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**Datasheet for the decision
of 10 October 2025**

Case Number: T 1026/23 - 3.3.04

Application Number: 16734038.9

Publication Number: 3310349

IPC: A61K31/01, A61K31/19, A61P25/00

Language of the proceedings: EN

Title of invention:
Compositions and methods for enhancing neurogenesis in animals

Patent Proprietor:
Société des Produits Nestlé S.A.

Opponents:
ABBOTT LABORATORIES
N.V. Nutricia

Relevant legal provisions:
EPC Art. 100(b), 83

Keyword:
Sufficiency of disclosure - (no)

Decisions cited:
T 0762/14



Beschwerdekammern

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Case Number: T 1026/23 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 10 October 2025

Appellant: Société des Produits Nestlé S.A.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 25 April 2023
revoking European patent No. 3310349 pursuant to
Article 101(3)(b) EPC.**

Composition of the Board:

Chairwoman M. Pregetter
Members: R. Hauss
 A. Bacchin

Summary of Facts and Submissions

- I. European patent No. 3 310 349 (the patent in suit) was granted with a set of 13 claims. Claim 1 reads as follows:
- 1. A composition for use in enhancing neurogenesis in an animal that is suffering from cognitive decline, that is at risk of becoming cognitively impaired, that is diagnosed with a disease, disorder, or other condition that affects its cognitive abilities, or that is at risk of contracting a disease, disorder, or other condition that affects its cognitive abilities, the composition comprising an unsaturated fatty acid (UFA), a nitric oxide releasing compound (NORC), a B vitamin, and an antioxidant, in an amount effective for enhancing neurogenesis in the animal.*
- II. The patent in suit was opposed under Article 100(a), (b) and (c) EPC on the grounds that the claimed subject-matter lacked novelty and inventive step, was not disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art and extended beyond the content of the application as filed, and also that the subject-matter of independent claim 7 was not patentable pursuant to Article 53(c) EPC.
- III. In the proceedings before the opposition division, the patent proprietor requested as its main request that the oppositions be rejected and that the opposed patent be maintained as granted. It also submitted a number of amended sets of claims as auxiliary requests.

IV. The documents cited in the proceedings included the following:

D2: J. Nutr. 127, 838S-841S (1997)

V. The decision under appeal is the opposition division's decision revoking the patent in suit, announced on 1 March 2023 and posted on 25 April 2023.

VI. The decision under appeal included the following findings.

(a) The requirement of sufficiency of disclosure was not met because guidance was lacking with regard to the feature "in an amount effective for enhancing neurogenesis in the animal" in claim 1 as granted. Thus, the ground for opposition under Article 100(b) EPC prejudiced maintenance of the patent as granted.

(b) A new set of claims, filed by the patent proprietor as auxiliary request 1 at the oral proceedings on 1 March 2023, was admitted.

(c) The subject-matter of claims 1 and 6 of auxiliary request 1 extended beyond the content of the application as filed (Article 123(2) EPC).

(d) The claims of auxiliary requests 2 to 36 did not meet the requirement of sufficiency of disclosure for the same reasons as those of the main request (Article 83 EPC).

(e) The opposition division did not allow the patent proprietor to present any further auxiliary requests.

VII. The patent proprietor (appellant) filed an appeal against this decision.

- VIII. With its statement setting out the grounds of appeal, the appellant presented 20 new sets of amended claims as auxiliary requests 1 to 20.
- IX. With a further submission dated 27 February 2024, the appellant filed further amended sets of claims as auxiliary requests 3a to 10a and 13a to 20a.
- X. The board, in a communication under Article 15(1) RPBA issued in preparation for oral proceedings and advising the parties of its preliminary opinion, pointed out that, contrary to what had been asserted by the parties, the claims of auxiliary request 4 as filed on appeal did not appear to be identical to those of former auxiliary request 1 filed at the oral proceedings before the opposition division and considered in the decision under appeal.

The board construed claim 1 as granted as a product claim directed to a composition suitable for enhancing neurogenesis in an animal.

On the issue of sufficiency of disclosure, a relevant question might be whether guidance was provided regarding the conditions under which the composition defined in the claims was suitable for enhancing neurogenesis. It might be discussed whether, apart from the composition of the specific test diet in Example 1, there was any general teaching in the application as filed regarding the preparation's qualitative and quantitative composition in relation to its suitability for achieving the desired effect. As these conditions could differ between animal species and pathologies (if a pathology was being targeted), it appeared that the invention would have to be re-worked from scratch for every animal species and pathology.

XI. By letter dated 7 August 2025, the appellant filed further sets of amended claims as auxiliary requests 4, 4a, and 21 to 29. The appellant stated that the new auxiliary request 4 was identical to auxiliary request 1 considered in the decision under appeal.

XII. Claim 1 of auxiliary request 4 filed by letter of 7 August 2025 reads as follows (differences in comparison with claim 1 of the main request underlined by the board):

1. A composition for use in enhancing neurogenesis in an animal that is suffering from cognitive decline, that is at risk of becoming cognitively impaired, that is diagnosed with a disease, disorder, or other condition that affects its cognitive abilities, or that is at risk of contracting a disease, disorder, or other condition that affects its cognitive abilities, the composition comprising an unsaturated fatty acid (UFA), a nitric oxide releasing compound (NORC), a B vitamin, and an antioxidant, in an amount effective for enhancing neurogenesis in the animal,
wherein the composition comprises from about 1% to about 15% UFA and wherein the UFA comprises one or more of a natural fish oil, ALA, EPA, DPA, DHA, or another n-3 fatty acid from any source and wherein the composition comprises from about 1% to about 10% NORC and wherein the NORC is arginine, citrulline, ornithine, or a nitric oxide-releasing derivative thereof and wherein the composition comprises from about 1,2 [sic] to 40 times the recommended daily requirement of the B vitamin and wherein the B vitamin is selected from the group consisting of vitamin B1, vitamin B2, vitamin B3, vitamin B5, vitamin B6, vitamin B7, vitamin B8, vitamin B9, vitamin B12, and mixtures thereof and wherein the composition comprises from

about 0.0001% to about 25% of the antioxidant and wherein the antioxidant is selected from any of the group consisting of carotenoids, flavonoids, phenolic acids and their esters, nonflavonoid phenolics, curcumin, flavonolignans, xanthones, eugenol, vitamin C, vitamin E, selenium, and mixtures thereof.

- XIII. For the wording of the claims of any of the other auxiliary requests, please refer to the electronic file.
- XIV. Oral proceedings before the board were held on 10 October 2025. At the oral proceedings, the appellant withdrew the version of auxiliary request 4 that had been filed with the statement setting out the grounds of appeal. At the close of the oral proceedings, the board announced its decision dismissing the appeal.
- XV. The appellant's pertinent arguments may be summarised as follows.

Sufficiency of disclosure

Claim 1 was directed to a further medical use. The feature "in an amount effective for enhancing neurogenesis in an animal" was a limiting feature. Guidance for carrying out the claimed subject-matter, in particular with regard to the components of the composition and their concentrations or amounts, was provided in paragraph [0036] of the application as filed, the dependent claims and Example 1. It would be clear to a reader that the narrower concentration ranges mentioned in paragraph [0036] were the preferred ones.

The person skilled in the art reading the patent in suit would readily understand that the control diet in Example 1 (as a non-working embodiment which had

failed to enhance neurogenesis) was not encompassed by claim 1, as it self-evidently did not meet the condition "in an amount effective for enhancing neurogenesis in an animal". Example 1 provided detailed guidance on how to supplement the control diet in order to achieve the claimed effect of enhancing neurogenesis. The achievement of this effect had been demonstrated in Example 1 since it showed that a diet supplemented with an effective amount of UFA, NORC, B vitamins and antioxidants significantly enhanced neurogenesis in an Alzheimer's disease mouse model, whereas the control diet without the claimed effective amount failed to induce neurogenesis. Results obtained with the mouse model could be extrapolated to the relevant patient group.

As in case T 762/14, any potential ambiguity of the feature "in an effective amount" could be resolved by resorting to the description and would, in any case, be an issue of clarity rather than an issue to be dealt with under Article 100(b) EPC.

The burden of proof was on the opponents (respondents) to show insufficiency of disclosure. The respondents had failed to provide experimental data to establish serious doubt.

Auxiliary requests - admittance

Auxiliary requests 1 to 3 and 5 to 20 presented with the statement setting out the grounds of appeal had been filed as a direct response to the findings in the decision under appeal that the subject-matter claimed in the main request and former auxiliary requests 2 to 36 was insufficiently disclosed (Articles 100(b) and 83 EPC) and that the subject-matter of former auxiliary request 1 extended beyond the content of the application as filed (Article 123(2) EPC). Moreover,

at the oral proceedings before the opposition division, the appellant had been denied the opportunity to file a further claim request to overcome the objection against former auxiliary request 1. The appellant could not have foreseen any of these findings.

Auxiliary requests 3a to 10a and 13a to 20a filed by letter of 27 February 2024 had been presented as a direct response to objections relating to a lack of clarity that respondent 1 (opponent 1) had raised in relation to auxiliary requests 3 to 10 and 13 to 20.

Auxiliary request 4 filed by letter of 7 August 2025 and presented in response to the board's communication under Article 15(1) RPBA, was a corrected version of this request which was identical to former auxiliary request 1 considered in the decision under appeal. Analogously, auxiliary request 4a filed by the same letter was a corrected version of auxiliary request 4a filed by letter of 27 February 2024.

Auxiliary requests 21 to 29 had been filed as a direct response to the board's observations on claim construction as presented in the communication under Article 15(1) RPBA.

XVI. The respondents' pertinent arguments may be summarised as follows.

Sufficiency of disclosure

The patent in suit showed only one example of a working embodiment, based on the use of a specific composition in a specific mouse model.

However, sufficiency of disclosure must be shown for the entire scope of the claim at issue. The patent proprietor (i.e. the appellant) bore the burden to prove that the alleged technical effect was credible, especially where, as in the case in hand, the

information provided in the patent itself gave rise to serious doubt in this regard.

The scope of current claim 1 was considerably broader than that of the sole example (Example 1) with regard to the selection and combination of the mandatory components and the selection of the animals in which neurogenesis was to be enhanced. At the same time, generalisable guidance on how to achieve the desired effect was lacking. A research project would be required to establish this across the claimed scope.

It was readily apparent from the example that the mere presence of the four mandatory components defined in claim 1 was insufficient to bring about the desired effect of enhancing neurogenesis, which was claimed only as a result to be achieved. This was demonstrated by the control diet (AIN-93M) of Example 1, which contained all the mandatory components recited in claim 1 but had nevertheless failed to enhance neurogenesis in the test animals.

The component classes in claim 1 were defined broadly and encompassed a large variety of individual components or mixtures. The ranges for their concentrations or amounts as indicated, for example, in paragraph [0036] of the application as filed (or similarly in the dependent claims) were also extremely broad and encompassed the concentrations and amounts used for the control diet of claim 1. Thus, the passages relied on by the appellant were either too specific (Example 1) or too general (paragraph [0036] and dependent claims) to provide the required guidance.

Auxiliary requests - admittance

None of the auxiliary claim requests filed by the appellant should be admitted.

Auxiliary requests 1 to 20 filed with the statement setting out the grounds of appeal were all new. These requests could and should have been filed at first instance. They were also unsuitable to overcome the finding of insufficiency of disclosure.

Auxiliary requests 3a to 10a and 13a to 20a filed by letter of 27 February 2024, which were based on auxiliary requests 3 to 10 and 13 to 20 and differed from them on account of the deletion of the word "about", should not be admitted for at least the same reasons.

Auxiliary requests 4 and 4a filed by letter of 7 August 2025 did not meet the requirement of Article 12(3) RPBA.

Auxiliary requests 21 to 29 were, *inter alia*, unsuitable to overcome the objection of insufficient disclosure.

XVII. The appellant (patent proprietor) requested that the decision under appeal be set aside and that the case be remitted to the opposition division for consideration of the undecided issues, namely novelty and inventive step.

The versions to be considered were the patent as granted (the main request) or, in the alternative, the versions according to the claims of any of the following auxiliary requests:

- auxiliary requests 1 to 3 and 5 to 20, filed with the statement setting out the grounds of appeal
- auxiliary request 4, filed by letter of 7 August 2025
- auxiliary requests 3a to 10a and 13a to 20a, filed by letter of 27 February 2024
- auxiliary requests 4a and 21 to 29 filed by letter of 7 August 2025

XVIII. Respondent 1 (opponent 1) requested that the appeal be dismissed.

It also requested that none of the auxiliary requests filed by the appellant be admitted.

Respondent 1 furthermore requested that the case be remitted to the opposition division if the board were to conclude that any of the appellant's requests met the requirements of Articles 123(2), 84 and 83 EPC.

XIX. Respondent 2 (opponent 2) requested that the appeal be dismissed.

It also requested that auxiliary requests 1 to 20 (filed with the grounds of appeal) and auxiliary requests 4, 4a and 21 to 29 (all filed by letter of 7 August 2025) not be admitted.

Respondent 2 furthermore requested that the case be remitted to the opposition division should the board find the patent to comply with the requirements of Articles 53(c), 123(2) and 83 EPC.

Reasons for the Decision

1. Claim construction

1.1 Claim 1 as granted is, formally, drafted in the format provided for by Article 54(5) EPC.

However, the use "for enhancing neurogenesis in an animal" in claim 1 is not of itself a use in a therapeutic method according to Article 53(c) EPC. This is because it is not apparent that enhancing neurogenesis in an animal would necessarily treat or prevent a disease or disorder when neither the magnitude of this effect nor its impact on any disease or disorder are stated in the claim.

Moreover, defining the animal as having, or being at risk of having, a condition affecting its cognitive abilities does not establish a clear link that would make the stated purpose of "enhancing neurogenesis" necessarily a therapeutic one across the scope claimed.

1.2 Consequently, the special concept of patentability according to Article 54(5) EPC does not apply.

Instead, claim 1 as granted has to be construed as being directed to a composition that is suitable for enhancing neurogenesis in an animal.

1.3 It also appears that either the composition of claim 1 or all or some of the components UFA, NORC, B vitamin and antioxidant are claimed "in an amount effective for enhancing neurogenesis in an animal" (see point I. above). This effective amount is, accordingly, a claim feature that is linked to the suitability requirement mentioned in point 1.2.

2. Sufficiency of disclosure - main request
(Article 100(b) EPC)
- 2.1 The requirement of sufficiency of disclosure must be satisfied on the effective date of the patent, i.e. on the basis of the information provided in the patent application as filed, together with the common general knowledge then available to the person skilled in the art.
- 2.2 Claim 1 as granted defines the claimed composition by the presence of four mandatory components (UFA, NORC, B vitamin and antioxidant). Furthermore, the composition is supposed to be (suitable) for use in enhancing neurogenesis in an animal. Thus, the claim states the desired technical effect of the composition, to be attained when the composition is administered to an animal. The animal is defined further by the status of its cognitive abilities.
- 2.3 However, claim 1 does not identify the technical features that are necessary to ensure that the desired effect of enhancing neurogenesis can be achieved across the scope of conceivable compositions and animals. Nor can these necessary technical features be derived from the teaching of the application as a whole, for the reasons set out below.
- 2.4 To start with, it cannot simply be assumed that the mere presence of one or more of the four mandatory components makes the composition suitable for enhancing neurogenesis in an animal, for the following reasons.
 - There is no evidence in the application as filed supporting such an assumption.
 - The four mandatory components are defined only as general substance classes, each covering a range of

multiple heterogeneous compounds with different properties.

- The appellant did not dispute that the control diet in Example 1, which did not act to enhance neurogenesis in the mouse model used, contained the four mandatory components recited in claim 1.
- Claim 1 includes the feature "in an amount effective for enhancing neurogenesis in the animal", which implies that ineffective amounts also exist.

2.5 Claim 1 defines a pool of possible options for selecting each of the four mandatory components. The animals to be treated can also vary.

The appellant correctly stated that only those compositions that are indeed suitable for enhancing neurogenesis in an animal are claimed.

However, this does not resolve the question of sufficiency of disclosure since the suitability requirement is only present as a desideratum, in the form of the terms "for use in enhancing neurogenesis in an animal" and "in an amount effective for enhancing neurogenesis in the animal". The issue under Article 100(b) EPC is precisely the lack of guidance for putting the claimed desideratum into practice by enabling the skilled person to identify working embodiments across the potential scope of options mentioned in claim 1 without unreasonable effort.

2.6 Claim 1 does not specify which of the four mandatory components is/are supposed to bring about the effect of enhancing neurogenesis, or the conditions under which this will happen. The functional feature "in an amount effective for enhancing neurogenesis in the animal" does not refer specifically to the composition as such

or to any of its components, nor does it indicate concrete effective amounts or suitable ratios of the components (see point 1.3 above). Moreover, in the absence of a specified dosage amount, the potential significance of the term "effective amount" in a product claim (in the case in hand relating to a composition *per se*) is questionable.

2.7 Hence, claim 1 itself does not provide guidance on how to identify working embodiments across the ambit of the claim without undue burden.

2.8 For relevant further potential guidance in the application as filed, the appellant referred to Example 1, paragraph [0036] and the dependent claims.

Example 1

2.9 The experiment described in Example 1, i.e. the sole example in the application as filed (see paragraphs [0083] to [0090]), compared the effect of a test diet on neuron density in mice with that of a control diet ("AIN 93-M", a well-known diet for laboratory rodents; see also D2).

In comparison with the control diet (see paragraphs [0086] and [0087]), the test diet was supplemented with:

- fish oil (supposed to represent UFA; see paragraphs [0057] and [0072])
- arginine (an NORC; see paragraph [0033])
- a mixture of several B vitamins
- a mixture of several antioxidants

The test animals were AD mice (a transgenic mouse model of Alzheimer's disease) and non-AD mice. They were fed the diets for 11 months.

The result observed was that neuron density at the hippocampal CA1 region in AD mice fed the test diet was found to be increased in comparison with AD mice fed the control diet and also with non-AD mice fed the control diet.

Paragraph [0090] concludes:

"These data indicate that a nutrient blend containing fish oil, arginine, B vitamins and antioxidants enhance [sic] adult neurogenesis at CA1 of hippocampus, while adequate amounts of arginine, B vitamins, and antioxidants in the control diet fails [sic] to enhance neurogenesis at CA1."

- 2.10 It may thus be accepted that the application as filed discloses, in one specific instance, a formulation that was suitable for enhancing neurogenesis in mice.
- 2.11 However, the question of sufficiency then arises for anything that is not the composition of the test diet of Example 1.
- 2.12 Under the established jurisprudence of the boards of appeal, the disclosure of one way of performing an invention is only sufficient if it allows the person skilled in the art to obtain substantially all embodiments falling within the ambit of the claims (Case Law of the Boards of Appeal of the European Patent Office, 11th edn., 2025, II.C.5). More technical details and more examples may be necessary to support claims of a broad scope.
- 2.13 The case in hand is a typical example of a situation where it is not enough for the application as filed to describe just one way of carrying out the invention.

- 2.14 The definitions in claim 1 encompass a vast range of possible combinations of four heterogeneous classes of components and of animals to be treated. Contrary to the appellant's view, the findings in Example 1 cannot be extrapolated to serve as guidance for formulations having different qualitative and quantitative compositions, and for different animal species, across the pool of possible embodiments envisaged in claim 1.
- 2.15 The results reported in Example 1 were obtained with a specific test diet that contained the components of the known AIN 93-M diet and that was furthermore supplemented with 2% Menhaden fish oil, 2% arginine, "4X" [sic] B vitamins including vitamins B1, B2, B3, B5, B6, B7, B9 and B12, and antioxidants (vitamin E: 500 mg/kg diet, vitamin C: 150 mg/kg diet; astaxanthin: 100 mg/kg and selenium: 0.40 mg/kg).
- Since the test diet thus differed from the control diet on account of multiple parameters, it cannot be derived from the description of the example which of these parameters were decisive for attaining the effect of enhanced neurogenesis. The last sentence of paragraph [0090] (see point 2.9 above) seems to suggest that fish oil is the relevant component, but there is no conclusive evidence on this.
- Thus, a skilled person reading Example 1 would not have been able to derive a generalisable technical concept to predict whether the composition would have the same effect on neurogenesis when changing any of the components or amounts or the animal species to which the composition was to be administered. Finding further working embodiments across the ambit of claim 1 would require a dedicated research programme.
- 2.16 Hence, Example 1 is not adequate for the appellant to discharge its burden of proof in this regard.

2.17 As regards the burden of proof, it is an established principle that each party has to prove its own assertions. The appellant, as the applicant for the patent in suit, bore the burden to ensure that the desired technical effect of enhancing neurogenesis in an animal was rendered credible in the application as filed, across the envisaged scope of compositions and animal species. If the appellant fails to discharge its burden of proof, there is no need for the respondents to provide experimental counter-evidence.

Paragraph [0036] and dependent claims

2.18 Paragraph [0036] of the application as filed reads as follows:

"The compositions comprise UFA and NORC, B vitamins and antioxidants, in an amount effective for enhancing neurogenesis. Generally, the compositions comprise from about 0.1% to about 50% UFA, and from about 0.1% to about 20% NORC. Additionally, the composition comprises from about 1.2 to 40 times the recommended daily requirement (RDA) of B vitamins and from about 0.0001% to about 25% of antioxidants. In various embodiments, the compositions comprise from about 1 to about 30% UFA, and in one aspect, from about 1 to about 15% UFA; and from about 1 to about 15% NORC, and in one aspect, from about 1 to about 10% NORC. In various embodiments, the B vitamins comprise from about 1.2 to 20 times the RDA, and in one aspect, from about 1.2 to 10 times the RDA, and antioxidants comprise from about 0.0001% to about 15%, in one aspect, from about 0.001% to about 5%, and in one specific aspect, from about 0.001% to about 2%. In one embodiment, the composition comprises from about 0.5g to about 10g UFA, and from about 0.5g to about 10g NORC, with 1.5-4 times the RDA for B vitamins and antioxidants. In some aspects, the

composition can include at least 4 times the RDA for B vitamins."

- 2.19 This does not overcome the lack of general guidance. The concentration ranges and amounts indicated in this paragraph are broad and unspecific, especially since the compound classes also have a broad scope for possible qualitative variation.
- 2.20 Dependent claims 3 to 6 as filed mention lists of compounds eligible for selecting the four mandatory components, and indicate broad concentration ranges (or a range of possible amounts in the case of the B vitamins). Such restrictions are provided by claim 3 for the UFA component, by claim 4 for the NORC, by claim 5 for the vitamin B component and by claim 6 for the antioxidant component. Each of these claims is only dependent on claim 1, i.e. their features are not disclosed in combination. Neither the content of these claims nor their dependencies tell the reader which components in which concentrations or amounts are responsible for the effect of enhancing neurogenesis. The lack of guidance persists since there is no evidence that keeping within the limits of any of these claims would bring about the desired effect of enhancing neurogenesis when the composition is administered to an animal.
- 2.21 To address a further argument put forward by the appellant, the issue with the feature "in an amount effective for enhancing neurogenesis in the animal" is not just a potential lack of clarity. In actual fact, the technical features responsible for the desired effect of enhancing neurogenesis, and the component(s) to which the term "effective amount" refers cannot be derived from the information provided in the application as filed. This deficiency is more

fundamental than a mere lack of clarity. The situation is thus different from the issue discussed in the decision in case T 762/14 (Reasons 2.4.4), in which it was examined whether the term "effective amount" was ambiguous with regard to the precise upper and lower limits it might imply. The cited decision in case T 762/14, therefore, is of no relevance for the case in hand.

2.22 For these reasons, the subject-matter of claim 1 as granted does not meet the requirement of sufficiency of disclosure. Thus, the ground for opposition under Article 100(b) EPC prejudices maintenance of the patent as granted.

3. Admittance - auxiliary requests 1 to 3 and 5 to 20 (Article 12(4) and (6) RPBA)

3.1 On appeal, the appellant chose not to defend the auxiliary requests filed in the proceedings before the opposition division, except for former auxiliary request 1 (which is identical to current auxiliary request 4; see point VI.(b) above and section 4. below).

3.2 The current auxiliary requests 1 to 3 and 5 to 20 were filed for the first time with the statement setting out the grounds of appeal. The filing of these requests constitutes an amendment to the appellant's case under Article 12(4) RPBA which may only be admitted at the board's discretion.

3.3 The reason given by the appellant for filing new auxiliary requests with its statement setting out the grounds of appeal - namely that they were filed in response to the opposition division's (unexpected) findings on sufficiency of disclosure and added

subject-matter of the main request and the former auxiliary claim requests - was not found adequate.

3.3.1 Firstly, since claim 1 in new auxiliary requests 1, 2, 11 and 12 remains unamended and is thus identical to claim 1 as granted, these requests cannot legitimately be intended to overcome the opposition division's objection of insufficient disclosure.

3.3.2 Secondly, it cannot be considered surprising:

- that an opposition division may agree with an objection raised by the opponents (as in the case of the main request and former auxiliary requests 2 to 36, the objection of insufficient disclosure in relation to the feature "in an amount effective for enhancing neurogenesis in an animal")
- or that an opposition division may reject a request with amended claims for non-compliance with Article 123(2) EPC (as in the case of former auxiliary request 1)

3.3.3 In fact, the objection of insufficient disclosure of the above-mentioned feature was not only raised by the opponents at the start of the opposition proceedings, but was also addressed, in favour of the opponents, by the opposition division's provisional opinion provided in an annex to the summons to oral proceedings dated 20 June 2022 (point 4.1).

The board is aware that, in reaction to the opposition division's preliminary opinion, which considered the former main request and the 16 auxiliary requests on file at that time, the appellant filed 19 further auxiliary requests, apparently intended to address the opposition division's concerns on insufficient disclosure (cf. submission of 20 December 2022, page 2, point I.1). However, the opposition division's finding

at oral proceedings that auxiliary requests 2 to 36 all suffered from the same deficiency under Article 83 EPC as the main request cannot be considered surprising. Nor can this justify filing 20 further auxiliary requests in appeal to address the same objection, especially when some do not even represent a fair attempt to overcome the deficiency (see point 3.3.1 above). The opposition division's decision essentially confirmed the preliminary findings on the objection under Article 83 EPC expressed in the summons to opposition oral proceedings, so that also the circumstances of the appeal do not justify the admittance of the new auxiliary requests.

3.3.4 Thus, the appellant should have anticipated the possibility of the opposition division not deciding in its favour on these points (see point 3.3.2 above). The appellant could and should have presented any further requests intended to address such possible outcomes at first instance, in time for them to be admitted and considered by the opposition division.

3.4 For these reasons, the board decided not to admit auxiliary requests 1 to 3 and 5 to 20 under Article 12(6) RPBA.

4. Admittance - auxiliary request 4
(Rule 139 EPC, Article 12(2) RPBA)

4.1 According to the statement setting out the grounds of appeal (see page 13, title of section 6), the appellant considered the version of auxiliary request 4 enclosed with that statement to be identical to former auxiliary request 1 as filed at the oral proceedings before the opposition division.

- 4.2 After the board informed the parties of its finding that auxiliary request 4 filed with the statement setting out the grounds of appeal was in fact not identical to former auxiliary request 1 (see point X. above and point 6.3 of the board's communication under Article 15(1) RPBA), the appellant filed a corrected version of auxiliary request 4. This corrected version (as filed by letter of 7 August 2025) is identical to former auxiliary request 1.
- 4.3 Since it was evident from the appellant's statement setting out the grounds of appeal (Article 12(3) RPBA) that its intention was to defend former auxiliary request 1, the board decided to admit the corrected version of auxiliary request 4 as a *bona fide* attempt to correct an obvious error (Rule 139 EPC). Moreover, former auxiliary request 1 is a request on which the decision under appeal was based (Article 12(2) RPBA).
5. Sufficiency of disclosure - auxiliary request 4 (Article 83 EPC)
- 5.1 The board's conclusions on the issue of sufficiency of disclosure, as set out in section 2. above for the main request, also apply to the subject-matter defined in claim 1 of auxiliary request 4.
- 5.2 The further limitations added to this claim in comparison with claim 1 as granted (see point XII. above) do not change the board's conclusions, for the following reasons.
- 5.2.1 In the case in hand, it is not decisive for the issue of sufficiency whether or not the control diet according to Example 1 falls under the definition of the composition in claim 1.

- 5.2.2 Although amended claim 1 of auxiliary request 4 provides lists of compounds eligible for selecting the four mandatory components and indicates concentration ranges (or ranges of possible amounts in the case of the B vitamins), it still covers a vast range of possible combinations with regard to the qualitative and quantitative composition of the claimed product.
- 5.2.3 There is no evidence in the application as filed (including in Example 1) for the appellant's assertion that the desired effect of enhancing neurogenesis using effective amounts would be achieved, across the envisaged scope, by staying within the ranges of compounds and concentrations/amounts specified in amended claim 1. The person skilled in the art would still be obliged to carry out a research programme to identify suitable compositions across the scope claimed.
- 5.2.4 Thus, the lack of generalisable guidance objected to in section 2. above persists.
- 5.3 Consequently, the subject-matter of claim 1 of auxiliary request 4 does not meet the requirement of sufficiency of disclosure, for analogous reasons as set out in the case of the main request (Article 83 EPC).
6. Admittance - auxiliary requests 3a to 10a and 13a to 20a filed by letter of 27 February 2024 (Article 13(1) RPBA)
- 6.1 The claims of auxiliary requests 3a to 5a, 7a to 10a, 13a to 15a and 17a to 20a filed by letter of 27 February 2024 differ from the corresponding claims in auxiliary requests 3 to 5, 7 to 10, 13 to 15 and 17 to 20 filed with the statement setting out the grounds of appeal only in that the expression "about" in ranges given for concentrations or amounts has been deleted.

Depending on the request, this amendment is found in independent or dependent claims.

- 6.2 The independent claims of auxiliary requests 6a and 16a are identical to those of auxiliary requests 6 and 16, respectively. While the expression "about" was retained in these requests, nitric-oxide-releasing derivatives of arginine were added as eligible NORCs in dependent claims 3 and 9 of auxiliary requests 6a and dependent claim 3 of auxiliary request 16a, in comparison with the corresponding claims of auxiliary requests 6 and 16.
- 6.3 Since auxiliary requests 3, 5 to 10 and 13 to 20 were not admitted under Article 12(6) RPBA, and auxiliary request 4 filed with the grounds of appeal was withdrawn (see point XIV. above) and would otherwise not have been admitted under Article 12(6) RPBA for the same reasons, the board saw no reason to admit variants of these requests that had been filed at an even later stage of the appeal proceedings. Consequently, the board did not admit auxiliary requests 3a to 10a and 13a to 20a (Article 13(1) RPBA).
7. Admittance - auxiliary request 4a filed by letter of 7 August 2025 (Article 13(2) RPBA)
- 7.1 Auxiliary request 4a in the version filed by letter of 7 August 2025 differs from current auxiliary request 4 only in that the expression "about" has been deleted in the independent claims.
- 7.2 Since this amendment is *prima facie* unsuitable for overcoming the finding of insufficient disclosure (see section 5. above), the board decided not to admit auxiliary request 4a, in the interests of procedural economy (Article 13(2) in conjunction with

Article 13(1) RPBA, the criteria of which may also be relied upon at the third level of the convergent approach, see Explanatory remarks to the RPBA, in Supplementary publication 2, OJ EPO 2020, 17).

8. Admittance - auxiliary requests 21 to 29
(Article 13(2) RPBA)
- 8.1 The appellant stated that it had filed auxiliary requests 21 to 29 in response to the board's observations on claim construction in the communication under Article 15(1) RPBA.
- 8.2 Claim 1 in these requests corresponds to claim 1 as granted but differs from it on account of the following restrictions.
 - (a) The animal is defined as suffering from cognitive decline or as having been diagnosed with a disease, disorder or other condition that affects its cognitive abilities, i.e. animals only "at risk" have been deleted (auxiliary requests 21 to 29).
 - (b) The animal has a phenotype associated with age-related cognitive impairment (auxiliary requests 22, 23, 25, 26, 28 and 29).
 - (c) The neurogenesis occurs at the CA1 region in the hippocampus in the animal and the neuron density is increased by at least 10% (auxiliary requests 23, 26 and 29).
 - (d) The same qualitative and quantitative restrictions as in claim 1 of current auxiliary request 4 apply with regard to the four mandatory components (see point XII. above; auxiliary requests 24 to 26).
 - (e) Different qualitative and quantitative restrictions from those in claim 1 of current auxiliary

request 4 apply with regard to the four mandatory components (auxiliary requests 27 to 29).

- 8.3 Amendments (a) to (c) do not achieve the intended effect of turning claim 1 into a claim directed to a further medical use under Article 54(5) EPC, as they do not change the considerations set out in point 1.1 above. None of these amendments can establish that the use for enhancing neurogenesis is necessarily a method according to Article 53(c) EPC. Moreover, even if that were the case, it would not change the board's reasoning and conclusions on sufficiency of disclosure set out above since the composition's suitability for enhancing neurogenesis and the claim feature "in an amount effective to enhance neurogenesis" have already been considered in the board's assessment.
- 8.4 The fact that amendment (d) does not establish sufficiency of disclosure has been set out in section 5. above, in the context of auxiliary request 4.
- 8.5 Consequently, the board was of the view that, *prima facie*, amendments (a) to (d) in auxiliary requests 21 to 26 (including their permutations) were unsuitable for overcoming the objection of insufficiency of disclosure as set out in sections 2. and 5. above for the main request and auxiliary request 4. For this reason, the board did not admit auxiliary requests 21 to 26, in the interests of procedural economy (Article 13(2) in conjunction with Article 13(1) RPBA, the criteria of which may also be relied upon at the third level of the convergent approach, see Explanatory remarks to the RPBA, in Supplementary publication 2, OJ EPO 2020, 17).

8.6 Claim 1 in each of auxiliary requests 27 to 29 attempts to redefine the qualitative and quantitative limitations for the composition in comparison with claim 1 of auxiliary request 4. These amendments do not serve to address the board's observations on claim construction, and no reason justifying their admittance was presented. Instead, the appellant indicated that these requests were based on auxiliary requests 5 and 5a (see the appellant's letter dated 7 August 2025, page 12), i.e. requests which the board did not admit under Article 12(6) RPBA (see points 3.4 and 6.3 above). Consequently, the board did not admit auxiliary requests 27 to 29 under Article 13(2) RPBA.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairwoman:



A. Wille

M. Pregetter

Decision electronically authenticated