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**Datasheet for the decision
of 10 June 2024**

Case Number: T 2363/22 - 3.3.09

Application Number: 14796363.1

Publication Number: 3065557

IPC: A23K40/30, A23K10/16,
A23K10/26, A23K20/147,
A23K20/26, A23K50/42

Language of the proceedings: EN

Title of invention:

DRY PET FOOD COMPRISING A PALATABILITY ENHANCING COATING

Patent Proprietor:

Mars, Incorporated

Opponent:

Société des Produits Nestlé S.A.

Headword:

Palatability enhancing coating/MARS

Relevant legal provisions:

EPC Art. 123(2), 70(1), 83, 56

Keyword:

Amendments - allowable (yes)

Sufficiency of disclosure - (yes)

Inventive step - closest prior art - (yes)

Decisions cited:

G 0002/21, T 0056/08



Beschwerdekammern

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Case Number: T 2363/22 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 10 June 2024

Appellant: Société des Produits Nestlé S.A.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
23 August 2022 concerning maintenance of the
European Patent No. 3065557 in amended form.**

Composition of the Board:

Chairman A. Haderlein
Members: F. Rinaldi
G. Decker

Summary of Facts and Submissions

I. This decision concerns the appeal filed by the opponent (appellant) against the opposition division's interlocutory decision to maintain the patent in amended form.

II. With its notice of opposition, the opponent had requested that the patent be revoked. The grounds for opposition it had invoked included Article 100(a) (lack of inventive step), 100(b) and 100(c) EPC.

III. The documents submitted during the opposition proceedings included:

D1: WO 2013/007639 A1

D2: WO 00/30456 A1

D15: Declaration by Mathieu Mao (dated 12 March 2021)

D16: Declaration by Mathieu Mao (dated 31 March 2022)

IV. With its reply to the statement setting out the grounds of appeal, the patent proprietor (respondent) filed three auxiliary requests. Auxiliary request 1 is the only request relevant to this decision.

V. Wording of the claims

Claims 1 and 9 of auxiliary request 1 are relevant to this decision. These claims read as follows:

"1. A dry pet food comprising 50-99.5 wt.% of a core and 0.5-50 wt.% of an external coating that covers at least a part of the core and that is composed of one or

more layers, including a covering layer that is located on the outside of the pet food, said dry pet food having a total water content of not more than 15 wt.%; said core containing:

- carbohydrates in a concentration of 20-90% by weight of the core, said carbohydrates including starch in a concentration of 5-50% by weight of the core;
- protein in a concentration of 10-50% by weight of the core;
- fat in a concentration of 0-40% by weight of the core;

said covering layer being composed of:

- 10-80 wt.% dry yeast extract;
- 0.5-30 wt.% of edible phosphate salt selected from pyrophosphate, triphosphate and combinations thereof by weight of the covering layer;
- 0-70 wt.% of other edible components;

wherein the dry yeast extract is contained in the covering layer in a concentration of 0.3-10%, preferably of 0.7-6% and most preferably of 1-3% by weight of the dry pet food and wherein the edible phosphate salt is contained in the covering layer in a minimum concentration of at least 0.1% by weight of the dry pet food, and in a maximum concentration that does not exceed 0.4% and preferably does not exceed 0.3% by weight of the dry pet food."

"9. A process of manufacturing a dry pet food according to any one of claims 1-7, said process comprising the successive steps of:

- providing a dough comprising 20-40 wt.% starch; 10-40 wt.% protein; and 15-45 wt.% water;
- extruding the dough employing extrusion temperatures that exceeds 105°C;
- optionally, applying one or more coating compositions onto the extrudate; and

• applying a palatability enhancing composition onto the optionally coated extrudate, said palatability enhancing composition containing yeast extract and edible phosphate salt selected from pyrophosphate, triphosphate and combinations thereof."

VI. The appellant's arguments, where relevant to this decision, can be summarised as follows:

- Claim 1 involved added subject-matter. The amendment in claim 1 that restricted the value ranges of the components of which the covering layer was composed was derived from a context in the application as filed in which the covering layer contained the components in the restricted value ranges. In addition, the amended range of 0.5 to 30 wt.% was not derivable from the application as filed.
- The invention was not sufficiently disclosed.
- The subject-matter of claim 1 lacked an inventive step starting from any one of control diet 2 of D1, experimental diet 2 of D1 or test ration R2 of D2. Yeast extract was not a distinguishing feature of claim 1. An improvement with respect to the lower phosphate content was not credible, even when D15 was taken into consideration. The problem was to provide an alternative dry pet food and the solution would have been obvious to the skilled person.

VII. The respondent's arguments, where relevant to this decision, can be summarised as follows:

- Claim 1 complied with Article 123(2) EPC. In the application as filed, "composed of" and "containing" had the same meaning. The amended

range was directly and unambiguously derivable from the application as filed.

- The appellant had not raised serious doubts substantiated by verifiable facts that the invention was reproducible.
- Irrespective of whether D1 or D2 was the closest prior art, the subject-matter of claim 1 involved an inventive step. The problem was to maintain or improve the palatability of a pet food composition. D15 demonstrated that the problem was solved. The solution would not have been obvious to the skilled person.

VIII. Final requests

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

The respondent requested as its main and sole request that the decision under appeal be set aside and that the patent be maintained in the following version:

Description:

Paragraphs 1-14, 16-18, 20-41, 43-45, 47, 49-55, 58, 60-90, 92, 94-121 of the patent specification

Paragraphs 15, 19, 42, 46, 48, 56, 57, 59, 91 and 93, filed by letter dated 12 February 2024

Claims:

No. 1 to 14 according to auxiliary request 1 filed with the reply to the statement setting out the grounds of appeal

Reasons for the Decision

1. *Patent*

1.1 The patent relates to a dry pet food which comprises a core and a palatability-enhancing coating that contains edible phosphate salt and yeast extract.

1.2 The application as filed discloses two embodiments of the palatability-enhancing coating: an "optimum palatability embodiment" and a "reduced phosphate embodiment". In the latter embodiment, the combination of yeast extract and phosphate salt is used to minimise the phosphate salt content, and the claims of the granted patent are directed to this embodiment.

1.3 In both the application as filed (page 8) and the patent (paragraph [0042]), the reduction in palatability resulting from the decrease in the phosphate salt content is stated to be compensated for by the impact of the yeast extract; that is, the yeast extract enhances the palatability contribution of the phosphate salt.

2. *Amendments*

2.1 The opposition division found that claim 1 as amended during the opposition proceedings complied with the requirement of Article 123(2) EPC.

2.2 The appellant contested this finding. While it acknowledged that the amendments were based on value ranges disclosed in the application as filed for the

"reduced phosphate embodiment", it raised the following objections.

- Claim 1 of the application as filed defined the composition of the covering layer using the term "composed of", which meant the same as "consisting of". However, the amendment added to this claim was based on passages of the description of the application as filed in which the term "containing" was used, which is "open" claim language. The amendment was therefore not allowable.
- There was no basis in the application as filed for an amount of phosphate salt in the covering layer of 0.5-30 wt.%. Instead, the amendment combined values from ranges with different levels of preference.

2.3 As to the first objection, there are three reasons why the appellant's arguments have not convinced the board, which are set out in the following.

2.4 First, the appellant did not convincingly explain why it believes that, generally, the term "composed of" means the same as "consisting of". It presented no tenable evidence for this allegation.

2.4.1 At the EPO, the term "consisting of" typically has a specific, confined meaning when used to define a list of elements in a claim. However, there is no generally accepted understanding within the EPO, let alone in the case law, that "composed of" has the same meaning as "consisting of". Decision T 56/08, to which the appellant referred, does not even mention the term "composed of", let alone give it a specific meaning.

- 2.4.2 Given that the premise of the appellant's argument is not correct, its reasoning does not hold either.
- 2.5 Second, neither the patent in suit itself nor the application as filed imposes the interpretation that "composed of" means "consisting of".
 - 2.5.1 The appellant's understanding that simply because two different terms are used, these terms must necessarily have different meanings is not supported by the disclosure of the application as filed.
 - 2.5.2 Instead, "composed of", "comprising" and "containing" are used in similar contexts and with synonymous meanings.
 - 2.5.3 This is clear from the first four lines of claim 1 of the application as filed alone, in which all three of these terms are used. It is not apparent that two different terms, i.e. "containing" and "comprising", have deliberately been used to indicate different meanings. Moreover, it cannot be seen that "composed of" is intended to have a different meaning from that of the other two terms used in the same passage. For instance, "composed of one or more layers" (line 2 of claim 1 of the application as filed) is not used to restrict the number of coating layers; instead, it leaves the number of layers open.
 - 2.5.4 Therefore, there is no indication in the patent or in the application as filed that the term "composed of", as used in claim 1, is to be interpreted in the same way as "consisting of".
 - 2.5.5 To be complete, the appellant further argued that in the published patent (the B1 publication), the term

"being composed of" was translated as "bestehend aus" in German and that this showed that the term "composed of" in the English text meant that no ingredient other than those explicitly mentioned was present in the covering layer.

2.5.6 However, it is the text of the European patent in the language of the proceedings (in this case English) that is considered to be the authentic text in any proceedings before the EPO (Article 70(1) EPC). Claims translated for information purposes cannot be used to give the authentic text a different meaning.

2.6 Third, it is assumed in the following, for the sake of argument, that "composed of" meant "consisting of", as asserted by the appellant.

2.6.1 Claim 1 of the application as filed discloses that the covering layer is composed of specified value ranges of dry yeast extract, edible phosphate salt and other edible components. According to the appellant's understanding, this claim is directed to a composition that consists of the three components with specific value ranges.

2.6.2 Now, the value ranges in claim 1 of the application as filed are broad. The amendment of this claim was intended to restrict these value ranges. The restricted, i.e. narrower, value ranges are disclosed in the application as filed on pages 9 and 10. While the value ranges are introduced on these pages as amounts of components that the covering layer "contains", the amendment cannot be said to infringe Article 123(2) EPC based on the following considerations.

2.6.3 The fact that the disclosure of the narrower value ranges is associated with the term "containing" would not stop the skilled person from considering this disclosure to be a valid basis for amending the broader value ranges. On the contrary, the skilled person would directly and unambiguously understand that the restricted (i.e. narrower) value ranges of the covering layer on pages 9 and 10 would equally apply in the context of the (allegedly) "closed" wording of the claim, within the meaning of "consisting of".

2.6.4 Furthermore, the appellant has not shown that there was any disclosure suggesting that the term "containing" does not implicitly encompass the notion of "consisting of" in the specific context of the application as filed. As is usual in the field of patents, the term "containing" in the application as filed simply expresses that further, undefined components may or may not be included.

2.7 Turning now to the objection that the value range of "0.5-30 wt.%" of edible phosphate salt adds subject-matter, the following observations are made.

2.7.1 The amendment is based on page 10, lines 10 to 12, of the application as filed. The passage reads:

"In the 'reduced phosphate embodiment' of the dry pet food, the covering layer of the pet food advantageously contains 0.2-30%, more preferably 0.5-25% and most preferably 1-20% by weight of the covering layer of the edible phosphate salt".

2.7.2 As the appellant itself acknowledged, the value range of 0.2 to (less than) 0.5 wt% of edible phosphate salt is not covered by claim 1 of the application as filed.

In its view, it followed from this that the ranges disclosed in the paragraph cited above had to be regarded as independently disclosed ranges. Hence, it was not permissible to combine the lowest value of the range disclosed in claim 1 of the application as filed with the upper limit of the range 0.2-30% on page 10 of the application as filed. The range specified in claim 1 therefore involved added matter.

2.7.3 However, claim 1 of the application as filed already points towards a covering layer that contains 0.5% by weight of an edible phosphate salt. In this claim, no distinction is made between the "optimum palatability embodiment" and the "reduced phosphate embodiment" of the application as filed. From this, the skilled person would directly and unambiguously understand that the application as filed requires a minimum concentration of 0.5% by weight of an edible phosphate salt for the "reduced phosphate embodiment". The combination of the specified minimum concentration with the maximum concentration of 30% by weight does not result in added subject-matter.

2.8 To conclude, the amendments in claim 1 of auxiliary request 1 comply with the requirement of Article 123(2) EPC.

3. *Sufficiency of disclosure*

3.1 The opposition division found that the invention fulfilled the requirement set out in Article 83 EPC.

3.2 The appellant contested this finding. In its view, the skilled person would not have known how to produce a stable product with the features of claim 1 because the patent did not comprise a working example with these

features. In example 1, the water content (before extrusion) was higher than that required by claim 1. As for claim 9, an undue burden was placed upon the skilled person to figure out when a composition was "palatability enhancing".

3.3 However, there is no convincing argument as to why the skilled person would have been prevented from producing an extruded kibble (i.e. the core) with the water content and features specified in claim 1. The appellant provided no verifiable evidence to support its submissions.

3.4 In more detail, the manufacture of kibbles is known in the art. Moreover, the extrusion step of example 1 is a cooking step, as a result of which the water content is necessarily reduced. The patent also explains this in paragraphs [0086] and [0087]. The experiment carried out by the respondent in D16 confirms what the skilled person would have expected: producing a kibble by extruding a dough leads to a reduction of the water content in the kibble obtained.

3.5 The appellant argued that determining when a composition was "palatability enhancing" constituted an undue burden on the skilled person. However, the description of the patent is primarily concerned with enhancing palatability. The features of claim 1 address the same aspect. The examples of the patent disclosed how palatability is tested. Therefore, this objection has failed to convince the board.

3.6 To conclude, the board sees no reason to disagree with the opposition division's assessment. The invention as set out in claim 1 of auxiliary request 1 fulfils the requirement set out in Article 83 EPC.

4. *Inventive step*

4.1 The opposition division concluded that the subject-matter of the main request before it involved an inventive step, regardless of whether the assessment was based on D1 or D2.

4.2 The appellant contested this decision. It presented a main line of argument based on D1 and a secondary line of argument starting from D2.

4.3 Closest prior art

4.3.1 The first step of the problem-solution approach is to determine the closest prior art.

4.3.2 The disclosure of D1 is a suitable starting point for assessing the inventive step of claim 1. The application as filed cited D1 as prior art, the opposition division gave more weight to this document in the contested decision, and the parties have continued to draw on D1 throughout the appeal proceedings.

4.3.3 The appellant wanted to start the assessment of inventive step from experimental diet 2 or control diet 2 of example 2 of D1. The question as to which one of the suggested starting points is more suitable does not have to be addressed here. The reason for this is that the relevant distinguishing features of claim 1 over the different embodiments of D1 are the same and the board acknowledges the presence of an inventive step, as will be seen in the following.

4.4 D2 is not a further suitable starting point

4.4.1 At this juncture, D2 has to be considered. The appellant was of the opinion that this document constituted a further suitable starting point for assessing inventive step. With respect to this line of argument, the following comments are made.

4.4.2 First, the appellant focused on D1 as its main argument. This indicates that D2 is less relevant as a starting point and that the attack based on D2 is to be understood to be a subsidiary line of argument.

4.4.3 Second, the composition of D2 that the appellant considers to be the starting point (test ration R2) comprises brewer's yeast and tetrasodium phosphate in the coating. However, the composition is not clearly disclosed. Test ration R2 is described with reference to control ration R1, but modifications have been made between rations R1 and R2; tetrasodium phosphate has been added to test ration R2 and the amount of coating disclosed in control ration R1 (2.25% by weight) has been modified. It is not clear whether the amount of coating has increased (to 2.5% by weight) or reduced (to 2% by weight), however. Assumptions have to be made. While it is understood that test ration R2 comprises 0.5% by weight of tetrasodium phosphate based on the product as a whole, the precise composition of the coating is ambiguous, as are the amounts of the active components based on the product as a whole.

4.4.4 Even if test ration R2 were to be used as the starting point, as asserted by the appellant, the conclusion on the inventive step of claim 1 would not be different. The reason for this is that the distinguishing features

of claim 1 over test ration R2 are (at least) those identified for experimental diet 2 and control diet 2 of D1 (see section 4.5 below). Thus, the same reasoning applies as that set out with respect to D1 and the same conclusion is reached. It should also be noted here that the appellant has not argued that entirely different considerations and reasoning would have been made if D2 was used as the starting point.

4.4.5 To summarise, the appellant insisted on providing and discussing different approaches for demonstrating obviousness. Yet it started its assessment from pieces of disclosure leading to the same distinguishing features, and applied analogous reasoning. No reason is apparent as to why the various approaches used would lead to different conclusions. Therefore, there is no reason to consider in detail the assessment starting from D2.

4.5 Distinguishing features over the closest prior art D1

4.5.1 D1 relates to palatability-enhancing compositions for pet foods. Example 2 discloses two dry cat food compositions (control diet 2 and experimental diet 2). Each one is coated with a palatability-enhancing composition that comprises brewer's yeast and trisodium pyrophosphate.

4.5.2 Irrespective of whether control diet 2 or experimental diet 2 is used as the starting point for assessing the distinguishing features, claim 1 differs (at least) in that:

- yeast extract is used (not brewer's yeast as in example 2 of D1)

- the edible phosphate salt is contained in the covering layer at a minimum concentration of at least 0.1% by weight and at a maximum concentration not exceeding 0.4% by weight of the dry pet food (in example 2 of D1 the concentration is 0.5% by weight)

- 4.5.3 In view of these two distinguishing features, in the following control diet 2 and experimental diet 2 will occasionally be referred to (jointly) as the closest prior art.
- 4.5.4 While there are further distinguishing features, such as the composition of the core, it is not necessary to identify them for the assessment of the obviousness of the subject-matter claimed. For instance, it is uncontested that the composition of the core of claim 1 is not relevant to the palatability of the kibble of claim 1. No technical effect has been ascribed to the composition of the core.
- 4.5.5 The appellant agreed that neither control diet 2 nor experimental diet 2 disclosed the edible phosphate salt concentration of claim 1.
- 4.5.6 However, the appellant argued that yeast extract did not constitute a distinguishing feature over the brewer's yeast disclosed in example 2 of D1. While it "does not contest that yeast and yeast extract are not one and the same thing" (letter dated 30 January 2024, page 5), its view was that yeast inherently comprised all of the components of yeast extract apart from the yeast's cell wall. Therefore, yeast extract was inherently disclosed in example 2 of D1.

4.5.7 However, the respondent correctly explained that yeast extract is a product commonly known in the art. The process for preparing yeast extract requires (among other process steps) separating cell walls from yeast. As the skilled person would have known, this process typically involves enzymatic and heating steps, among others, and leads to a water-soluble product. The properties of the yeast extract differ from those of the yeast from which it is produced. The fact that yeast extract and brewer's yeast are different products (in particular in terms of palatability) is clearly demonstrated by the comparison in D15 between a product comprising yeast extract (P1) and a product comprising brewer's yeast (P2).

4.5.8 In view of this, the (simplified) "equation" that the appellant proposes, namely:

$$\text{yeast extract} = \text{yeast} - \text{cell walls}$$

would not be accepted by the skilled person. It cannot be accepted by the board, either.

4.5.9 It follows from this that yeast extract (as well as the concentration thereof defined in claim 1) is a distinguishing feature of claim 1.

4.6 Technical effect and problem

4.6.1 The patent as granted does not contain data that specifically allows a direct comparison of the closest prior art with claim 1 for the purpose of establishing the technical effect(s) achieved by the invention.

4.6.2 However, as early as with its reply to the notice of opposition, the patent proprietor filed the declaration

D15, which includes comparative tests. These tests are intended to provide a basis for comparing the closest prior art with claim 1.

4.6.3 It is noted that the tests in D15 do not compare every composition that the opponent considered a starting point with the subject-matter of claim 1. However, in a situation where an opponent lodges several inventive-step attacks from various starting points, it is understandable that the patent proprietor might choose to formulate comparative compositions that address distinguishing features that all starting points have in common. Under these circumstances, the question to be answered is whether the set-up and formulation(s) chosen for the comparative tests are representative of the disclosure used as the starting point.

4.6.4 In the case in hand, the board found no indication that the set-up and formulations chosen in D15 are not suitable for demonstrating the effects of the distinguishing features on inventive step. The set-up is technically sound and the compositions tested allow credible conclusions to be drawn on the effect(s) caused by the distinguishing features.

4.6.5 In detail, in D15 four different coating compositions were tested, P1 to P4. The tests were carried out by offering cats kibbles coated with the composition to be tested and measuring the weight of product eaten. The two key components of coating compositions P1 to P4 that are varied (based on the total weight of dry pet food) are the following:

P1: 0.4% pyrophosphate / 1% yeast extract

P2: 0.4% pyrophosphate / 1% brewer's yeast

P3: 0.5% pyrophosphate / 1% yeast extract

P4: 0.5% pyrophosphate / 1% brewer's yeast

4.6.6 Manifestly, coating composition P1 is in accordance with claim 1. Coating composition P4 is representative of the closest prior art and comprises the two features that are not in claim 1: brewer's yeast and the higher concentration of pyrophosphate. The remaining two coating compositions, i.e. P2 and P3, are not representative of the prior art. They have been formulated and tested to illustrate the effect of each individual distinguishing feature (P2: brewer's yeast; P3: higher concentration of pyrophosphate).

4.6.7 D15 demonstrates that replacing brewer's yeast with dry yeast extract has the following effects, among others:

- improving palatability (comparison of weight eaten for compositions with coating compositions P1 vs. P4); and
- allowing the phosphate concentration to be reduced while simultaneously retaining palatability (comparison of weight eaten for compositions with coating compositions P1 vs. P3)

4.6.8 The appellant calculated that coating composition P4 (and P3) contained pyrophosphate in an amount of 33 wt.% based on the covering layer composition. However, in experimental diet 2 of D1, the covering layer was composed of 21 wt.% of pyrophosphate (i.e. within the range specified in claim 1). For this reason, it argued that coating composition P4 (and P3)

in D15 did not correspond to the composition of experimental diet 2 of D1.

- 4.6.9 However, as explained in section 4.6.3 above, a patent proprietor is not expected to provide comparative tests with respect to each and every starting point. Rather, the question to be answered is whether the set-up chosen supports the conclusion that a technical effect is credibly achieved, and in particular whether the comparative test is representative of the disclosure used as a starting point.
- 4.6.10 In this regard it is not convincing that the difference identified by the appellant has a decisive effect on the conclusions drawn from D15, let alone that it leads to results that lack technical meaning. In any case, the difference cannot lead to disregarding the effect demonstrated for the two distinguishing features that coating composition P4 addresses.
- 4.6.11 For completeness, the following observations are made. The kibbles made with coating composition P4 include a higher concentration of phosphate, based on the coating layer, than in experimental diet 2. Considering that phosphate is a palatant known in the art, the only technically conceivable effect that reducing the phosphate concentration in the covering layer (as in experimental diet 2 of D1) might have is that cats would perceive such a kibble to be even less palatable compared with what is reported in D15 for coating composition P4. Thus, it is not apparent that the formulation chosen for coating composition P4 would lead to distorted results that lack credibility.
- 4.6.12 The board's conclusion is that it is not apparent that the difference in the concentration of phosphate

renders the results of coating composition P4 meaningless. Moreover, there is no (experimental) evidence on file that would support any allegation along these lines.

- 4.6.13 The appellant also argued that there was no evidence that the effect observed in D15 for the higher concentration of phosphate in claim 1 would also be observed for the minimum concentration of at least 0.1% by weight of the dry pet food. The objection here is that the effect might not be obtained over the entire scope of claim 1.
- 4.6.14 However, comparative example 4 of the patent in suit demonstrates that the palatant yeast extract is remarkably more effective than pyrophosphate. In the experiments of this example, cats were offered food coated with 0.74% pyrophosphate by weight of the coated kibbles or 1% yeast extract by weight of the coated kibbles. While the amount of palatant is clearly higher with the kibbles coated with yeast extract (about 33% higher than with the pyrophosphate kibbles), the cats' preference for the kibbles coated with yeast extract was remarkably higher (about 300% higher than with the pyrophosphate kibbles).
- 4.6.15 In view of this, it is credible that concentrations of edible phosphate salt way below the highest concentration of claim 1 still provide an acceptable taste, provided the edible phosphate salt is combined with yeast extract, i.e. that the palatability is at least maintained in view of the closest prior art. The appellant has not provided any evidence supporting its allegation that no such effect would be observed at a concentration of 0.1% edible phosphate salt by weight of the dry pet food.

- 4.6.16 Finally, the appellant argued that the tests in D15 were carried out on cats, but nothing has been shown for other pets.
- 4.6.17 Here again, it is credible that the results obtained for cats, which are known to be sensitive when it comes to palatability, would also be observed for other pets, e.g. dogs. No evidence supporting the appellant's view is on file.
- 4.6.18 Although this point was not addressed by the appellant at the oral proceedings before the board, it is noted that in the case in hand, the board sees no reason to disregard the data presented after the date of filing of the patent, i.e. D15. It is recalled that the patent (in paragraph [0042]) and the application as filed disclose that:
- the combination of yeast extract and phosphate salt is used to minimise the phosphate salt content
 - the reduction in palatability resulting from the decrease in phosphate salt content is compensated for by the impact of the yeast extract
- 4.6.19 In view of this, the invention and the role of dry yeast extract and edible phosphate salt have been disclosed and explained. Therefore, the board is satisfied that the effects highlighted in D15 are, in the words of G 2/21 (OJ EPO 2023, 85), "encompassed by the technical teaching and embodied by the same originally disclosed invention". The data in D15 illustrates with respect to the specific closest prior art cited how yeast extract compensates for the decrease in phosphate concentration.

4.6.20 The problem formulated by the appellant, namely the provision of an alternative, does not take into account the patent's teaching in paragraph [0042] or the effects demonstrated. Likewise, the formulation of two partial problems with respect to the two distinguishing features, as had also been argued by the appellant in writing, is not permissible.

4.6.21 Instead, considering the technical effect demonstrated (see, in particular, section 4.6.7 above), the problem is to maintain or improve the palatability of a pet food composition.

4.7 Non-obviousness

4.7.1 Starting from the closest prior art, it is conceded that the skilled person might have envisaged replacing brewer's yeast with yeast extract. The skilled person might even have had reason to believe that doing this would have led to an improvement. However, the skilled person would not have considered simultaneously reducing the amount of phosphate while still expecting the palatability to improve, or at least not to be negatively affected.

4.7.2 Contrary to the appellant's view, there is no teaching in D1 or D2 leading to the solution of claim 1. While in these two documents low concentrations of phosphate are suggested and are possible, in principle, there is no indication that this can be done while maintaining palatability. The prior art contains no teaching to this effect, let alone when combined with the use of yeast extract.

4.8 Therefore, the subject-matter of claim 1 involves an inventive step (Article 56 EPC). The same considerations also apply to claim 9.

5. *Adaptation of the description*

The respondent provided an adapted description. The appellant did not raise any objections to the amendments made. The board also sees no reason to object to the adapted description.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent in the following version:

Description:

Paragraphs 1-14, 16-18, 20-41, 43-45, 47, 49-55, 58, 60-90, 92, 94-121 of the patent specification

Paragraphs 15, 19, 42, 46, 48, 56, 57, 59, 91 and 93, filed by letter dated 12 February 2024

Claims:

No. 1 to 14 according to auxiliary request 1 filed with the reply to the statement setting out the grounds of appeal

The Registrar:

The Chairman:



K. Götz-Wein

A. Haderlein

Decision electronically authenticated