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**Datasheet for the decision
of 19 February 2009**

Case Number: T 1109/06 - 3.3.07

Application Number: 00955627.5

Publication Number: 1204397

IPC: A61K 7/00

Language of the proceedings: EN

Title of invention:

Discontinuous films for skin care compositions

Applicants:

THE PROCTER & GAMBLE COMPANY

Headword:

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Relevant legal provisions:

EPC Art. 84

Relevant legal provisions (EPC 1973):

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Keyword:

"Clarity (no)"

Decisions cited:

-

Catchword:

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Case Number: T 1109/06 - 3.3.07

D E C I S I O N
of the Technical Board of Appeal 3.3.07
of 19 February 2009

Appellants:

THE PROCTER & GAMBLE COMPANY
One Procter & Gamble Plaza
Cincinnati, Ohio 45202 (US)

Representative:

Wilding, Richard Alan
Procter & Gamble Technical Centres Limited
Patent Department
Rusham Park
Whitehall Lane
Egham, Surrey TW20 9NW (GB)

Decision under appeal:

Decision of the Examining Division of the
European Patent Office posted 18 April 2006
refusing European application No. 00955627.5
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: S. Perryman
Members: F. Rousseau
G. Santavicca

Summary of Facts and Submissions

- I. The appeal lies from the decision of the Examining Division refusing European application No. 00 955 627.5, entitled "Discontinuous films from skin care compositions", filed as international application No. PCT/US00/22545 on 17 August 2000 and published as WO 01/12137.
- II. The decision was based on an amended set of nine claims submitted with letter dated 22 June 2004, independent claim 1 thereof reading as follows :
- "1. A discontinuous film formed from a topical composition, the composition comprising one or more powder materials dispersed in a carrier comprising at least one liquid diluent, wherein the film has an average particle size as defined in the description on page 9 of from 0.5 to 150 microns, an average spacing between particles of at least about 3 microns, and a coverage value of 80% or less, the particle size, particle spacing and coverage value being determined according to the methods herein."
- III. The application was refused on the grounds that the claimed subject-matter was not susceptible of industrial application (Articles 52 and 57 EPC) and that claim 1 lacked clarity contrary to the requirements of Article 84 EPC.
- IV. The notice of appeal was filed on 9 June 2006, and the appeal fee paid the same day. With their statement setting out the grounds of appeal dated 4 July 2006, the appellants requested that the decision under appeal

be set aside and that the patent be granted on the basis of the claims on which the decision had been based. Auxiliary, oral proceedings were requested should the Board not be in the position to allow the main request.

V. In response to the summons to attend oral proceedings, the appellants withdrew by letter of 15 December 2008 their request for oral proceedings and informed the Board that they would not attend oral proceedings, should they take place as scheduled. They also declared that they did not wish to add to the facts, arguments and evidence on file.

VI. In a communication of the Board dated 22 December 2008, the subject-matter defined in claim 1 was among others objected to for lack of clarity. Reference was in particular made to the definition of the term "film" in the third edition of the Collins English Dictionary (1991). The appellants were also informed that the oral proceedings would take place on 19 February 2009 as scheduled.

VII. No reply to the Board's communication was submitted by the appellants, who did not attend oral proceedings as announced in their letter of 15 December 2008.

VIII. The arguments of the appellants submitted in writing, as far as they are relevant to the present decision, can be summarised as follows:

(a) Present claim 1 claims a discontinuous *in situ* film, which is preferably deposited by electrostatic spraying. Films of this type may provide sufficient

coverage to obscure underlying imperfections while at the same time not providing such extensive coverage as to bestow a totally artificial look.

(b) The word "film" may be defined as "a thin covering or coating" in view of the second definition given in the Webster's online dictionary <http://www.merriam-webster.com/dictionary/film>. In the light of this definition, the presence of volatile liquid with the film would not seem to be relevant.

IX. No further set of claims has been submitted, so that the appellants' sole request is that the decision under appeal be set aside and that a patent be granted based on the claims as filed by letter dated 22 June 2004.

X. At the end of the oral proceedings the decision of the Board was pronounced.

Reasons for the Decision

1. The appeal is admissible.
2. Claim 1 relates to a discontinuous film formed from a topical composition, the composition comprising one or more powder materials dispersed in a carrier comprising at least one liquid diluent. The film is furthermore defined to have an average particle size as defined in the description on page 9 of from 0.5 to 150 microns, an average spacing between particles of at least about 3 microns, and a coverage value of 80% or less, the

particle size, particle spacing and coverage value being determined according to the methods herein.

3. According to the definitions provided respectively in the third edition of the Collins English Dictionary (1991) and in the Webster's online dictionary, a film is "a thin coating or layer" or "a thin covering or coating". Nothing in claim 1, however, defines such a coating, covering or layer, as neither its thickness, nor its area, nor its weight per unit area is given. Rather the claim refers to particles scattered on an (unidentified surface) and this is in contradiction to the normal understanding of a film. Claim 1 refers to particles of average size from 0.5 to 150 microns, which have a minimum average spacing of at least 3 microns and a coverage value of at most 80%. The absence of any maximum spacing or any minimum coverage value results in a definition of a product which covers isolated particles of the specified size however widely scattered on a surface, which is in contradiction to any conceivable notion of a film, but the claim provides nothing allowing this contradiction to be resolved. Whereas discontinuous areas of film or films with holes are imaginable, a discontinuous film as presently defined in claim 1 does not have any clear meaning, as it cannot be determined for example what should be the minimum amount of coverage required to consider the ensemble of scattered particles presently defined to represent a film within the meaning of the present invention. Appellants' explanation that the films may provide sufficient coverage to obscure underlying imperfections does not help to resolve this clarity issue. Moreover, it is not clear whether the claimed product allows the presence in the film of any liquid

diluent, as according to the description the diluent may be volatile. In other words, it is not clear whether the claim is directed only to an intermediate stage when the liquid diluent is still present or to the dry rest when the liquid has evaporated.

4. The subject-matter as defined in present claim 1 lacks therefore clarity contrary to the requirements of Article 84 EPC. The sole request is thus refused.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar

The Chairman

C. Eickhoff

S. Perryman