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**Title of invention:**  
PROCESS FOR THE PRODUCTION OF NATURAL CRYSTALLINE COLORANT AND  
RELATED PROCESSING SYSTEM

**Patent Proprietor:**  
E. & J. Gallo Winery

**Opponent:**  
Oterra A/S

**Relevant legal provisions:**  
EPC Art. 100(c), 108, 111, 123(2)  
EPC R. 99(2)

**Keyword:**  
Grounds for opposition - added subject-matter  
Amendments - intermediate generalisation



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Case Number: T 0209/24 - 3.3.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.02**  
**of 8 January 2026**

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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 8 December 2023  
revoking European patent No. 2725925 pursuant to  
Article 101(3)(b) EPC.**

**Composition of the Board:**

**Chairman** P. O'Sullivan  
**Members:** S. Bertrand  
L. Bühler

## **Summary of Facts and Submissions**

- I. The appeal by the patent proprietor ("appellant") is against the opposition division's decision revoking European patent No. 2 725 925.
- II. The patent relates to a process and processing systems for preparing and processing purified natural colour pigments and colourants (patent, paragraph [0001]).
- III. In the impugned decision, the opposition division's conclusions included that claim 1 of each of the main request (patent as granted) and auxiliary requests 1 to 3 did not meet the requirements of Article 123(2) EPC.
- IV. In the statement of grounds of appeal, the appellant contested the opposition division's decision.
- V. In the reply to the grounds of appeal, the opponent contested the appellant's submissions and agreed with the opposition division's conclusions.
- VI. By letter dated 24 September 2025, the opponent withdrew its opposition.
- VII. The board summoned the appellant to oral proceedings in accordance with its request and issued a communication pursuant to Article 15(1) RPBA.
- VIII. Oral proceedings before the board were held by videoconference on 8 January 2026. During the oral proceedings, the appellant filed auxiliary request 6.

IX. The appellant's requests relevant to the present decision were as follows.

The appellant requested that the decision be set aside and, should the main request (patent as granted), or in the alternative, any one of auxiliary requests 1 to 3 as filed during oral proceedings before the opposition division on 27 September 2023, auxiliary requests 4 and 5 filed with the letter of 5 December 2025 and auxiliary request 6 filed during oral proceedings before the board, meet the requirements of Article 123(2) EPC, that the case be remitted to the opposition division for further prosecution.

X. The appellant's submissions relevant to the present decision are addressed in the reasons for the decision below.

## **Reasons for the Decision**

Main request

1. Added matter - claim 6 - Article 100(c) EPC

1.1 Claim 6 of the main request reads as follows:

*"1. A process for producing a purified, crystalline natural pigment, comprising:*

*a. purifying a fruit/vegetable juice or extract (100) containing pigments through a pigment purification system (200) using ultrafiltration and diafiltration across polymeric membranes by removing sugar and organic acids from the fruit/vegetable juice or extract (100) to increase the concentration of pigment relative*

*to sugar and organic acids thereby producing a color-enriched liquid, wherein the polymeric membranes are composed of polyethersulfone (PES) with a molecular weight cutoff in the range of about 5,000-10,000 Daltons;*

*b. concentrating the color-enriched liquid by a falling film, forced circulation or plate evaporator (300) to produce a concentrated color-enriched liquid having 20% to 35% solids;*

*c. drying the purified and concentrated color-enriched liquid using a refractive window dryer (400) to produce a composition comprising crystalline pigment or a mixture of pigments having less than 8% moisture, and*

*d. milling the dried composition."*

For the purpose of the present assessment, the features of claim 6 of the main request are numbered as follows:

- (1) purifying a fruit/vegetable juice or extract (100) containing pigments;
- (2) through a pigment purification system (200);
- (3) using ultrafiltration and diafiltration across polymeric membranes;
- (4) by removing sugar and organic acids from the fruit/vegetable juice or extract (100) to increase the concentration of pigment relative to sugar and organic acids thereby producing a colour-enriched liquid;
- (5) wherein the polymeric membranes are composed of polyethersulfone (PES) with a molecular weight cutoff in the range of about 5,000-10,000 Daltons;

- (6) concentrating the colour-enriched liquid by a falling film, forced circulation or plate evaporator (300);
- (7) to produce a concentrated colour-enriched liquid having 20% to 35% solids;
- (8) drying the purified and concentrated colour-enriched liquid using a refractive window dryer (400);
- (9) to produce a composition comprising crystalline pigment or a mixture of pigments having less than 8% moisture; and
- (10) "milling the dried composition".

1.2 In its decision, the opposition division held that the individual features of claim 1 of the main request, which is directed to a processing system, found basis in the application as filed, but that claim 1 nevertheless resulted from a combination of several passages of the application as filed which were disclosed in connection with separate embodiments rather than within a single embodiment (decision, page 5, third paragraph).

Although the discussion during the oral proceedings focused on system claim 1 of the main request, the issue of added subject-matter also arises for process claim 6 of the main request. Auxiliary request 6, filed during oral proceedings before the board, comprises a single process claim corresponding to claim 6 of the main request, albeit with further limitations. The appellant expressly confirmed that the basis relied upon for this process claim was the same as that relied upon for system claim 1 of the main request, and that the process features map onto the technical features of

the system claim previously discussed. The decisive issues underlying the assessment of added subject-matter for claim 6 of the main request were therefore discussed during the oral proceedings. In these circumstances, the board assesses added subject-matter for claim 6 of the main request and sets out its reasoning in the following.

1.3 During the oral proceedings, the appellant submitted that the features of claim 1 of the main request, and thus implicitly those of claim 6, were based on the combination of figures 1 to 3 and paragraphs [0009], [0014], [0037] to [0041], [0043], [0047] to [0051], [0054], [0055] to [0057] and [0069] of the application as filed.

1.4 The board is not persuaded by this argument for the following reasons.

Figures 1 to 3 of the application as filed disclose flow charts illustrating exemplary processes for purifying and drying natural fruit- and vegetable-based pigments (paragraphs [0017] to [0019] of the applications filed).

Figure 1 (including the reference numerals in brackets below) discloses a process for purifying and drying natural fruit- and vegetable-based pigments comprising, *inter alia*, a pigment purification step (200), a concentration step (300), a drying step (400) and a milling step (500).

Figure 2 (including the reference numerals in brackets below) discloses a process for producing a purifying pigment (206) starting from a fruit/vegetable juice/extract (100), which along with diafiltration water (206) forms a feed liquid (201), comprising subjecting the feed liquid to an ultrafiltration step (202) using

a membrane system (203), recycling the retentate (204) and performing a diafiltration step (206). Sugar and organic acids (205) are removed in the permeate, and the purified pigment (206) is obtained in the retentate, as indicated by the arrows adjacent to the membrane system (203) and the step of recycling the retentate (204).

Figure 3 discloses a process for concentrating a purified pigment (206) which was previously purified by membrane filtration (top left arrow), comprising a concentration step (300), a drying step using a refractive window dryer (400) and a milling step using a screening mill (500) to obtain a crystalline colour (600).

Thus, the combination of figures 1 to 3 discloses a process comprising, *inter alia*, the following features:

- purifying a fruit/vegetable juice or extract (100) through a pigment purification system (200) (figures 1 and 2);
- concentrating the colour-enriched liquid to produce a concentrated colour-enriched liquid having 20% to 35% solids (figures 1 and 3);
- drying the purified and concentrated colour-enriched liquid using a refractive window dryer (400) (figures 1 and 3); and
- milling the dried composition (figure 1).

Accordingly, the combination of figures 1 to 3 discloses features (1), (2), (7), (8) and (10) of claim 6 of the main request.

The board further acknowledges that features (3) to (6) and (9) are disclosed in paragraphs [0039], [0041], [0050], [0051], [0055] and [0069] of the application as filed, as follows:

- Feature (3) is disclosed in paragraph [0039], second sentence, or paragraph [0041], third sentence.
- Feature (4) is disclosed in paragraph [0039], third and fourth sentences.
- Feature (5) finds basis in paragraph [0041], fourth sentence.
- Feature (6) is disclosed in paragraph [0051].
- Feature (9) finds basis in paragraph [0055], first two sentences, and [0069]. The last sentence of paragraph [0069] discloses that pigment compositions may include one or more crystalline pigments, thus providing a basis for the mixture of pigments.

However, figure 2 and paragraph [0041], which relates to the disclosure of figure 2, disclose recycling a portion of the retentate (204) comprising the purified pigment to the feed liquid tank (201). This feature is absent from claim 6.

Claim 6 therefore represents an intermediate generalisation of the process disclosed in figure 2 and paragraph [0041] the application as filed. Such an intermediate generalisation is allowable only if there is no clearly recognisable functional or structural relationship between the omitted feature and the remaining features of the claim.

During the oral proceedings, the appellant did not submit that such a functional relationship was absent, and the board finds that this condition is not met in the present case. The omitted feature is functionally linked to features (3), (4) and (5) of claim 6, all of which relate to the ultrafiltration step. More specifically, a functional relationship exists because the technical effect pursued by feature (4) - namely the selective removal of sugars and organic acids while retaining pigments to obtain a colour-enriched liquid - is achieved only through the specific configuration of the ultrafiltration process defined by features (3) and (4) and the omitted feature. Feature (3) defines the use of ultrafiltration and diafiltration across polymeric membranes as the separation mechanism. This choice determines the separation principle. Feature (5) specifies that the polymeric membranes are polyethersulfone (PES) membranes with a molecular weight cut-off of about 5,000-10,000 Da. This parameter directly governs the selectivity of the ultrafiltration step, i.e. the ability to allow sugars and organic acids to pass into the permeate while retaining pigment molecules in the retentate. The omitted feature requires recycling a portion of the retentate to the feed liquid tank. This recycling step functionally interacts with the ultrafiltration/diafiltration process by maintaining pigment concentration while enhancing the washing-out of low-molecular-weight compounds, thereby contributing to the enrichment effect specified in feature (2).

- 1.5 Accordingly, claim 6 of the main request adds subject-matter contrary to Article 123(2) EPC.
- 1.6 Claim 1 of the main request is directed to a processing system comprising features corresponding, in system terms, to features (1) to (10). Similarly to claim 6,

claim 1 does not comprise the features of recycling a portion of the retentate (204) comprising the purified pigment to the feed liquid tank (201) and performing diafiltration using water. For the same reasons as set out above for claim 6, claim 1 likewise represents an unallowable intermediate generalisation.

- 1.7 Consequently, the ground for opposition under Article 100(c) EPC prejudices the maintenance of the patent as granted.

Auxiliary requests 1 to 5

2. Auxiliary requests 1 to 5 differ from the main request as follows.
- 2.1 In auxiliary request 1, claims 1 and 5 differ from claims 1 and 6 of the main request in that the polymeric membranes are defined as PES spiral ultrafiltration membranes with a nominal molecular weight cut-off of about 5,000 Daltons.
- 2.2 In auxiliary request 2, claims 1 and 5 differ from claims 1 and 6 of the main request in that the evaporator (300) is restricted to a falling film evaporator.
- 2.3 Auxiliary request 3 is a combination of auxiliary requests 1 and 2.
- 2.4 In auxiliary request 4, claims 1 and 5 differ from claims 1 and 6 of the main request in that the pigment is defined as being selected from the group consisting of anthocyanins, carotenoids, betalains, curcumin, carminic acid, carminic acid derivatives, chlorophyll, and chlorophyll derivatives.

- 2.5 In auxiliary request 5, claims 1 and 6 differ from claims 1 and 6 of the main request by the addition of the feature "in the retentate". Independent claims 1 and 6 thus require that the concentration of pigment relative to sugar and organic acids is increased in the retentate.
3. During the oral proceedings before the board, the appellant was informed that at least the same reason as set out for the features of claim 1 of the main request appeared to apply to the corresponding claims of auxiliary requests 1 to 5. The appellant did not comment on this assessment. In the absence of any counter-arguments, the board concludes that auxiliary requests 1 to 5 do not meet the requirements of Article 123(2) EPC and are therefore not allowable.

#### Auxiliary request 6

4. Added matter - claim 1 - Article 123(2) EPC
- 4.1 Claim 1 of auxiliary request 6 differs from claim 1 of the main request in that:
- the diafiltration uses **water**;
  - the concentration of pigment relative to sugar and organic acids is increased **in the retentate**; and
  - the dried composition is milled through **a screening mill**.
- 4.2 The board acknowledges that:
- the feature "diafiltration using water" is disclosed in figure 2, reference sign (206) and in paragraph [0041] of the application as filed;

- the feature "in the retentate" is disclosed in paragraph [0041], first sentence of the application as filed; and
- the feature " through a screening mill" is disclosed in figure 3 of the application as filed.

However, claim 1 of auxiliary request 6 still does not comprise the step of recycling a portion of the retentate to the feed liquid tank. Consequently, the amendments made do not fully overcome the objection of unallowable intermediate generalisation set out for claim 6 of the main request.

4.3 Accordingly, claim 1 of auxiliary request 6 adds subject-matter contrary to Article 123(2) EPC, and auxiliary request 6 is not allowable.

5. Admittance of auxiliary request 6

5.1 Auxiliary request 6 was filed during the oral proceedings before the board. The board decided to admit this request into the proceedings. Since auxiliary request 6 is not allowable, there is no need for the board to provide reasons for its admittance.

6. Remittal - Article 111(1) EPC

As none of the appellant's requests meets the requirements of Article 123(2) EPC, there was no need to decide on the request for remittal of the case to the opposition division for further prosecution.

**Order**

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

1. The appeal is dismissed.

The Registrar:

The Chairman:



U. Bultmann

P. O'Sullivan

Decision electronically authenticated