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**Datasheet for the decision
of 18 October 2021**

Case Number: T 0076/19 - 3.3.06

Application Number: 12726951.2

Publication Number: 2850168

IPC: C11D3/50, C11D17/00, C11D17/04,
C11D1/94

Language of the proceedings: EN

Title of invention:
Multiphase surfactant fragrance composition

Patent Proprietor:
Colgate-Palmolive Company

Opponent:
THE PROCTER & GAMBLE COMPANY

Headword:
Composition comprising two structured phases/COLGATE-PALMOLIVE

Relevant legal provisions:
EPC Art. 54, 56
RPBA Art. 12(4)

Keyword:

Novelty (main request) - (yes)

Inventive step (main request) - (yes)

New line of reasoning for inventive step submitted for the first time during appeal - not admitted

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0076/19 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 18 October 2021

Appellant: Colgate-Palmolive Company
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 13 November
2018 revoking European patent No. 2850168
pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman J.-M. Schwaller
Members: L. Li Voti
C. Heath

Summary of Facts and Submissions

- I. The patent proprietor's appeal is against the decision of the opposition division to revoke European patent no. 2850168.
- II. With its grounds of appeal the appellant maintained all the requests filed before the opposition division and submitted inter alia that claim 1 of the main request was novel over **D2** (US 6 288 015 B1) and involved an inventive step taking **D1** (WO 2006/088535 A1), **D7** (V. Normand et al., "*Modelling perfume deposition on fabric during a washing cycle: theoretical approach*", *Flavour Fragr. J.*, 2008, 23: 49-57) or **D9** (WO 2005/017085 A1) as closest prior art. The appellant also requested that oral proceedings be held in the event that the board did not intend to maintain the opposed patent based on the main request.
- III. In its reply the opponent (also respondent) maintained inter alia that claim 1 of the main request lacked novelty and inventive step over D2 and requested that the proprietor's appeal be dismissed and that oral proceedings be appointed prior to any other decision.
- IV. With a further letter the appellant maintained its arguments and submitted that, even when considering D2 as closest prior art, the claimed subject-matter involved an inventive step.
- V. The parties were summoned to oral proceedings.
- VI. In response to the preliminary opinion of the board that claim 1 of the main request was novel and involved an inventive step, the **respondent** replied with letter

dated 23 March 2021 as follows: "... *The respondent conditionally withdraws its request for oral proceedings, on the condition that the patent is maintained on the basis of one of the requests currently on file (i.e. the main request filed on 2 November 2017; the first auxiliary request filed on 7 August 2018; the second auxiliary request filed on 23 October 2018 at oral proceedings; and the third auxiliary request filed on 23 October 2018 at oral proceedings).*"

The board then decided to cancel the oral proceedings.

VII. From the written submissions of the parties, the board understands the final requests to be as follows:

The Appellant requests that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the main request filed with letter of 2 November 2017 or, auxiliary of any one of auxiliary request I filed with letter of 7 August 2018 or of auxiliary requests II or III, both filed during the oral proceedings before the opposition division on 23 October 2018.

The Respondent requests that the appeal be dismissed.

VIII. Claim 1 according to the main request reads as follows:

"1. A multicomponent composition comprising a first phase comprising at least one surfactant chosen from anionic surfactants, amphoteric surfactants, zwitterionic surfactants, cationic surfactants, and nonionic surfactants, wherein an amount of nonionic surfactant is less than 75% by weight of all surfactant in the first phase, and a second phase comprising

fragrance, wherein the first phase comprises at least 75% by weight of all surfactant in the first phase and the second phase, wherein the second phase comprises at least 75% by weight of all fragrance in the first phase and second phase, wherein the composition is an aqueous, liquid composition, and wherein the composition includes an anionic surfactant and optionally, an amphoteric and/or zwitterionic surfactant, and wherein the first phase and the second phase are in physical contact with each other and each are structured to have a yield stress that does not allow more than 50% by weight of each phase to mix with the other phase."

Dependent claims 2 to 9 concern particular embodiments of the claimed multicomponent composition; claim 10 concerns a method of providing an increased fragrance release from a surfactant and fragrance containing composition comprising separating the surfactant and fragrance into a multicomponent composition according to any of the preceding claims; and claim 11 concerns the use of the multicomponent composition of any of claims 1 to 9 to increase fragrance delivery compared to a single component composition having the same amount of surfactant and fragrance.

Reasons for the Decision

1. In reply to the communication under Article 15(1) RPBA of 8 March 2021 expressing the board's preliminary opinion, the respondent withdrew its request for oral proceedings on condition that the patent would be maintained on the basis of one of the requests currently on file.

In the absence of any new facts or arguments, the board does not see any reason to diverge from its preliminary opinion that the subject-matter of the claims according to the main request was novel and inventive over the cited prior art as exposed in the following.

2. Main request - Novelty (Article 54 EPC)

2.1 Claim 1 of this request concerns an aqueous liquid composition including **at least an anionic surfactant** and comprising **two phases** in physical contact with each other, **each phase being structured** to have a yield stress that does not allow more than 50% by weight of each phase to mix with the other phase, wherein

- **the first phase** comprises **at least 75%** by weight of all surfactants in the two phases;
- the surfactant in **the first phase** is chosen from anionic, amphoteric, zwitterionic, cationic and nonionic surfactants;
- the amount of nonionic surfactant in **the first phase** (if present) is **less than 75%** by weight of all surfactant in the first phase;
- the **second phase** comprises **a fragrance**, whose content is **at least 75%** by weight of all fragrances present in the two phases.

2.2 In the decision under appeal the subject-matter of claim 1 was found to lack novelty over claim 51 of D2. This objection was also maintained by the respondent.

2.2.1 The board notes that claim 51 of D2 is dependent on claim 1 concerning a liquid multiphase cleaning composition containing an aqueous phase and a non-aqueous phase immiscible with the aqueous phase which can be temporarily converted into an emulsion by shaking and wherein the composition comprises at least

one lignin sulfonate, i.e. an anionic surfactant (see D2: column 3, lines 61-62). Therefore, the cleaning composition of claim 51 comprises an anionic surfactant and has two phases in physical contact with each other.

In particular claim 51 discloses that the composition consists of 70-95% by volume of the aqueous phase and 5-30% of the non-aqueous phase.

The **aqueous phase** comprises 0.01-10% by weight of anionic surfactant and 0.1-1.5% by weight of lignin sulfonate, thus **0.11-11.5% by weight total anionic surfactant, 0-3% nonionic surfactant, 0-0.2% perfume, 0-0.5% of a viscosity regulator**, which is a structuring agent (see column 7, lines 21-27), optionally water-soluble additives for reducing the rain and/or film effect, water-soluble organic solvent, volatile alkali, and an amount of water to complete the aqueous phase to 100%.

The **non-aqueous phase** comprises 0-100% aliphatic gasoline hydrocarbons, **0-100% terpene hydrocarbons, which is a fragrance** (column 5, lines 24-26), **0-5% nonionic surfactant**, 0-5% of an alkoxyated aromatic dihydroxy additive, and **0-1% perfume**, wherein the sum of aliphatic gasoline and **terpene hydrocarbons** completes the non-aqueous phase to 100%.

2.3 From the above it is clear that claim 51 thus encompasses compositions wherein **the non-aqueous phase consists of only fragrance (terpene hydrocarbons)**. By considering that the minimum amount for the non-aqueous phase is 5% by volume of the total composition and the maximum possible amount of fragrance in the aqueous phase is 0.2% by weight, **the amount of fragrance in the non-aqueous phase necessarily amounts in this case to**

more than 75% by weight of the overall fragrance, as required for the second phase of claim 1 at issue. However, the non-aqueous phase may be substantially based on aliphatic gasoline hydrocarbons and not comprise any fragrance at all.

Furthermore, the aqueous phase, which corresponds to the first phase of claim 1 at issue, may comprise at least 75% of the overall surfactant of the two phases as required by claim 1 at issue, if the amount of anionic surfactants (0.11-11.5%) and optional nonionic surfactant (0-3%) in the aqueous phase is sufficiently high with respect to the amount of the optional nonionic surfactant (0-5%) in the non-aqueous phase, taking into account the respective volume of each phase. Moreover, the amount of nonionic surfactant in the aqueous phase (0-3%) may be less or more than 75% of overall surfactant in this phase depending on the relative amounts of the anionic surfactants (0.11-11.5%).

2.4 It follows that various selections are to be made to arrive at an embodiment encompassed by the generic disclosure of claim 51 and which also contains all the compositional requirements of claim 1 at issue. Claim 51 thus does not directly and unambiguously disclose in combination all features of claim 1 at issue.

2.5 The board notes additionally that, even though the aqueous phase of D2 may be structured because of the possible presence of the viscosity regulator, the non-aqueous phase is not structured since it does not comprise any structuring agent. Therefore, both phases cannot have a yield stress that does not allow more than 50% by weight of each phase to mix with the other phase as required in claim 1 at issue.

Hence, also for this reason the combination of features of claim 1 at issue is not directly and unambiguously disclosed in said claim 51.

2.6 It follows that the subject-matter of claim 1 of the main request (and by the same token that of claims 2 to 11, which depend thereon or are related thereto) is therefore novel over claim 51 of D2.

3. Main request - Inventive step (Article 56 EPC)

3.1 According to the patent (paragraph [0002]), in surfactant-containing cleansing compositions a large portion of the fragrance can be solubilised by the surfactant and is thus not released during use. Therefore, the goal of the invention is to deliver more fragrance so that the amount of fragrance can be reduced and costs minimised.

3.2 During opposition only documents D1, D7 and D9 were discussed as possible starting points for the evaluation of inventive step. For the parties D7 (for the appellant) or D2 (for the respondent) represent respectively the closest prior art.

3.2.1 The board notes that D1 concerns unit dose liquid detergent packages containing two layer liquid detergent compositions exhibiting good storage stability both in product consistency and colour (paragraph bridging pages 1-2; page 2, first and last full paragraph). D1 thus does not have the same purpose as the patent in suit.

3.2.2 D2 concerns (column 2, lines 52-60) the provision of high-performance, storage-stable and easy-to-handle compositions for cleaning hard surfaces which show

separate phases, which can be converted into an emulsion for application and remain homogenous during application and then revert to separate phases and so develop an anti-rain and anti-film effect onto the treated surface. D2 thus also does not have the same goal as the patent in suit.

- 3.2.3 D7 (title and page 49, right column, last paragraph) relates to modelling perfume deposition on fabric during a washing cycle. In particular, D7 concerns the effect of surfactant micelles on the deposition of perfume molecules on fabric (abstract and page 55), and so represents a scientific study on the mechanism of perfume deposition during washing in the presence of a surfactant but this document does not address the purpose of the patent either.
- 3.2.4 D9 concerns (page 1, line 31 to page 2, line 17; page 3, line 19 to page 4, line 17) the provision of fragranced aminoplast or coacervate microcapsules wherein the perfume is more stable in presence of a liquid surfactant formulation and the capsules prevent the perfume to be easily released therefrom. Thus also D9 does not deal with the same goal as the patent.
- 3.2.5 It follows that **none** of these documents concerns the provision of a surfactant-containing composition able to deliver more fragrance so that the amount of fragrance can be reduced and costs minimised.
- 3.2.6 The board notes that D2 having never been used as closest prior art during opposition proceedings, its late identification as closest prior art amounts to a new line of reasoning that could have been brought earlier, in particular before the opposition division. This new line of reasoning thus represents a fresh case

for which the board exercises its discretion not to admit it into the proceedings under Article 12(4) RPBA 2007.

- 3.2.7 Considering that D7 and D9 are the only documents addressing perfume delivery to the fabric, anyone can thus represent a suitable starting point for the evaluation of inventive step, with the consequence that the technical problem is to be formulated as indicated in the patent, namely as the provision of a surfactant-containing composition able to deliver more fragrance so that the amount of fragrance can be reduced and costs minimised.
- 3.2.8 The board notes that in the absence of evidence to the contrary, it has no reason to assume that this technical problem has not been solved by means of the composition of claim 1 at issue.
- 3.3 As to the question whether the solution proposed by claim 1 was obvious or not from the prior art, the board notes that neither the disclosure of D9 nor that of D7 would have prompted the skilled person to depart from their teachings requiring either the use of a composition including two phases in physically separated compartments (D9, page 4, lines 17-24) or the choice of a perfume having a selected logP (D7, page 55) and to use instead a composition comprising **two structured phases in physical contact with each other** and having the compositional requirements of claim 1 at issue in order to solve the technical problem posed.
- 3.3.1 In the absence of any reasoning from the respondent concerning inventive step starting from D7 or D9, the board has no reason not to accept the appellant's

arguments submitted in this respect in its grounds of appeal and its letter of 17 September 2019.

3.4 For the sake of completeness, the board notes that the same conclusion would be reached by considering the reasoning put forward by the respondent and based on D2, because the latter does not contain any disclosure which would have prompted the skilled person to select, among the multiple alternatives offered by the broader composition of claim 51, a combination of aqueous and non-aqueous phases complying with all the requirements of claim 1 at issue with the expectation of arriving at a surfactant-containing composition having improved fragrance delivery so that the amount of fragrance can be reduced and costs minimised.

3.5 The board therefore concludes that the subject-matter of claim 1 of the main request (and by the same token that of claims 2 to 11 depending thereon or related thereto) was not obvious for the skilled person from the known prior art, and so involves an inventive step under Article 56 EPC. The the claims according to the main request of 2 November 2017 thus comply with all the requirements of the EPC, and so the proprietor's appeal succeeds.

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 on the basis of claims 1 to 11 according to the main request filed on 2 November 2017 with a description to be adapted where appropriate.

The Registrar:

The Chairman:



D. Hampe

J.-M. Schwaller

Decision electronically authenticated