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**Datasheet for the decision  
of 20 April 2007**

**Case Number:** T 0336/04 - 3.3.06

**Application Number:** 96903663.1

**Publication Number:** 0808151

**IPC:** A61K 7/50

**Language of the proceedings:** EN

**Title of invention:**

Personal care compositions and wipe products containing the compositions

**Patentee:**

THE PROCTER & GAMBLE COMPANY

**Opponent:**

Kimberly-Clark Worldwide, Inc.

**Headword:**

Wipe product / PROCTER

**Relevant legal provisions:**

EPC Art. 56

**Keyword:**

"Inventive step (all requests) - no: obvious modification"

**Decisions cited:**

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**Catchword:**

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Case Number: T 0336/04 - 3.3.06

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.06  
of 20 April 2007

**Appellant:** THE PROCTER & GAMBLE COMPANY  
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**Representative:** Gillard, Richard Edward  
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**Respondent:** Kimberly-Clark Worldwide, Inc.  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 11 December 2003  
revoking European patent No. 0808151 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** P.-P. Bracke  
**Members:** P. Ammendola  
A. Pignatelli

## Summary of Facts and Submissions

- I. This appeal is from the decision of the Opposition Division to revoke the European patent No. 0 808 151 granted on the European patent application 96 903 663.1 (international publication WO 96/24329).
- II. The Opponent had sought revocation of the patent in suit on the grounds of lack of novelty and inventive step (Article 100(a) in combination with Articles 52(1), 54 and 56 EPC) by relying, *inter alia*, on
- document (3) = US 5,043,155.
- III. The Opposition Division had revoked the patent because none of the amended sets of claims according to the then pending main and auxiliary requests of the Patent Proprietor complied with the requirements of the EPC. In particular, the claimed subject-matter that was found not already known in the prior art, was however found to represent an obvious alternative to the wipe products for perineal cleansing providing protection against diaper (perineal) dermatitis disclosed in document (3).
- IV. The Patent Proprietor (hereinafter Appellant) has lodged an appeal against this decision and has filed with the grounds of appeal sets of amended claims as main and auxiliary requests.

With a facsimile of 3 April 2007 it has than replaced all these requests by six new sets of amended claims, respectively labelled as main and first to fifth auxiliary requests.

V. For the present decision it is sufficient to consider claim 1 according to any of the versions in these last requests.

Claim 1 of the **main request** reads:

"1. A wipe product comprising a substrate and an emulsion composition, the wipe product characterized in that the composition comprises:  
(a) at least 90% by weight water;  
(b) 0.5% to 2.5%, by weight silicone oil; and  
(c) an emulsifier in an amount effective to emulsify said oil in said water; said silicone oil preferably comprising a dimethicone polymer having a viscosity of from 50 to 1000 mm<sup>2</sup>/s (centistokes), more preferably 350 mm<sup>2</sup>/s (centistokes); and said emulsifier being a polymeric emulsifier, preferably a carboxylic acid polymeric emulsifier, most preferably an acrylates/C10-C30 alkyl acrylate crosspolymer."

Claim 1 of the **first auxiliary request** differs from claim 1 of the main request only in that the wording "(c) an emulsifier in an amount effective to emulsify said oil in said water;" has been replaced by "(c) 0.05% to 0.5% by weight emulsifier;".

Claim 1 of the **second auxiliary request** differs from claim 1 of the first auxiliary request only in that the initial wording "A wipe product comprising" has been replaced by "A wipe product for personal care comprising".

Claim 1 of the **third auxiliary request** differs from claim 1 of the main request only in that the wording "*said emulsifier being a polymeric emulsifier, preferably a carboxylic acid polymeric emulsifier, most preferably an acrylates/C10-C30 alkyl acrylate crosspolymer.*" has been replaced by "*said emulsifier being a carboxylic acid polymeric emulsifier selected from a crosslinked homopolymer of an acrylic acid monomer or derivative thereof in which the acrylic acid has substituents on the two and three carbon positions independently selected from C<sub>1-4</sub> alkyl, -CN, -COOH, and mixtures thereof, a crosslinked copolymer having (i) a first monomer selected from an acrylic acid monomer or derivative thereof as defined above, a C<sub>1-4</sub> alcohol acrylate ester monomer or derivative thereof as defined above, and mixtures thereof, and (ii) a second monomer which has a C<sub>8-40</sub> chain alcohol acrylate ester monomer or derivative thereof as defined above, and combinations thereof.*".

Claim 1 of the **fourth auxiliary request** differs from claim 1 of the third auxiliary request only in that the wording "*(c) an emulsifier in an amount effective to emulsify said oil in said water;*" has been replaced by "*(c) 0.05% to 0.5% by weight emulsifier;*".

Claim 1 of the **fifth auxiliary request** differs from claim 1 of the fourth auxiliary request only in that the wording "*by weight emulsifier; said silicone oil preferably comprising a dimethicone polymer having a viscosity of from 50 to 1000 mm<sup>2</sup>/s (centistokes), more preferably 350 mm<sup>2</sup>/s (centistokes); and said emulsifier being*" has been replaced by "*by weight emulsifier; the emulsifier being*".

VI. Oral proceedings took place before the Board on 20 April 2007.

VII. The Appellant has conceded that claim 1 according to any of the versions in its requests would encompass wipe products for personal care providing protection against perineal dermatitis that differ from those disclosed in document (3) for the lower amount of silicone oil in the emulsion composition only. However, it has argued that these claimed products would represent no obvious alternative to this prior art, for the following reasons.

Document (3) required explicitly the minimum amount of silicone oil in the composition impregnating the substrate (hereinafter "the silicone minimum") to be "*about 3.0% by weight*". The skilled person would have no reason to disregard this requirement, even in the absence of any information in this citation as to whether a lower amount of silicone oil would still allow any acceptable protection against perineal dermatitis.

On the contrary, the skilled reader of document (3) would have reasonably concluded that the silicone minimum represented the lowest possible silicone amount providing acceptable protection against dermatitis (hereinafter "the minimum protective amount") because, as evident from paragraph 6 of document (3) itself, the authors of this citation paid explicit attention to the cost of the compositions and, thus, were certainly also interested in lowering as much as possible the fraction of the most expensive ingredients such as the silicone oil.

In any case, the silicone minimum in document (3) should be interpreted also considering the common general knowledge - recognised in the patent too and undisputed by the Respondent - that silicone oils would provide no protective effect at all when used at very low amounts, such as 0.01% by weight or less.

Finally, in a complex technical field like that of perineal wipe products, the skilled person would expect that even minor variations in their structure might produce unpredictably significant changes in their properties.

VIII. The Respondent has refuted these arguments by maintaining, *inter alia*, that it is conventional in this technical field to search for alternatives to patented products by changing slightly the compositions thereof. In the absence in document (3) of any indication as to the reasons of the required silicone minimum, the skilled reader of this citation would have expected that lesser amounts of silicone oil would still have provided some, possibly reduced, but still acceptable protection against perineal dermatitis.

IX. The Appellant has requested that the decision of the first instance be set aside and that the patent be maintained in amended form on the basis of the claims according to the main request, or alternatively of any of the first to fifth auxiliary requests, all requests as filed under cover of the facsimile of 3 April 2007.

The Respondent has requested that the appeal be dismissed.

## **Reasons for the decision**

*Inventive step (Article 100(a) EPC in combination with Articles 52(1) and 56 EPC) for all Appellant's requests*

1. Relevance of the Respondent's objection based on document (3) for all Appellant's requests.

As explicitly admitted by the Appellant, claim 1 of the Respondent's main request as well as claim 1 of the first to fifth auxiliary requests (see above section VII of the Facts and Submissions) define wipe products only differing from those already disclosed in document (3) in that the amount of silicon oil in the emulsion composition ranges from 0.5% to 2.5% by weight (of the composition), i.e. below the silicone minimum disclosed in claim 1 and the paragraph bridging columns 2 and 3 of document (3).

Hence, the Respondent's objection based on this document applies to all the Appellant's requests.

Therefore, it will be sufficient in the present case to indicate the reasons for which the Board has concluded that it was obvious for the skilled person to reduce the amount of silicone oil in the emulsion compositions of document (3) to 2.5% by weight, as this evidently implies that the subject-matter of all requests of the Appellant does not involve an inventive step.

2. *Inventive step assessment*

- 2.1 The Board concurs with the parties that the wipe products disclosed in document (3) represent a



reasonable starting point for the assessment of inventive step because they address the same technical problem addressed in the patent in suit, i.e. to deliver onto the skin a silicone layer protective against perineal dermatitis.

- 2.2 The Board concurs with the parties that the claimed wipe products differ from this prior art only in the lower amount of silicone oil.

The Board notes, however, that the patent in suit provides no element rendering credible that the presently claimed wipe products achieve a level of skin protection superior or at least equal to that already achieved in the relevant prior art. The Board notes also that, despite the extreme structural similarity of the claimed wipe products to those of the prior art, the Appellant has provided neither additional experimental comparisons nor theoretical arguments which would allow to rank the level of protection achieved by the former vis-à-vis that obtained by the latter.

On the other hand, document (3) attributes to the wipe products disclosed therein the capability to provide protection effect against perineal dermatitis (see in document (3) column 2, lines 44 to 47, "...a *substantially highly protective residue on the skin...*"). However, this citation does not indicate if the level of protection actually ensured by all these wipe products represents the minimum acceptable level for such protection (or a level superior to such minimum).

Therefore, the Board has no reason for concluding that the presently claimed wipe products are necessarily at

least as effective as (or necessarily more effective than) those of document (3) in protecting the perineal skin against diaper dermatitis.

Accordingly, it only appears that the presently claimed wipe products provide qualitatively, but not necessarily also quantitatively, the same protective effect provided by those disclosed in document (3).

Hence, the sole technical problem credibly solved by the claimed wipe products vis-à-vis those of the relevant prior art is that of **rendering available further wipe products providing protection against perineal dermatitis.**

2.3 The Board considers that a skilled person aiming only at a qualitative alternative to the prior art wipe products, i.e. aiming at any acceptable level of protection against perineal dermatitis even if this would possibly be lower than the level already achieved in the prior art, would consider obvious to try **any** modification of the emulsion compositions used in the wipe products of the prior art that appear at least possibly compatible with some protection effect.

2.4 It remains therefore to be established whether or not the skilled person would have considered reducing the amount of silicone oil below the minimum disclosed in document (3) as a modification that is possibly compatible with some protection against perineal dermatitis.

2.4.1 The Board notes that document (3) does not indicate the reasons as to why the authors of this citation have considered appropriate to indicate "*about 3.0% by weight*" as the lowest value for the silicone oil amount.

Hence, the skilled reader of document (3) can only reasonably presume that as long as the amount of the silicone oil in the emulsion composition is at least about 3.0% the level of protective effect **desired by the authors of this citation** is certainly obtained.

However, in the opinion of the Board, this does not amount to a suggestion that the lowest protection level obtained by this wipe products is necessarily the minimum acceptable and, thus, does not imply that any further reduction of the silicone oil amount below the silicone minimum in document (3) is likely to disrupt any protective effect.

- 2.4.2 Instead, the Appellant has considered that the skilled reader of document (3) would reasonably **expect** that the silicone minimum given therein resulted from the economical considerations which would necessarily have lead the authors of this citations to disclose the less expensive wipe products providing the minimum acceptable level of protection. As evidence in favour of this interpretation the Appellant has referred to the relevance attributed to economical considerations in column 5, lines 6 to 8, of document (3).

The Board notes, however, that the sentence referred to by the Appellant not only refers to an ingredient different from the silicone oil, but proves that, in general, the ingredient costs may not be the sole element to be taken into consideration (indeed, the cited sentence indicates as advantages of a very low amount of emulsifying agent not only a cost reduction but also the avoidance of skin irritation).

In any case, the sentence referred to in the Appellant's reasoning does not prove that in the case of the silicone ingredient costs had been the sole reason for the silicone minimum in document (3). In particular, it does not render improbable the possible existence of other reasons - as relevant as the ingredient cost or even more relevant - which could have motivated the authors of this citation in defining the desired silicone minimum. It is, for instance, not apparent to the Board how the cited portion of document (3) would render unlikely a possible interest of the authors of document (3) in obtaining more competitive wipe products, and thus in ensuring a level of skin protection superior to the minimum acceptable level thereof. Hence, even in view of the possible relevance of cost reasons it cannot be excluded that the silicone minimum in this citation could define a quantity of silicone higher than the minimum protective amount.

2.4.3 The Appellant has also submitted that the well known fact, explicitly recalled in paragraph 6 of the patent in suit and undisputed by the Respondent, that at amounts below 0.01% by weight of the emulsion composition the silicone oil would provide no significant protection benefits, would render evident that the silicone minimum disclosed in document (3) represented the reasonable prediction of the authors as to the minimum protective amount.

The Board concurs with the Appellant that, in the absence in document (3) of any reasons justifying the given silicone minimum, the skilled person could rely on the common general knowledge. However, even if paragraph 6 of the patent in suit would disclose common

general knowledge in the field, still this referred to amounts of less than 0.01% by weight, i.e. amounts so small to allow no reasonable prediction as to whether the minimum protective amount would already lay at about 3.0% of silicone oil, (i.e. the value disclosed in document (3)), rather than at silicone amounts of 2.5%, 1% or even 0.5% (i.e. as in the range given in the present claims).

Thus, this common general knowledge would have no possible influence on deciding if document (3) leads away from reducing the amount of this ingredient to 2.5% (or any other amount well above 0.01%) by weight.

2.4.4 The Appellant has finally alleged that in a complex technical field like that of perineal wipe products, the skilled person would expect that even minor variations in their structure might result in unpredictably significant changes in their properties.

However, the Appellant has provided no support for such allegation, and such statement is too general to appear certainly relevant in the present case. Moreover, this alleged general prejudice against any modification of previously described wipe products has been contested by the Respondent, who as argued that, on the contrary, it would be conventional in this technical field to successfully search for alternatives to already described products by attempting small modifications of their compositions and, in particular, to investigate the criticality of the end points of the generic compositional ranges given in the prior art patents.

2.4.5 For all the above reasons the Board concludes that the skilled person would consider possible that a slight reduction to e.g. 2.5% by weight of the amount of silicone oil in the emulsion composition disclosed in document (3) could still result in protection against perineal dermatitis. Hence, it was obvious for the skilled person, searching for a qualitative alternative to the prior art disclosed in document (3), to attempt to solve the posed technical problem by such modification, thereby arriving at the claimed wipe products.

2.5 Thus, and taking into account the considerations already made above (see point 1), the Board concludes that the subject-matter of claim 1 according to any of the versions in the main request or first to fifth auxiliary requests of the Appellant does not involve an inventive step. Hence, none of these requests is found to comply with the requirements of Articles 52(1) and 56 EPC.

## **Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:

G. Rauh

P.-P. Bracke