*

The claim referred to a rearing composition, as indicated by the presence of "*rearing prey*".

*Inventive step*
*Starting point for the assessment of inventive step*

Rice husks was not an appropriate starting point.

One realistic starting point in documents D3/D9 was buckwheat husks, which were used in the examples of documents D3/D9. If buckwheat husks were not considered an appropriate starting point, the exemplary list of carrier materials disclosed in documents D3/D9 constituted an appropriate starting point (T 1126/19), and the invention should be treated as a selection invention, based on the selection of a carrier material having mite shelters, namely with the configuration of millet husks, from the broad range (long list) of carriers presented as equal alternatives in these documents.

The selection of rice husks from the list in documents D3/D9 in light of document D5 amounted to an inadmissible hindsight approach.

When determining the starting point of the inventive step analysis, the disclosure in documents D3/D9 had to be assessed with the eyes of the skilled person (T 2759/17).

The skilled person would have understood from documents D3/D9 that all carrier materials listed provided a porous medium and allowed an exchange of metabolic gases and heat produced by the mite populations. However, the skilled person would not have assumed that all materials showed identical performance when it came to rearing mite populations.

G 1/23 (Reasons 94 and 95) confirmed the patent proprietor's position that the disclosure in documents D3/D9 had to be assessed, when it came to determining the starting point of the inventive step analysis, with the eyes of the skilled person and that it had to be taken into consideration that documents D3/D9 did not disclose a list of equal alternatives.

*Difference, technical effect and objective technical problem*

The patent specification contained plausible explanations regarding the provision of shelters for the mite individuals based on stacked carrier elements (paragraphs [0005], [0017], [0024]; experiments I, II). This technical effect had to be taken into consideration in line with the established case law on selection inventions.

Document D5 supported a surprising effect of millet husks.

When rice husks were taken as the starting point, the objective technical problem was how to provide a high performance carrier.

*Obviousness*

The claimed solution was a non-obvious alternative over documents D3/D9, as the opposition division had also concluded.

Starting from document D3 or D9, the skilled person would not have turned to document D6. This document was directed to a composition of individuals of the *Phytoseiulus persimilis* (*P. persimilis)* species not included in the technical teaching of document D3 or D9. Document D6 did not address the suitability of carrier elements for the *Phytoseiid* mite species disclosed in document D3 or D9.

In addition, the purpose and systems of the mite compositions of documents D3/D9 was different from that of the compositions of document D6. Whereas documents D3/D9 were aimed at rearing (rearing populations of) predatory mites together with a food source of living (rearing populations of) prey mites, document D6 was aimed at transport and in particular dispersing *P. persimilis* individuals (mostly adults) harvested without a food source.

The skilled person would have understood that these different purposes gave rise to different requirements for the carrier materials and also that the behaviour of predatory mites was influenced by the presence/ absence of the food source, which also formed a living rearing population. For the skilled person, this would have made it difficult to use results from the system of D6 to make predictions for the rearing systems according to D3/D9.

Astigmata in documents D3/D9 were not a food source for *P. persimilis*, and there was no food source in the composition of document D6.

*Request for referral of questions to the Enlarged Board of Appeal*

A referral to the Enlarged Board was warranted in light of the decisiveness of the selection of the starting point of the inventive step analysis on the outcome of the decision for the current case and the divergence in the case law in connection to this.

The questions to be referred were as follows.

(1) Is the selection of a suitable starting point for the assessment of the presence of an inventive step a task for the skilled person or for the deciding body?
(2) Do real-world circumstances need to be taken into consideration?
(3) Does the choice of the starting point for the assessment of the presence of an inventive step need to be justified, in particular by technical or scientific considerations of the skilled person?
(4) Do any special criteria apply where a closest prior-art document contains a list of items representing potential starting points?

XV. *Opponent 1's and opponent 2's submissions relevant to the decision are summarised as follows.*

*Main request - claim 1*
*Novelty*

The opposition division was correct in its assessment that claim 1 lacked novelty over document D1. No two-

fold selection was necessary to arrive at the combination of millet husks and predatory mites.

*Auxiliary request 1 - claim 1*
*Novelty*

The arguments for the main request also applied to auxiliary request 1. Claim 1 lacked novelty over document D1.

*Auxiliary request 2A - claim 1*
*Clarity*

The expression "*substantially made of natural polymers*" was unclear. The interpretation of the disclaimer could not be dependent on the teaching of document D1. Whether a product with 80% natural polymers fell inside or outside of the disclaimer and, therefore, outside or inside of the claim, was unclear.

*Admittance and consideration of document D18*

Document D18 should not be admitted, because it should have been filed earlier. The objection that no technical effect was associated with the selection of millet husks in comparison to rice and buckwheat husks was raised at the beginning of the opposition. The patent proprietor should therefore have filed any evidence supporting a positive effect of millet husks in the first-instance proceedings.

*Auxiliary request 3 - claim 1*
*Claim construction*

The claim referred to a composition and did not specify that the composition was intended "*for rearing mites*".

The composition could also be used for pest control, see claim 7.

*Inventive step*

As correctly held by the opposition division and not contested by the patent proprietor, documents D3/D9 disclosed all features of claim 1 with the exception of millet husks as a carrier.

*Starting point for the assessment of inventive step*

All carrier materials disclosed in documents D3/D9 were available, they represented equal alternatives, and they were all suitable starting points.

As the claimed subject-matter had to be based on an inventive step over any embodiment of the prior art, there was no reason to perform the analysis over each carrier material mentioned in the closest prior art reference. It was sufficient to start from the explicitly disclosed embodiment with rice husks.

G 1/23 was not related to the selection of an embodiment within a closest prior art reference. It was concerned with the impact of enablement and reproducibility for novelty and inventive step. The patent proprietor had never argued that the starting point for assessment of inventive step (rice husks) was obviously defective or not enabled. The patent proprietor's suggestion that G 1/23 required a change in how the starting point for the assessment of inventive step was chosen was incorrect.

The starting point for assessment of inventive step (rice husks) was disclosed for the same purpose as the

other carrier materials disclosed in documents D3/D9, namely in the rearing of predatory mites, which was the same purpose that the patent was oriented to.

*Difference, technical effect and objective technical problem*

No specific effect was disclosed in the patent in association with the selection of millet husks as the stacked carrier elements.

An advantage of millet husks over other protective carriers, such as other husks, was also not mentioned or shown in the contested patent.

The test results described in document D5 did not show any positive effect of millet husks compared to rice husks. The patent proprietor had not provided any evidence for a particular technical effect either.

The objective technical problem was the provision of alternative carrier elements for a mite composition according to document D3 or document D9.

*Obviousness*

If the only contribution of the invention was to propose something different from the prior art (i.e. the provision of an alternative), it was usually appropriate to consider that the skilled person would take into account any alternative known in the underlying technical field, unless the closest prior art teaches away from it.

In the current case, the underlying technical field was the provision of predatory mite compositions for use in

biological pest control.

The skilled person knew from document D6 that millet husks were a possible carrier material for compositions comprising predatory mites.

There was nothing in documents D3 or D9 that ruled out the use of millet husks as an alternative option. Rather, documents D3 and D9 stated that any solid material that was suitable as a carrier surface for the mite individuals could be used as a carrier. The teaching of document D6 aligned with all the requirements that D9 specified for the carrier material.

Since breeding compositions and compositions for crop protection did not usually differ with regard to the carrier material, it was irrelevant to the skilled person whether they knew the material from a breeding composition or compositions for crop protection.

There was no indication for the skilled person that the predatory mite *P. persimilis* examined in document D6 had any special requirements with regard to the carrier material.

The skilled person would therefore have considered, without inventive effort, the alternative carrier material millet husks known from document D6 for a composition according to document D3 or D9 and, based on the good properties shown in document D6, used it as a carrier material with a reasonable expectation of success.

*Request for referral of questions to the Enlarged Board of Appeal*

It was not necessary to refer any questions to the Enlarged Board of Appeal.

*Opponent 2's request for reimbursement of the appeal fee*

Multiple substantial procedural violations occurred in the first-instance proceedings in connection with the assessment of compliance of auxiliary request 3 with the requirements of inventive step. These violations infringed opponent 2's right to be heard. Therefore, it was equitable to reimburse the appeal fee (Rule 103(1)(a) EPC).

XVI. The parties' requests relevant to the present decision are as follows.

The patent proprietor requested that the decision under appeal be set aside and the patent be maintained as granted (main request). Alternatively, they requested that the patent be maintained in amended form on the basis of the set of claims of one of auxiliary requests 1 and 2A, or, alternatively, on the basis of the set of claims of auxiliary request 3 (implying a dismissal of the opponents' appeals). The patent proprietor further requested that document D18 be admitted into the proceedings and that questions on the selection of a starting point for the assessment of inventive step be referred to the Enlarged Board of Appeal. The patent proprietor also requested that opponent 2's argument that document D5 did not show any effect of millet husks compared to buckwheat husks, which was only

submitted in reply to the patent proprietor's grounds of appeal, not be admitted.

Opponent 1 and opponent 2 requested that the decision under appeal be set aside and the patent be revoked in its entirety. They further requested that document D18 not be admitted into the proceedings.

Opponent 2 also requested that the appeal fee be reimbursed under Rule 103(1)(a) EPC; that the patent proprietor's submission that example II of the patent showed that wheat bran was not suitable for rearing predator mites not be admitted into the appeal proceedings and that the patent proprietor's submission that cooling in D2 was incompatible with documents D3/ D9 not be admitted into the appeal proceedings.

## Reasons for the Decision

*Main request (patent as granted) - claim 1*
*Novelty (Article 100(a) in conjunction with Article 54(3) EPC)*

1. The opposition division held that document D1 disclosed the subject-matter of claim 1 of the main request (decision under appeal, Reasons 4).

2. The patent proprietor's argument that to arrive at the combination of millet husks with predatory mites, a first selection had to be made to arrive at predatory mites as the subspecies of predatory arachnids and a second selection had to be made from the list of materials in document D1 had been put forward in the opposition proceedings (decision under appeal, Reasons 4.1) and rejected by the opposition division (decision under appeal, Reasons 4.1.1).

3. Thus, the opposition division considered that paragraphs [0018] to [0021], [0023] and [0026] to [0028] of document D1 made it clear to the person skilled in the art that the invention according to document D1 applied specifically to predatory mites, i.e. individualised predatory mites out of the more generic statement of predatory arachnids. In addition, paragraphs [0035] and [0039] to [0040] of document D1 provided further preferred features of the microcapsules adapted for the rearing of predatory mites. Since paragraphs [0045] and [0046] directed to a composition for rearing predatory arachnids referred unambiguously to the previous paragraphs directed to the specification of the microcapsules, the opposition division concluded that it was directly and unambiguously derivable for the skilled person that the composition according to paragraphs [0045] and [0046] was for rearing predatory mites. The opposition division concluded that the millet husks disclosed in paragraph [0046] of document D1 were therefore disclosed in combination with predatory mites and that no twofold selection was necessary.

4. The patent proprietor provided no arguments, either in the written proceedings or at the oral proceedings before the board, why the opposition division's reasons for holding that the person skilled in the art would infer directly and unambiguously from document D1 that the composition according to paragraphs [0045] and [0046] was for rearing predatory mites was not correct.

5. Instead, without analysing the reasoning of the opposition division, the patent proprietor asserted that the analysis presented by the opposition division to reach its conclusion was incorrect because the opposition division had not accepted that a twofold

selection was necessary on the basis of the disclosure of document D1.

6. The board disagrees for the following reasons.

7. First, the patent proprietor's assertion amounts to saying that the decision must be incorrect because it did not accept the patent proprietor's argument.

8. Second, the board cannot identify any errors in the reasoning of the opposition division. It is settled case law of the boards that the technical disclosure in a prior-art document must be considered as a whole and that individual sections of a document cannot be considered in isolation from the others but must be seen in their overall context (Case Law of the Boards of Appeal of the EPO, 11th edn., 2025 (Case Law), I.C.4.1). The opposition division's consideration of paragraphs [0018] to [0021], [0023], [0026] to [0028], [0035] and [0039] to [0040] of document D1 for determining the technical teaching of paragraphs [0045] and [0046] of document D1 and the conclusions drawn from this analysis are in line with established case law.

9. As a result, the board sees no reason to set aside the decision under appeal on this point.

10. Article 100(a) in conjunction with Article 54(3) EPC precludes maintenance of the patent as granted.

*Auxiliary request 1*
*Novelty*

11. The subject-matter of claim 1 of auxiliary request 1 is identical to that of claim 1 of the main request.

Auxiliary request 1 contravenes Article 54(3) EPC for the same reasons as set out above for the main request. This was not disputed by the patent proprietor.

*Auxiliary request 2A - claim 1*
*Clarity*

12. Claim 1 of auxiliary request 2A comprises an undisclosed disclaimer based on paragraphs [0021] and [0030] of document D1 (decision under appeal, Reasons 8). It reads "*and wherein, if the individuals of the mite species are from a predatory mite species, the food source for the mite individuals does not comprise a micro-encapsulated food substrate comprising microcapsules having a solid shell substantially made of natural polymers and having a diffusion barrier layer*" (see section XII. above for the complete wording of the claim).

13. The disclaimer was not in the claims as granted and was inserted during opposition proceedings to restore novelty over the disclosure of document D1.

14. A claim containing a disclaimer must meet the requirements of clarity and conciseness of Article 84 EPC (G 1/03, Order 2.4; G 1/16, Reasons 48; Case Law, II.E.1.7.3 e); T 286/06).

15. In the case in hand, the question arises as to whether a person skilled in the art, when reading the disclaimer, understands which microencapsulated food substrates are excluded by its wording and which are still encompassed by claim 1.

16. The opposition division held that the expression "*substantially made of natural polymers*" in claim 1 and

the corresponding expression in document D1 "*aus im Wesentlichen natürlichen Polymeren*" qualified the natural polymers forming the solid shell of the microcapsules (decision under appeal, Reasons 8.3.1); that the expression was to be interpreted as meaning "*the solid shell being made of natural polymers within the technical tolerance of the method used to manufacture the shell (see Guidelines F-IV, second paragraph)*" (decision under appeal, Reasons 8.3.1); and that it was therefore clear.

17. The board notes that claim 1 of auxiliary request 2A and the application do not contain any information about the "*method used to manufacture the shell".* This information is only found in the description of document D1. It therefore appears that the opposition division assumed that the disclaimer was to be interpreted in light of the description of document D1.

18. However, this is not correct. It is well established in the case law of the boards that a claim must be interpreted in light of the description of the patent itself, not another document. The skilled person reading claim 1 of auxiliary request 2A cannot therefore rely on the description in document D1 to interpret the expression "*substantially made of natural polymers*".

19. The term "*substantially*" cannot be understood as referring to variability within standard manufacturing tolerances either. Instead, in agreement with opponent 1 and opponent 2, the board considers that the expression "*substantially made of natural polymers*" characterises the content of natural polymers in the solid shell of a microencapsulated food substrate

suitable as a food source for predatory mites.

20. The board also shares the view of opponent 1 and opponent 2 that the expression "*a solid shell substantially made of natural polymers*" lacks clarity as a consequence of the use of the term "*substantially*". When reading the disclaimer, the skilled person does not unambiguously understand whether microcapsules with a shell consisting, for example, of 80% natural polymers fall within the exclusion defined in the disclaimer or not. As a consequence, the skilled person does not understand which microencapsulated food substrates fall outside or inside of the claim.

21. It follows from the above that it is not possible to clearly distinguish the limits of the exclusion and therefore the limits of the scope of claim 1, rendering the claim unclear within the meaning of Article 84 EPC.

22. This was not disputed by the patent proprietor, either in the written proceedings or at the oral proceedings before the board.

23. Claim 1 of auxiliary request 2A lacks clarity.

*Admittance and consideration of document D18*

24. Document D18, an experimental report, was first submitted with the patent proprietor's appeal. Since it constitutes an amendment to the patent proprietor's case within the meaning of Article 12(4) RPBA, it may be admitted into the proceedings only at the board's discretion.

25. Under Article 12(6), second sentence, RPBA, the board must, as a rule, not admit, *inter alia*, evidence which should have been submitted in the proceedings leading to the decision under appeal, unless the circumstances of the appeal case justify its admittance. It is well established in the case law of the boards that Article 12(6), second sentence, RPBA expresses and codifies the principle that each party should submit all facts, evidence, arguments and requests that appear relevant as early as possible to ensure a fair, speedy and efficient procedure (Case Law, V.A.4.3.7(a)).

26. The patent proprietor requested that document D18 be admitted into the appeal proceedings in support of its arguments concerning a surprising technical effect of millet husks compared to the carrier materials of documents D3/D9. In support of admittance, the patent proprietor argued that document D18 had been filed in direct reaction to the statements made in point 14.3.1 of the decision of the opposition division.

27. Opponent 1 and opponent 2 requested that document D18 not be admitted on the grounds that it could and should have been filed in opposition proceedings.

28. In point 14.3.1 of the decision, the opposition division held that no specific effect was disclosed in the contested patent in association with the selection of millet husks as stacked carrier elements on the ground that the advantageous effect stated in paragraphs [0005] to [0006] of the patent was achieved over non-sheltering carriers. In addition, the opposition division noted that the patent proprietor had not provided any evidence for a technical effect associated to the provision of millet husks as carrier

elements.

29. However, the opponents are correct in stating that the effects of millet husks compared to other carrier materials were the subject of the first-instance proceedings from the outset. Opponent 2 had submitted document D5 and argued that no technical effect was associated with the selection of millet husks in comparison to rice and buckwheat and that the objective technical problem over document D9 was to provide an alternative carrier for mite rearing (opponent 2's notice of opposition, page 8, penultimate and ultimate paragraph).

30. The submission of document D18 only on appeal cannot therefore be regarded as a justified reaction to the decision under appeal. If the patent proprietor had wished to rely on experimental evidence to prove an advantageous effect of millet husks, they should have submitted this evidence during the opposition procedure in response to the notices of opposition.

31. The board is also unable to deduce from the patent proprietor's submissions any reasons why document D18 could not have been submitted during opposition proceedings. Nor can the board identify any circumstances of the appeal that justified the submission of this document only on appeal. The patent proprietor has also failed to present any such circumstances.

32. For these reasons, the board decided not to admit document D18 into the proceedings (Article 12(6) RPBA).

*Admittance and consideration of various arguments*

33. The patent proprietor requested that opponent 2's argument that document D5 did not show any effect of millet husks compared to buckwheat husks not be admitted.

34. Opponent 2 requested that the patent proprietor's submission that example II of the patent showed that wheat bran was not suitable for rearing predator mites and the patent proprietor's submission that cooling in document D2 was incompatible with documents D3/D9 not be admitted into the appeal proceedings.

35. The above arguments did not play any role in the board's considerations in reaching the decision (see below). Therefore, no decision on their admittance was necessary.

*Auxiliary request 3*
*Claim construction*

36. Claim 1 is for a composition comprising (i) a population of individuals from a Phytoseiid mite species, (ii) a food source for the mite individuals selected from rearing prey from the suborder Astigmata and (iii) stacked carrier elements selected from millet husks, where the carrier elements comprise shelters for mite individuals (see section XII. above for the complete wording of the claim).

37. Although the composition includes rearing prey as a food source for the mite individuals, claim 1 does not require the rearing of mites, let alone mass rearing. The composition can be used for rearing (claim 6,

section XII. above) but also for biological pest control in a crop (claim 7, section XII. above).

38. The patent proprietor's argument that the claim related exclusively to a rearing composition due to the presence of rearing prey is therefore not accepted.

*Inventive step*

39. The parties were in agreement that both document D3 and document D9 were suitable as the closest prior art and that the composition recited in the claim differs from those disclosed in documents D3/D9 only in that it comprises millet husks as the carrier elements instead of any of the carriers disclosed in documents D3/D9.

*Starting point for the assessment of inventive step*

40. The parties were however in dispute as to which disclosure in documents D3/D9 should be taken as the starting point for the assessment of inventive step.

41. The starting point for assessing inventive step is normally a set of features disclosed in combination in a document, typically in the form of an embodiment or example. Documents D3/D9 describe five mite compositions comprising, as equal alternatives, the carrier elements wheat bran, buckwheat husks, rice husks, saw dust and corn cob grits (document D9, claim 1, paragraph bridging pages 8 and 9; document D3, claim 1, page 7, second full paragraph).

42. In agreement with the opponents, the board considers that each of these embodiments can be used as the starting point for assessing inventive step. All embodiments are presented as suitable, and there is

nothing in documents D3/D9 that would disqualify any of them. Since each embodiment can be used, the board also agrees with the opponents that the assessment of inventive step can be based on a mite composition containing rice husks as carrier elements as the starting point. Finally, the board agrees with the opponents that there is no reason to perform the analysis for each carrier material mentioned in documents D3/D9 because the claimed subject-matter must be based on an inventive step over any embodiment of the prior art.

43. The patent proprietor contended that the composition comprising rice husks of documents D3/D9 was not a suitable starting point for the assessment of inventive step for various reasons. First, they argued that buckwheat husks, rather than rice husks, should be taken as the starting point since buckwheat husks were used in the examples of documents D3/D9 and were therefore highlighted. In the alternative, if buckwheat husks were not accepted as the starting point, the list of carriers disclosed in documents D3/D9 should be taken as the starting point in line with decision T 1126/19. Second, they submitted that the opponents had selected rice husks from the list in documents D3/D9 in light of post-published document D5 and thus with hindsight. Third, they argued that G 1/23 (Reasons 94 and 95) confirmed that the disclosure in D3/D9 had to be assessed, for determining the starting point of the inventive step analysis, with the eyes of the skilled person (T 2759/17, Catchword). The skilled person would have understood from documents D3/D9 that all carrier materials listed provide a porous medium and allow an exchange of metabolic gases and heat produced by the mite populations. However, the skilled person would not have assumed that all materials would

show identical performance when it came to rearing mite populations. For the skilled person, documents D3/D9 therefore did not disclose a list of equal alternatives.

44. For the following reasons, the board does not concur with the patent proprietor's view.

45. First, Article 56 EPC requires that an invention, having regard to the state of the art, not be obvious to a person skilled in the art. The state of the art for the purpose of considering inventive step is the entire state of the art as defined in Article 54(2) EPC, without any ranking or distinction (T 2140/22, Reasons 1.9.1).

46. It is well established in the case law of the boards, based on the wording of Article 56 EPC, that if inventive step is to be acknowledged, the claimed subject-matter must be inventive starting from any starting point in the prior art. Conversely, if the invention is obvious to the skilled person from at least one starting point, an inventive step is lacking (Case Law, I.D.3.3). Neither the EPC nor the case law of the boards stipulate that the starting point for assessing inventive step must be the entire disclosure, an example, or a preferred embodiment in the prior art. Rather, the starting point may be any disclosure in the prior art.

47. There is also no requirement that an embodiment must be exemplified for it to be considered in the assessment of inventive step. There is, likewise, no requirement that the prior art contain any pointer, suggestion or incentive to select a particular embodiment for further development for this embodiment to qualify as the

starting point in the problem solution approach (Case Law, I.D.3.1)

48. The board also considers, as a matter of principle and in agreement with T 2001/23 (Reasons 3), that if the subject-matter of a claim is found to lack an inventive step starting from a particular disclosure, as is the case here (see below), it is not possible to establish inventive step by proposing that the assessment be started from a different starting point.

49. In the case underlying decision T 1126/19 the prior art disclosed a long list of possible pharmaceutically acceptable salts of rucaparib. The list included camsylate, but the preferred salts were phosphate and gluconate. The competent board considered that in these circumstances the starting point was a list of pharmaceutically acceptable salts because the isolation of the camsylate salt, i.e., one of the non-preferred options from the list, would have distorted the teaching of the prior art, putting an inappropriate weight on that option (T 1126/19, Reasons 6.2.2). In the case in hand, documents D3/D9 disclose the mite compositions comprising the alternative carrier elements as equivalent alternatives (point 41. above). None of them is disclosed as preferred or otherwise singled out. The current case can thus be distinguished from the case underlying decision T 1126/19 and there is no reason in the case in hand to take the list of carriers disclosed in documents D3/D9 as a starting point instead of one embodiment.

50. Second, the board notes that the opponents referred to document D5 only in connection with the determination of the technical effect associated with the distinguishing feature (see below) and thus in the next

step of the problem solution approach. Rice husks are disclosed in documents D3/D9 as equal alternatives to other carriers (point 41. above), and were selected on this basis as one suitable starting point. The patent proprietor's assertion that the selection of rice husks involved hindsight is therefore unfounded.

51. Third, G 1/23 does not support the patent proprietor's argument that the skilled person is the relevant point of reference in selecting the starting point for the inventive step analysis. Points 93 to 95 of decision G 1/23 are concerned with the impact on novelty and inventive step of accessible but not fully reproducible products which the Enlarged Board of Appeal accepted as being part of the prior art. According to these considerations, the relevance of such a product for assessing inventive step, namely its suitability as a starting point or secondary source of information, depends on the available information associated with the product, i.e. it depends on what is disclosed to the skilled person. The Enlarged Board of Appeal did not make any finding that the choice of starting point in the problem-solution approach requires motivation by the skilled person. In the case in hand, all carrier elements disclosed in documents D3/D9 are available, and all can be used. Indeed, the patent proprietor never argued that rice husks would be obviously defective or not enabled.

52. As to the patent proprietor's argument that, pursuant to T 2759/17, a disclosure within a prior-art document could only be considered a suitable starting point for assessing inventive step if the skilled person would have realistically started from it, the board observes that, pursuant to T 2759/17 (Reasons 5.6), an important consideration in this assessment is generally whether

this disclosure aims at the same or a similar purpose or effect as that underlying the patent in question.

53. In the case in hand, as correctly noted by opponent 2, the starting point for assessment of inventive step, namely a composition comprising rice husks, is disclosed for the same purpose as the compositions comprising other carrier materials disclosed in documents D3/D9, namely the rearing of predatory mites, which is also the purpose to which the patent is directed. The board concludes that in the case in hand, a composition comprising rice husks would also be a realistic starting point under the approach set out in T 2759/17.

54. The patent proprietor's assertion that documents D3/D9 did not disclose a list of equal alternatives to the skilled person is based on the results in Example II of the patent, in which millet husks performed better than bran. Since the closest prior art must be assessed from the skilled person's point of view on the day before the filing or priority date valid for the claimed invention, the assertion must be rejected for this reason alone.

*Difference, technical effect and objective technical problem*

55. Based on the disclosure of a composition comprising rice husks as the starting point, the only difference to the composition according to claim 1 is that instead of rice husks, millet husks are used as the carrier elements.

56. As regards the technical effect associated with the distinguishing feature, the board notes that the patent describes that millet husks have a sheltering effect in

comparison with the non-sheltering carriers wheat bran and vermicullite (paragraphs [0005] and [0006], experiments I and II). The patent does not indicate any advantageous effect of millet husks over rice husks.

57. However, to acknowledge any effect, an appropriate comparison with the closest prior art must be available which convincingly shows that the alleged technical effect has its origin in the distinguishing feature of the claimed invention compared with the closest prior art (Case Law, I.D.4.3.2).

58. Based on the evidence on file and in agreement with the decision under appeal and opponents 1 and 2, the board holds that no technical effect is associated with the distinguishing feature compared with rice husks.

59. The patent proprietor's argument that the patent in suit described millet husks as providing shelters for the mite individuals based on stacked carrier elements and further, that this technical effect should be taken into consideration in the inventive step analysis in line with established case law on selection inventions must thus also be rejected. The current invention is not a selection invention.

60. As for the patent proprietor's reliance on document D5, the board notes that this document shows that the rearing of the *Phytoseiid* mite species *Amblyseius swirskii* provides higher densities in millet husks and in rice husks in comparison to buckwheat husks. Document D5 thus shows effects of millet husks over buckwheat husks, but not over rice husks.

61. The objective technical problem is the provision of alternative carrier elements for a mite composition

comprising a population of a phytoseiid predatory mite species and a factitious host population which comprises at least one species selected from the family of the *Carpoglyphidae*.

*Obviousness of the claimed solution*

62. The opposition division held that the skilled person would not have turned to document D2 or D6 to solve the objective technical problem because these documents concerned a predatory mite composition with *P. persimilis* and because documents D3/D9 did not list *P. persimilis*.

63. It is, however, well established in the case law of the boards that when an alternative is provided, it is usually appropriate to assume that the skilled person would consider all alternatives known in the underlying technical field, unless the closest prior art leads away from them. No special incentive or motivation is required for the skilled person to combine the teaching of secondary sources of information with that of the closest prior art (Case Law, I.D.4.5).

64. The skilled person starting from the composition of documents D3/D9, faced with the technical problem identified above and without a requirement to achieve any specific technical effect, therefore had at their disposal all known carrier elements.

65. Document D6 concerns the behavioural response of *P. persimilis*, a phytoseiid predatory mite used in the biological control of spider mites, in inert materials (document D6, title and abstract). It teaches that millet husks are a suitable carrier for *P. persimilis* and are to be preferred over Vermiculite

(document D6, page 400, second paragraph).

66. From document D6, the skilled person was therefore familiar with the use of millet husks as a possible carrier material for a mite composition with the predatory mite *P. persimilis.*

67. The provision of predatory mite compositions for use in biological pest control is the underlying technical field in the case in hand (see e.g. claims 1 and 7 of auxiliary request 3). Both documents D3/D9 (document D3, claim 17; document D9, claim 17) as well as document D6 (point 65. above) relate to this technical field. The fact that claim 1 of auxiliary request 3 excludes *Phytoseiulus* mite species from the scope of protection does not alter the technical field of the invention. *P. persimilis*, like the mite species mentioned as examples in D3 and D9, belongs to the group of predatory mites used in biological plant protection.

68. Documents D3 and D9 teach that any solid material that is suitable as a carrier surface for the mite individuals can be used as a carrier (D3, page 7, lines 10 to 13; D9, page 8, lines 31 to 33). There is thus nothing in document D3 or D9 that would have led away from the use of millet husks as an alternative option either.

69. Moreover, the teaching of document D6 on millet husks aligns with the requirements that document D9 specifies for the carrier material. Thus, the millet husks of document D6 are solid plant materials similar to rice husks; the millet husks of document D6 can be maintained in a three-dimensional layer with a certain thickness in the order of centimetres; the millet husks

of document D6 provide a three-dimensional structure in which the phytoseiid mites are free to move (document D6, page 400, second paragraph).

70. The board, in agreement with the opponents, therefore concludes that the skilled person would have considered millet husks to be a suitable alternative carrier for a mite composition as described in documents D3/D9. Consequently, starting from the mite composition comprising rice husks disclosed in documents D3/D9, it was obvious to the skilled person seeking to provide alternative carrier elements for such a mite composition to replace rice husks with millet husks.

71. The patent proprietor contended that starting from either D3 or D9, the skilled person would not have turned to document D6. First, because document D6 did not address the suitability of carrier elements for the *Phytoseiid* mite species disclosed in documents D3/D9. Second, because documents D3/D9 were aimed at rearing predatory mites together with a food source while document D6 was aimed at transport and in particular dispersing *P. persimilis* individuals. Third, because Astigmata in documents D3/D9 were not a food source for *P. persimilis*, and there was no food source in the composition of document D6.

72. The board disagrees.

73. First, since the problem to be solved is providing an alternative and not an improved composition (see point 61. above), no incentive to turn to document D6 is required for the skilled person to select millet husks as the carrier element. It is sufficient for document D6 to indicate that millet husks can be used as suitable alternative carrier elements in a mite

composition.

74. Second, there is no indication for the skilled person that the predatory mite *P. persimilis* examined in document D6 had any special requirements with regard to the carrier material. Consequently, there was no reason to assume that a carrier suitable for *P. persimilis* would not also be a suitable alternative carrier for other Phytoseiid mite species.

75. Third, since breeding compositions and compositions for crop protection do not usually differ with regard to the carrier material, it was irrelevant to the skilled person whether they knew the material from a breeding composition or from a compositions for crop protection. For the same reason, the absence of a food source in the composition of document D6 was also irrelevant.

76. Claim 1 of auxiliary request 3 contravenes Article 56 EPC.

*Request to refer questions to the Enlarged Board of Appeal (Article 112 EPC)*

77. Under Article 112(1)(a) EPC, boards can refer questions to the Enlarged Board of Appeal either of their own motion or upon request from a party to ensure uniform application of the law or if a point of law of fundamental importance arises if they consider that a decision is required for the above purposes and if the answer to that question is relevant for ruling on the case in hand.

78. The patent proprietor requested that the board refer questions to the Enlarged Board of Appeal (see section XIV. for the exact formulation of these questions) in

view of the divergence in the case law in connection to the selection of the starting point for assessment of inventive step. They argued that decision T 1078/23 was at variance with decision T 2759/17 and decision G 1/23 and that, if the board considered that the question of which approach was to be taken for determining the starting point for the analysis of inventive step was not resolved by G 1/23 and intended to follow decision T 1078/23, a referral to the Enlarged Board of Appeal was justified because the selection of the starting point was decisive for the outcome in the current case and the case law in this regard was divergent.

79. However, for the reasons stated above (points 41. to 53.), it is not decisive in the case in hand which approach is taken to determine the starting point for the inventive step analysis.

80. The board therefore concluded that, in this case, questions did not need to be referred to the Enlarged Board of Appeal under Article 112(1)(a) EPC. The patent proprietor's request was therefore rejected.

*Opponent 2's request for reimbursement of the appeal fee (Rule 103(1)(a) EPC)*

81. Under Rule 103(1)(a) EPC, the appeal fee must be reimbursed in full where the board deems an appeal to be allowable if such a reimbursement is equitable by reason of a substantial procedural violation.

82. Whether the reimbursement is equitable depends on whether the procedural deficiencies were 1) substantial and 2) forced the appellant to file the appeal (causal link between the necessity to file an appeal and the alleged procedural violation). A procedural violation

is not to be deemed substantial if the outcome of the proceedings would not have been different had the violation not occurred (T 4/00, Reasons 2.6).

83. Opponent 2 asserted that, in connection with the assessment of compliance of auxiliary request 3 with the requirements of inventive step, several substantial procedural violations had occurred that infringed their right to be heard and amounted to a suspicion of partiality.

84. First, opponent 2 submitted that the chairman of the opposition division stated during oral proceedings that in coming to the conclusion that auxiliary request 3 was inventive over document D9 as the closest prior art, it was also taken into account that the claims were restricted to particular mites and that, from the perspective of a work-around, there were sufficient possibilities. Since opponent 2 had not had an opportunity to comment on these consideration, their right to be heard had been infringed (Article 113(1) EPC).

85. Pursuant to Article 113(1) EPC, decisions of the European Patent Office must be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments. It is well established in the case law of the boards that the "*grounds or evidence*" under Article 113(1) EPC are to be understood as meaning the essential legal and factual reasoning on which the decision is based. While in opposition proceedings a decision may be given orally (Rule 111(1) EPC)), it is the written decision of the opposition division that must contain the essential legal and factual reasoning (Rule 111(2)) EPC). The reasons for holding that auxiliary request 3

is inventive over documents D6 and D9 are set out in points 14 to 14.7.1 of the decision under appeal.

86. The board observes that the considerations objected to by opponent 2 - a narrowing of the scope of protection and the possibility of work-arounds - are not among the reasons given in the decision under appeal for holding that auxiliary request 3 is inventive over documents D6 and D9.

87. Conversely, opponent 2 did not contest that they could comment on the reasons set out in the decision under appeal in Reasons 14 to 14.7.1.

88. The board concludes that the opposition division's decision that auxiliary request 3 is inventive over documents D6 and D9 is based on grounds on which opponent 2 had the opportunity to comment.

89. Second, during the oral proceedings before the board, opponent 2 further submitted that the need to draft and send an email to the opposition division to have their objection under Article 113(1) EPC recorded in the minutes and, at the same time, to raise their Article 56 EPC attacks against auxiliary request 3 on the basis of document D8 had prevented them from presenting their best possible objections under Article 56 EPC against auxiliary request 3. For this reason, too, their right to be heard had been infringed.

90. The board notes that the minutes drawn up by the opposition division (minutes), contain a statement corresponding to the appellant's submission in point 84. above (minutes, paragraph bridging pages 8 and 9). This statement was submitted by email during

the oral proceedings by opponent 2 and included at their request (minutes, point 5.15). According to the minutes, opponent 2 also provided their reasons why auxiliary request 3 lacked an inventive step over document D8 (minutes, point 5.16).

91. It is not apparent from the minutes that opponent 2 had asked for more time to make their submissions on document D8. Nor did opponent 2 argue before the board that they had requested more time or that such a request was denied.

92. However, if a party is of the opinion that they do not have enough time to defend their case, it is their duty to request more time and give reasons therefore.

93. In conclusion, the board is of the opinion that opponent 2's right to be heard was not infringed.

94. Third, opponent 2 submitted that when explaining the reasons for coming to the conclusion that auxiliary request 3 was inventive over documents D3 and D9 as the closest prior art, the chairman of the opposition division added that it was the goal of the EPO to grant patents. In opponent 2's view, this comment amounted to a suspicion of partiality towards the patent proprietor.

95. Although Article 24 EPC applies only to members of the boards and the Enlarged Board of Appeal, the requirement of impartiality applies, as a general rule, also to employees of the departments of the first instance of the EPO taking part in decision-making activities affecting the rights of any party (G 5/91, OJ EPO 1992, 617, Order 1). If not all members of an opposition division fulfil the requirement of

impartiality, a procedural violation arises as to the composition of the opposition division, normally rendering the decision void (G 5/91, Reasons 5). A disqualifying partiality is limited to when the opinion of a person responsible for taking decisions affecting the right of parties is swayed by their attitude towards a party.

96. However, an objection on the ground of suspected partiality before the department of first instance can be disregarded if it is not raised immediately after the party concerned becomes aware of the reason for the objection (G 5/91, Reasons 4; see also EPO Guidelines March 2022, version in force when the oral proceedings were held before the opposition division, Part E - Chapter XI-1).

97. In the board's view, such an objection on the grounds of suspected partiality of a member of the opposition division can be disregarded all the more so if it is raised only on appeal, even though the party concerned was already aware of the reasons for the objection. The board observes that any suspicion of partiality must be justified on an objective basis that can be verified by the board.

98. It appears from the file that opponent 2 was aware of the reasons for the objection during oral proceedings (see minutes, point 5.15). Nevertheless, they did not raise any objection of partiality in the opposition proceedings (see minutes, point 5.16). Since no challenge to impartiality was raised during opposition proceedings, there is also no statement of the chairman of the opposition division on the facts and circumstances put forward by opponent 2 on appeal, and there is no appealable decision on this issue which

could be reviewed by the board.

99. The board concludes that opponent 2's objection of suspected partiality of the chairman of the opposition division should have been raised in opposition proceedings and that it cannot be considered by the board on appeal.

100. As a result, opponent 2's request for reimbursement of the appeal fee must be refused.

101. However, the board points out that considerations relating to the EPO's objective of granting patents would have no place in opposition proceedings.

**Order**

**For these reasons it is decided that:**

1. The decision under appeal is set aside.

2. The patent is revoked.

3. The request for reimbursement of the appeal fee is refused.

The Registrar: The Chairwoman:

A. Wille M. Pregetter

Decision electronically authenticated