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**Datasheet for the decision  
of 5 October 2022**

**Case Number:** T 0557/20 - 3.3.07

**Application Number:** 09790888.3

**Publication Number:** 2309970

**IPC:** A61K8/03, A61K8/06, A61Q5/02,  
A61Q19/10, A61K8/02

**Language of the proceedings:** EN

**Title of invention:**  
MULTIPHASE PERSONAL CARE COMPOSITION WITH ENHANCED DEPOSITION

**Patent Proprietor:**  
The Procter & Gamble Company

**Opponent:**  
Henkel AG & Co. KGaA

**Headword:**  
Multiphase personal care composition / P&G

**Relevant legal provisions:**  
RPBA 2020 Art. 12(3), 13(2)  
EPC Art. 56

**Keyword:**  
Amendment after summons - exceptional circumstances (no)  
Inventive step - (yes)



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Case Number: T 0557/20 - 3.3.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.07**  
**of 5 October 2022**

**Appellant:** Henkel AG & Co. KGaA  
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**Respondent:** The Procter & Gamble Company  
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**Representative:** P&G Patent Germany  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
13 December 2019 concerning maintenance of the  
European Patent No. 2309970 in amended form.**

**Composition of the Board:**

**Chairman** A. Uselli  
**Members:** J. Lécaillon  
A. Jimenez

## Summary of Facts and Submissions

- I. European patent EP 2 309 970 (hereinafter "the patent") was granted on the basis of 15 claims. The independent claims of the patent as granted relate to multiphase personal care compositions.
- II. An opposition was filed against the patent on the grounds that its subject-matter lacked novelty and inventive step, it was not sufficiently disclosed and it extended beyond the content of the application as originally filed.
- III. The opposition division took the interlocutory decision that, on the basis of the amended main request filed on 27 September 2019, the patent met the requirements of the EPC. The independent claims of said main request read as follows:

"1. A multiphase personal care composition comprising:

- a. a structured surfactant phase comprising:
- i. from 5% to 30%, by weight of said multiphase personal care composition, of a mixture of lathering surfactants;
  - ii. a lamellar inducing agent;
  - iii. a cationic polymer selected from the group consisting of a cationic guar, a cationic guar derivative and mixtures thereof;
- b. an oil continuous benefit phase comprising:
- i. a hydrocarbon based benefit material;.
  - ii. a low HLB emulsifier comprising an unsaturated monoglyceryl ester having from 14 to 30 carbon atoms;

wherein said oil continuous benefit phase comprises a ratio of said hydrocarbon based benefit materials to said low HLB emulsifier comprising from 30:1 to 200:1."

"4. A multiphase personal care composition comprising:

- a. a structured surfactant phase comprising:
  - i. from 5% to 30%, by weight of said multiphase personal care composition, of a mixture of lathering surfactants selected from anionic surfactants, nonionic surfactants, amphoteric surfactants, cationic surfactants and mixtures thereof;
  - ii. a lamellar inducing agent;
  - iii. a cationic polymer selected from the group consisting of a cationic guar, a cationic guar derivative and mixtures thereof;
  
- b. an oil continuous benefit phase comprising:
  - i. a hydrocarbon based benefit material;
  - ii. a low HLB emulsifier comprising an unsaturated monoglyceryl ester having from 14 to 30 carbon atoms;

wherein said oil continuous benefit phase comprises a ratio of said hydrocarbon based benefit materials to said low HLB emulsifier comprising from 30:1 to 200:1."

"9. A multiphase personal care composition comprising:

- a. a structured surfactant phase comprising
  - i. from 15% to 22%, by weight of said multiphase personal care composition, of a mixture of lathering surfactants selected from anionic

surfactants, nonionic surfactants and amphoteric surfactants.

ii. a lamellar phase inducing agent comprising an electrolyte;

iii. a cationic polymer is selected from cationic guar, cationic guar derivatives and mixtures thereof;

b. an oil continuous benefit phase comprising:

i. a hydrocarbon based benefit material is selected from petrolatum, mineral oil and mixtures thereof;

ii. a low HLB emulsifier comprising glycerol monooleate;

wherein said oil continuous benefit phase comprises a ratio of said hydrocarbon based benefit materials to said low HLB emulsifier comprises from 30.1 to 200:1."

IV. The decision of the opposition division, posted on 13 December 2019, cited *inter alia* the following documents:

D1: WO 2005/105032 A1

D2: US 2004/0248748 A1

D24: Experimental Data Report (27 September 2019)

V. The opposition division decided in particular as follows:

(a) The main request met the requirements of Articles 123(2), 123(3), 54, 84 and 83 EPC.

(b) Document D1 was the closest prior art. The distinguishing feature was the ratio of hydrocarbon based benefit materials to low HLB emulsifiers. According to D24, this resulted in an enhanced

benefit agent deposition. Depending on whether this effect was considered predictable or not, the objective technical problem to be solved resided in the provision of either an alternative personal care composition or a personal care composition having enhanced benefit agent deposition. In both cases, D1 whether alone or in combination with D2 did not render the claimed solution obvious. The main request thus fulfilled the requirements of Article 56 EPC.

- VI. The opponent (appellant) lodged an appeal against the above decision of the opposition division.
  
- VII. With its reply to the appellant's statement setting out the grounds of appeal the patent proprietor (respondent) defended its case on the basis of the main request as maintained in first instance, and on the basis of auxiliary requests 1-2 filed during the first instance proceedings on 27 September 2019 and resubmitted with the reply to the statement setting out the grounds of appeal.
  
- VIII. Oral proceedings were held before the Board on 5 October 2022.
  
- IX. The appellant requested that the decision under appeal be set aside and the patent be revoked. The appellant further requested that the substantiation of the ground of appeal of novelty submitted with the letter of 16 September 2022 be admitted into the appeal proceedings.
  
- X. The respondent requested that the appeal be dismissed, *i.e.* that the patent be maintained as amended during first instance proceedings (main request), or that the

patent be maintained on the basis of one of the auxiliary requests 1-2 filed during first instance proceedings on 27 September 2019 and resubmitted with the reply to the statement setting out the grounds of appeal. The respondent also requested that the submission filed by the appellant with letter of 16 September 2022 be non admitted into the appeal proceedings.

XI. The arguments of the appellant, as far as relevant for the present decision, can be summarised as follows:

- (a) Novelty of the main request had been formally objected to in the statement of grounds of appeal, even if the objection had only been substantiated with the letter dated 16 September 2022. Furthermore clarifying the exact nature of the distinguishing feature over the closest prior art would be important also for the discussion of inventive step. No new objection had been raised with regard to inventive step under point 2. of the letter of 16 September 2022. Merely a new argument, substantiating why the distinguishing feature *versus* the closest prior art had no particular effect, had been provided. The submissions made under point 1. and 2. of the letter of 16 September 2022 were therefore to be admitted into the appeal proceedings.
  
- (b) The subject-matter of the main request did not involve an inventive step. No technical effect associated with the identified distinguishing feature *versus* D1 had been appropriately substantiated. The comparative data provided in D24 were indeed not representative of the closest prior art and the further data provided in the patent

actually revealed that the alleged effect did not occur, let alone over the whole range claimed. It followed that the objective technical problem could only be formulated as the provision of an alternative multiphase personal care composition. The presently claimed range of ratios of components bi) to bii) corresponded to usual ratios used in cosmetic compositions, as revealed by D2. This feature could thus not provide any inventiveness to the claimed composition.

XII. The arguments of the respondent, as far as relevant for the present decision, can be summarised as follows:

(a) The appellant's submissions made with the letter dated 16 September 2022 contained a new objection of lack of novelty and new arguments with regard to inventive step which had not been substantiated in the previous submissions of the appellant, namely in the statement of grounds of appeal. In particular the new argument regarding the comparative data provided in D24 was raised so late that the respondent could not provide counter-evidence. As there were no exceptional circumstances justified by cogent reasons for the filing of these new submissions at this late stage of the proceedings, they were not to be admitted according to Article 13(2) RPBA 2020.

(b) The subject-matter claimed in the main request differed from the compositions of the closest prior art D1 in the ratio of components bi) to bii). As substantiated in table 5 of the patent in suit and D24, the technical effect linked to this distinguishing feature was an increased benefit agent deposition. Starting from D1, the objective



technical problem resided in providing a multiphase personal care composition that can provide significantly enhanced benefit agent deposition without negatively impacting lather performance and after-use in skin feel. Neither D1 nor D2, the latter pertaining to a different purpose namely the provision of stable compositions, taught to adjust the ratio of components bi) to bii) in the presently claimed range to solve this problem. The main request thus fulfilled the requirements of Article 56 EPC.

## **Reasons for the Decision**

### *Main request*

#### 1. Amendments and sufficiency of disclosure

The appellant did not pursue in the appeal stage its objections according to the grounds of opposition under Article 100(c) EPC and Article 100(b) EPC. The Board agrees with the opposition division that the main request fulfills the requirements of Articles 123 and 83 EPC.

#### 2. Admittance of the appellant's submission of 16 September 2022

##### 2.1 The respondent requested that the appellant's submission of 16 September 2022 not be admitted into the appeal proceedings. The Board observes that the appellant's letter of 16 September 2022 contains two main parts listed under point 1. and point 2.

The submissions made under point 1. relate to the interpretation of the feature bii) in claim 1 of the

main request and the novelty of said claim over D1. In essence, the appellant is arguing that the feature "a low HLB emulsifier comprising an unsaturated monoglyceryl ester having from 14 to 30 carbon atoms" should be construed to mean that the low HLB emulsifier is an unsaturated monoglyceryl ester having from 14 to 30 carbon atoms. On the basis of this interpretation the appellant considers that example 12 of D1 anticipates claim 1.

The submissions made under point 2. contain arguments regarding the inventive step issue, which follow the preliminary opinion of the Board regarding the claim interpretation and the distinguishing feature versus D1 (see point 2.1 of the letter). Since both submissions (point 1. and 2. of the letter) do not appear to be directly related, their admittance is assessed separately.

2.2 Submissions under point 1. of the letter of 16 September 2022

2.2.1 According to Article 12(3) RPBA 2020, the statement of grounds of appeal and the reply shall contain a party's complete case. In the present case, the statement of grounds of appeal contains a vague mention that the appeal was directed against the decision of the opposition division considering that the main request met the requirements of Articles 54 and 56 EPC (see point 2. of the statement of grounds of appeal). However, no lack of novelty objection has been substantiated in this statement of grounds of appeal, which exclusively addressed the compliance with Article 56 EPC. The Board observes indeed that the section 5. of the statement of grounds of appeal under the heading "Grounds of Appeal" did neither address novelty nor

contest the distinguishing feature between the subject-matter of the main request and D1 defined in the impugned decision. Moreover the last sentence of the statement of grounds concludes that "We request that the patent be revoked for lacking an inventive step".

2.2.2 Hence, neither the ground of appeal of lack of novelty nor the interpretation of feature bii) made under point 1. of the letter of 16 October 2022 did form part of the appeal case of the opponent.

2.2.3 The appellant's letter of 16 September 2022 was filed after notification of the summons to attend oral proceedings. The admittance of the submissions under point 1. of the appellant's letter of 16 September 2020 is thus to be assessed according to Article 13(2) RPBA 2020. Pursuant to Article 13(2) RPBA 2020, amendment to the appellant's appeal case at this late stage of the proceedings shall not be admitted unless there are exceptional circumstances which have been justified with cogent reasons by the appellant.

2.2.4 The appellant stated that the formal discussion of novelty would help clarifying the exact distinguishing feature over the closest prior art. However this discussion should have been done already in the statement of grounds in reply to the decision of the opposition division, at least when identifying the distinguishing feature over the closest prior art. The Board further observes that its preliminary opinion did not contain any new issue which may have justified the submission of the present interpretation of the feature bii) and the subsequent objection of lack of novelty.

2.2.5 Accordingly there are no exceptional circumstances which would justify the admittance of the submissions

made under point 1. of the letter of 16 September 2022. These submissions (novelty objection and claim interpretation) are thus not admitted into the appeal proceedings.

2.3 Submissions under point 2. of the letter of 16 September 2022

2.3.1 The respondent argued that the arguments concerning the comparative example of D24 and its alleged lack of relevance to substantiate an effect *versus* the closest prior art were newly raised. The introduction of these new arguments at this late stage of the proceedings would take the respondent by surprise and would prevent him from filing any counter-evidence. Moreover, these arguments could have been introduced earlier in the proceedings.

2.3.2 The Board observes that the submissions made under point 2. contain arguments regarding the inventive step issue. The specific points concerning the comparative example D24 and the lack of substantiation of an effect over the closest prior art were indeed not raised in the appellant's statement of grounds of appeal. However, they constitute a further development of the objection of lack of inventive step raised therein and are therefore not considered as being an amendment whose admittance would be subjected to the requirements of Article 13(2) RPBA 2020.

2.3.3 Hence, there are no reasons to exclude the submissions made under point 2. of the letter of 16 September 2022 from the appeal proceedings.

3. Novelty

The appellant did not substantiate any objection of lack of novelty in the statement setting out the grounds of appeal and the objection under point 1. of the submission of 16 September 2022 was not admitted into the appeal proceedings (see point 2.2). The Board agrees with the opposition division that the main request meets the requirements of Article 54 EPC.

4. Inventive step

4.1 The patent in suit relates to multiphase personal care compositions providing enhanced benefit agent deposition (see paragraph [0004]). The composition comprises a) a structured surfactant phase and b) an oil continuous benefit phase. The structured surfactant phase comprises the following components (see claim 1 and paragraph [0005]) :

- ai) 5-30% by weight of the composition of a mixture of lathering surfactants,
- aii) a lamellar inducing agent, and
- aiii) a cationic deposition polymer.

The oil continuous benefit phase comprises the following components (see claim 1 and paragraph [0005]):

- bi) a hydrocarbon based benefit material, and
  - bii) a low HLB emulsifier comprising an unsaturated monoglyceryl ester having from 14 to 30 carbon atoms,
- wherein the ratio of bi) to bii) is comprised in the range from 30:1 to 200:1.

4.2 In agreement with both parties, the Board considers D1 to represent the closest prior art.

D1 describes personal care compositions that deposit hydrophilic solid benefit agents on keratinous surfaces and improve moisturization and appearance and feel of keratinous surfaces (see page 1, first paragraph). The closest embodiments of D1 were considered by both parties to be examples 11 and 12 (see pages 37-38 of D1). The compositions of these examples comprise:

- a cleansing phase composition containing Miracare SLB-365 (*i.e.* a mixture of lathering surfactants, component ai) of present claim 1), sodium chloride (*i.e.* a lamellar inducing agent, component aii) of present claim 1) and guar hydroxypropyltrimonium chloride (*i.e.* a cationic deposition polymer, component aiii) of present claim 1), and
- a lipid phase formed of a lipid composition and an internal structure hydrophilic phase composition. The lipid composition contains petrolatum and a mineral oil (*i.e.* hydrocarbon based benefit compound, component bi) of present claim 1). The internal structure hydrophilic phase composition comprises low HLB emulsifiers, in particular Monomuls 90-018 (*i.e.* an unsaturated monoglyceryl ester having from 14 to 30 carbon atoms, component bii) of present claim 1).

4.3 It remained undisputed in the submissions admitted into the appeal proceedings that the ratio of the hydrocarbon based benefit material (component bi)) to the low HLB emulsifier (component bii)) constituted the distinguishing feature between the compositions according to the present claims (ratio of 30:1 to 200:1) and examples 11 (ratio of 15,1:1) and 12 (ratio of 16,6:1) of D1.

- 4.4 The parties however disagreed on the effect associated with this distinguishing feature and thus on the formulation of the objective technical problem.
- 4.4.1 The experiments detailed in table 5 of the patent and D24 provide a comparison between a composition having a ratio below the claimed range (18:1) and corresponding compositions having ratios within the claimed range (47:1, 49:1, and 95:1). A significantly improved benefit agent deposition was obtained for the examples according to the claims compared to the comparative example. This comparison appears to appropriately substantiate an improved effect for the tested ratios falling within the claimed range compared to the lower ratio of the comparative example.
- 4.4.2 As acknowledged by the respondent (see pages 7-8 of the reply to the statement of the grounds of appeal), there appears to be no linear relation between the increase of benefit agent deposition and the increase of the ratio of the hydrocarbon based benefit material to the low HLB emulsifier (compare for example the results of examples 1 to 2 of D24). However, the comparative composition has a ratio slightly higher than the one of the compositions of examples 11 and 12 of D1, but still very close. Moreover the improvement of the benefit agent deposition results obtained for both compositions according to the claims is highly significant (+69% and +88%). Hence, it is credible that the enhanced benefit agent deposition would also be observed *versus* the compositions of the closest prior art.
- 4.4.3 In this context, the appellant argued that the comparative example of table 5 of the patent in suit and D24 would not be representative of the composition of the closest prior art D1. Indeed, the solutions of

examples 11 and 12 of D1 contained a mixture of components as low HLB emulsifier, namely Monomuls 90 L-12 and Monomuls 90-018. On the other hand the comparative example of table 5 and D24 contained as low HLB emulsifier only glyceryl monooleate, *i.e.* only the unsaturated monoglyceryl ester having from 14 to 30 carbon atoms and no additional low HLB emulsifier. According to the appellant, it could therefore not be concluded that the claimed solutions had an improved effect compared to the closest solutions of D1.

The Board observes that the comparative example and the examples according to the invention used in D24 and Table 5 of the patent in suit differ from each other only in the nature of the identified distinguishing feature over the closest prior art, namely the ratio bi) to bii). As stated under point 4.4.1 this comparison appropriately substantiate an effect for the distinguishing feature. There is furthermore no evidence on file that would allow to consider that this effect would not also occur with a mixture of low HLB emulsifiers in any proportions, at least to some extent. Contrary to the opinion of the appellant, in the present case, the respondent discharged its burden of proof by providing said comparative data. Under these circumstances the Board considers that the burden of proving that this effect would not also occur when an additional low HLB emulsifier would be present lies with the appellant.

4.4.4 Furthermore, the appellant contested that an effect linked to the distinguishing feature would occur at all, not to mention over the whole scope of the claims. This would be apparent when comparing Comparative Example F and Inventive Examples 1 and 2 of the patent



in suit as well as when comparing Inventive Example 2 and Inventive Example 8, for the following reasons:

- All the solutions of Comparative Example F and Inventive Examples 1 and 2 (see Table 3) had the same ratio of components bi) to bii) falling under the range claimed (namely 34:1, see Table 3). Nevertheless the deposition of benefit agent was much better in the inventive examples 1 and 2 as in comparative example F (see Delta L value which is indicative of deposition profile according to paragraph [0092] of the patent).
- Also Inventive Example 8 (see Table 6) having a higher ratio of components bi) to bii) than Inventive Example 2 (45:1 for Inventive Example 8 versus 34:1 for Inventive Example 2) had nevertheless a lower Delta L value (14,50 for Inventive Example 8 versus 17,40 for Inventive Example 2, see Tables 3 and 6).

This argument is not convincing, for the following reasons:

- the solution of Comparative Example F contains a cationic polymer which is not according to the present claims. The importance of the nature of the cationic polymer is however a key aspect of the patent in suit (see e.g. paragraphs [0095] and [0097] of the patent in suit) and the claimed ratio of components bi) to bii) is relevant for solutions containing the presently claimed cationic polymer. Consequently, the fact that the claimed effect does not occur for a solution containing a cationic polymer not according to the claims cannot substantiated the absence of effect linked to the claimed ratio for compositions according to the claims.

- The delta L values obtained for Inventive Examples 2 and 8 are both still significantly higher than those having the claimed components but a ratio outside the scope of the claims. In both cases the benefit agent deposition is increased, *i.e.* the effect occurs. The variability in the delta L values is only representative of the non-linearity of the effect but does not constitute an evidence of the non-occurrence of the effect.

4.4.5 The appellant further contested the occurrence of an effect on the basis of the results obtained for Comparative Example A, because the magnitude of deposition for this example, arbitrarily used as "control", was similar to the one of the Inventive Examples.

This argument is not persuasive. Comparative Example A (see Table 2) is neither according to the invention nor to the closest prior art. In particular, it does not contain any cationic polymer. The purpose of the comparison of this example with Comparative Examples B and C was to demonstrate the competition between the deposition of the benefit material and the cocervate in typical personal care compositions (see paragraph [0095]). This comparison underlines the impact of the cationic polymer and thus the necessity of adequately choosing it. It cannot however constitute an evidence that the claimed ratio has no effect on solutions according to the claims, *i.e.* containing a specific guar cationic polymer.

4.4.6 Finally, during oral proceedings, the appellant mentioned that also the absolute amounts of agents used should be considered and not only the ratio of components bi) to bii). This argument is however not

convincing. If very low amounts of benefit material were to be used, the increase in deposition would indeed be possibly accordingly reduced. There is however no reason to believe that it would not occur at all.

4.5 When a technical effect directly linked to the distinguishing feature has been demonstrated, it has to be taken into account in the formulation of the objective technical problem. Whether this effect would be expected or not in the present case, is to be considered when assessing the obviousness of the claimed solution. Accordingly, starting from D1, the objective technical problem resides in the provision of a further multiphase personal care composition with improved benefit agent deposition.

4.6 It remains to be determined whether the present solution would have appeared obvious to the skilled person.

4.6.1 The Board observes that, in view of the absence of a linear relation between the increase of benefit agent deposition and the increase of the ratio of the hydrocarbon based benefit material to the low HLB emulsifier (see point 2.4, second paragraph), the claimed effect would not necessarily have been expected. The enhanced benefit agent deposition of the benefit material does indeed not appear to be merely linearly correlated to a reduction of the amount of emulsifier in the composition.

4.6.2 Concerning the teaching of the prior art, the Board notes that:

(i) the amount of the components corresponding to the present hydrocarbon based benefit material are broadly defined in D1 (see amount of lipid and lipid phase defined in third and fourth paragraphs on page 18 of D1),

(ii) the amount of the components corresponding to the low HLB emulsifier are not particularly specified in D1. The amount of association structure forming materials is defined in the first paragraph on page 11 of D1. But these materials encompass several components, so that this amount is not the one of the emulsifier within the mixture (see examples 11 and 12 of D1), and

(iii) D2 generally discloses ratios of benefit oil phase to low HLB emulsifier (see paragraphs [0063] and [0080] of D2) as well as a specific example of said ratio which falls within the present claimed range (see example 6). However D2 is concerned with the provision of stable compositions and does not teach that this ratio may increase the benefit agent deposition. Moreover the low HLB emulsifiers disclosed in D2 are saturated ones and do therefore not encompass the present unsaturated monoglyceryl ester having from 14 to 30 carbon atoms.

Hence, even if it could be considered that the general disclosure of D1 encompasses the present ratios and that usual ratios for cosmetic compositions as disclosed in D2 fall within the presently claimed range, neither D1 nor D2 provides any indication that adjusting the ratio of the hydrocarbon based benefit material to the low HLB emulsifier within the presently claimed range would result in increasing the benefit agent deposition. The skilled person would therefore

not have found in either D1 or D2 any incentive to work within the presently claimed range of ratios of components bi) to bii) in order to solve the above defined objective technical problem.

4.7 Accordingly, the main request fulfills the requirements of Article 56 EPC.

## Order

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

The appeal is dismissed.

The Registrar:

The Chairman:



B. Atienza Vivancos

A. Uselli

Decision electronically authenticated