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**Datasheet for the decision
of 16 January 2025**

Case Number: T 2513/22 - 3.3.07

Application Number: 16763478.1

Publication Number: 3344227

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A61K8/81, A61K8/86, A61K8/44,
A61K8/46

Language of the proceedings: EN

Title of invention:

COMPOSITION COMPRISING AT LEAST ONE ANIONIC SURFACTANT, AT
LEAST TWO PARTICULAR NONIONIC SURFACTANTS, AT LEAST ONE
AMPHOTERIC SURFACTANT AND AT LEAST ONE PARTICULAR CATIONIC
POLYMER

Patent Proprietor:

L'OREAL

Opponent:

Dalli-Werke GmbH & Co. KG

Headword:

COMPOSITION COMPRISING AT LEAST ONE ANIONIC SURFACTANT, AT
LEAST TWO PARTICULAR NONIONIC SURFACTANTS, AT LEAST ONE
AMPHOTERIC SURFACTANT AND AT LEAST ONE PARTICULAR CATIONIC
POLYMER/L'Oréal

Relevant legal provisions:

RPBA 2020 Art. 12(4), 12(6), 13(1)

EPC Art. 56

Keyword:

Admission of a new document (No)

Admission of new lines of attack

Main request - Inventive step (Yes)



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Chambres de recours

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Case Number: T 2513/22 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 16 January 2025

Appellant: Dalli-Werke GmbH & Co. KG
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
13 October 2022 concerning maintenance of the
European Patent No. 3344227 in amended form.**

Composition of the Board:

Chairwoman Y. Podbielski
Members: D. Boulois
J. Molina de Alba

Summary of Facts and Submissions

- I. The European patent 3 344 227 had been opposed under Article 100 (a) EPC on the grounds that its subject-matter lacked novelty and inventive step.
- II. The appeal lies from the decision of the opposition division finding that the patent in amended form met the requirements of the EPC.
- III. The decision was based on the claims as granted as the main request and on auxiliary request 1 filed on 21 September 2021.

Independent claim 1 of auxiliary request 1 read:

"1. Composition comprising:

- (a) one or more anionic surfactants,
- (b) a mixture of a first nonionic surfactant chosen from saturated or unsaturated, linear or branched, oxyalkylenated C₈ to C₄₀ fatty alcohols and of a second nonionic surfactant, different from the first nonionic surfactant, chosen from saturated or unsaturated, linear or branched, oxyalkylenated C₈ to C₄₀ fatty alcohols; the mixture of nonionic surfactants being present in a total content of at least 3% by weight relative to the total weight of the composition,
- (c) one or more amphoteric surfactants in a total content of at least 2% by weight relative to the total weight of the composition, and
- (d) one or more cationic polymers with a cationic charge density of greater than or equal to 4 meq./g."

IV. The documents cited during the opposition proceedings included the following:

D1: US 6 489 286 B1

D2: US 5 882 660

D3: WO 2014/101045 A1

D4: US 2006/0020145 A1

D5: US 2003/0108503 A1

D6: EP 0 865 272 B1

D7: US 2010/0249004 A1

D8: US 2005/0143267 A1

D9: Data Profile Euperlan® PK 3000 AM

D10: Experiments filed during the examination phase with letter dated 11 October 2018.

V. According to the decision under appeal, the subject-matter of the main request was not novel over D1.

D1 was considered to represent the closest prior art with regard to auxiliary request 1, while the opponent also raised an objection of lack of inventive step starting from D2, D5 and D7. The problem to be solved over D1 was the provision of an alternative composition that provides detangling properties to the hair. The claimed solution was the use of a combination of oxyethylenated fatty alcohols in a specific minimum amount. The solution was not obvious in view of D1 in combination with D6 or with the common general knowledge of the person skilled in the art.

VI. The opponent (hereinafter the appellant) filed an appeal against said decision.

VII. The patent proprietor (hereinafter the respondent) filed auxiliary requests 2 and 3 with its reply to the grounds of appeal dated 24 March 2023.

VIII. With a letter dated 19 September 2023, the appellant submitted new evidence:

D11: US 2003/0158065 A1

D12: Ramis-Ramos et al., Anal. Methods, 2013, 5, 341-354.

IX. A communication from the Board, dated 23 September 2024, was sent to the parties.

X. Oral proceedings took place on 16 January 2025. During oral proceedings and with regard to the assessment of inventive step, the parties agreed that both the claimed compositions and those of the closest prior art D1 imparted detangling properties to the hair. Therefore, the objective technical problem could be defined as the provision of an alternative composition which imparts detangling properties to the hair.

XI. The arguments of the appellant may be summarised as follows:

Admittance of D11 into the appeal proceedings

This document was from the same technical field and similar to D1. There was no new teaching and this document did not add any complexity to the case.

Admittance of the lines of attack based on D1 in combination with D2/D3/D5 or with D4/D7

All the documents were known and had been discussed during the opposition proceedings. There was therefore no particular difficulty with these combinations.

Auxiliary request 1 - Inventive step

The skilled person would have selected example 54 in D1 as the closest prior art, since the composition of this example contained cationic polymers that had particularly good conditioning properties. The composition claimed in auxiliary request 1 differed from example 54 in table 13 of D1 in that, in addition to the first alkoxyated fatty alcohol, a second alkoxyated fatty alcohol was used as the second nonionic surfactant. However, according to the patent, this difference had no effect, but produced exactly the same result (cf. composition A versus B-G in the contested patent). Thus, the problem to be solved was the provision of an alternative composition. The use of alkoxyated fatty alcohol was known from D2, D3, D5 or D6 and the claimed solution was obvious.

XII. The arguments of the respondent may be summarised as follows:

Admittance of D11 into the appeal proceedings

D11 could and should have been filed during the opposition proceedings. The document was not more relevant than D1.

Admittance of the lines of attack based on D1 in combination with D2/D3/D5 or with D4/D7

These new lines of attacks were not directed to the facts and arguments on which the decision under appeal was based and constituted an amendment of the appellant's case.

The appellant had filed arguments focusing on D1 alone or in combination with D6 in response to the summons to attend oral proceedings during the opposition proceedings. Therefore, the appellant had made the strategic choice of not pursuing an inventive step reasoning based on D1 in combination with D2, D3 or D5 or with D4 or D7 during the first instance proceedings. Since the circumstances of the appeal case remained the same as those of the first instance proceedings, there was no reason prompting the appellant to bring forward new lines of attack at this stage of the proceedings.

Auxiliary request 1 - Inventive step

Claim 1 of auxiliary request 1 differed from example 54 of D1 by the presence of a saturated or unsaturated, linear or branched, oxyalkylenated C₈-C₄₀ fatty alcohols, as a second nonionic surfactant, different from laureth-4, instead of PEG-80 sorbitan laurate. The objective technical problem to be solved in view of D1 was to provide an alternative cosmetic composition inducing detangling properties to the hair and a good cosmetic quality feel. D1 did not teach the addition of a oxyalkylenated C₈-C₄₀ fatty alcohol, and the solution was not known from any of documents D2, D3, D5 or D6.

XIII. Requests

The appellant (opponent) requested that the decision under appeal be set aside and the patent be revoked. They furthermore requested that document D11 be admitted into the appeal proceedings.

The respondent (patent proprietor), requested that the appeal be dismissed and the patent thus be maintained on the basis of auxiliary request 1 held allowable by

the opposition division, alternatively that the decision under appeal be set aside and the patent be maintained according to one of the sets of claims filed as auxiliary requests 2 and 3 with letter of 24 March 2023 (reply to the appeal).

In addition, the respondent requested that the lines of attack based on D1 in combination with D2, or D3, or D5 not be admitted in the appeal proceedings.

Reasons for the Decision

1. Admittance of D11 into the appeal proceedings

- 1.1 This document was filed by the appellant in its letter dated 19 September 2023 after the respondent replied to the statement of grounds of appeal.

D11 is a patent application of the same applicant as the closest prior art D1, claims the same priority and has an almost identical description. According to the appellant, claim 1 of D11 does not mention any specific non-ionic surfactant, while D1 specifically claims the presence of a non-ionic surfactant selected from polyoxyethylene derivatives of polyol esters.

- 1.2 The admittance of this document is to be assessed under the requirements of Article 13(1) RPBA. According to Article 13(1) RPBA, the Board shall exercise its discretion in view of, *inter alia*, the current state of the proceedings, the suitability of the amendment to resolve the issues which were admissibly raised by another party in the appeal proceedings or which were

raised by the Board, and whether the amendment is detrimental to procedural economy.

In the Board's view, the introduction of D11 relates to a point which is not crucial, since it does not address the issues raised in particular on obviousness of the claimed solution. The submission of D11 was accompanied by only a few sentences explaining its relevance (see appellant's letter dated 19 September 2023, page 8, second full paragraph, second two sentences). This cannot be regarded as a sufficiently substantiated inventive step objection and would need a further discussion. In addition, D11 does not appear to be *prima facie* more relevant than D1. The reason for filing D11, i.e. that D11 does not claim specific non-ionic surfactants, has no effect on the discussion on invention step, since the description of D11 is similar to the description of the closest prior art D1 and its teaching with regard to the preferred non-ionic surfactants is identical. The fact that the preferred non-ionic surfactants are not claimed in D11 is of no relevance.

As D11 is not *prima facie* relevant, it is not suitable to address the issues which led to the decision under appeal. This alone speaks against admitting D11 into the appeal proceedings. In addition, the appellant has failed to provide reasons, as required by Article 13(1) RPBA, why it has submitted D11 only at this stage of the appeal proceedings.

Consequently, D11 is not admitted into the appeal proceedings (Article 13(1) RPBA).

2. Admittance of the lines of attack based on D1 in combination with D2, D3 or D5

2.1 During the first instance proceedings the appellant raised objections of lack of inventive step against the granted claims. These were based on D1, D2, D5 or D7 as closest prior art. D3 and D6 were referred to as documents with which the closest prior art was combined. With regard to auxiliary request 1, the appellant relied on D1 as closest prior art and combined it with D6 and with the common general knowledge of the person skilled in the art.

In its statement setting out the grounds of appeal the appellant objected to the claims of auxiliary request 1 for lack of inventive step when starting from D1 as the closest prior art, combined with common general knowledge, or with D5/D6 or with D2/D3.

2.2 The Board acknowledges that the inventive step objections starting from D1 in combination with D5 or D2/D3 have been presented for the first time in the appeal proceedings. They constitute an amendment within the meaning of Article 12(4) RPBA and their admittance is to be assessed under Article 12(4) and (6) RPBA.

The new inventive step objections do not introduce a new closest prior art, but present merely combinations with documents which had all been the subject of inventive step objections during the first instance proceedings. The parties are thus familiar with all of the documents and the arguments are not particularly complex. Thus, the factual or legal framework of the case does not change. For these reasons the Board considers that this line of attack does not present any

complexity and that it meets the need for procedural economy.

Moreover, the appellant's reliance on the new objections can be seen as a legitimate reaction to the decision of the opposition division acknowledging an inventive step of the claims of auxiliary request 1 when starting from D1 as the closest prior art.

Accordingly, this new line of attack is admitted into the appeal proceedings (Article 12(4) and 12(6) RPBA).

3. Admittance of the lines of attack based on D1 in combination with D4 or D7

- 3.1 In its letter dated 19 September 2023, the appellant objected to the claims of auxiliary request 1 for lack of inventive step when starting from D1 as the closest prior art, combined with D2, D4, D5, D6, D7.

While the combination of D1 with D5, D6 or with D2 was already presented in the statement of grounds of appeal, and D7 was used as closest prior art during the opposition proceedings, the combination of D1 with D4 and/or D7 is a new combination and represents an amendment to the appellant's case.

- 3.2 According to Article 13(1) RPBA, any amendment to a party's appeal case after it has filed its grounds of appeal or reply is subject to the party's justification for its amendment and may be admitted only at the discretion of the Board. The party shall provide reasons for submitting the amendment at this stage of the appeal proceedings. Article 12, paragraphs 4 to 6, shall apply *mutatis mutandis*.

In the present case, the appellant did not provide any explanation or justification as to why this combination of documents was filed at this late stage of the appeal proceedings. The combination of D1 with D4 and/or D7 was indeed not presented in the statement of grounds of appeal or during the opposition proceedings, in particular in response to the filing of auxiliary request 1. It appears clear that it could and should have been filed earlier.

Documents D4 and D7 were cited in view of the disclosure of non-ionic surfactants, in particular alkoxyated fatty alcohols, in cosmetic compositions. According to the appellant, D4 discloses in paragraph [0044] the use of alkoxyated fatty alcohols while D7 teaches on page 17, in the compositions of Examples 7 to 9, the use of alkoxyated fatty alcohols, namely cetareth-60 myristyl glycol.

The Board notes that the technical contribution of these documents to the issues of inventive step is questionable, since the documents do not disclose any combination of non-ionic surfactants and are not *prima facie* relevant for the assessment of obviousness. The use of the claimed non-ionic surfactants in cosmetic compositions is known from the other cited documents, namely D2, D3, D5 or D6. Hence, the content of D4 or D7 is not more relevant than the other cited documents, and a new discussion thereon would only add unnecessary complexity to the case.

Hence, the requirements of Article 13(1) and Article 12(6) RPBA are not met, and the Board decides to not admit the lines of attack on inventive step based on D1 in combination with D4 or D7.

4. Auxiliary request 1 - Inventive step

4.1 The claimed invention relates to a composition for cleansing and conditioning keratin fibers, in particular human keratin fibers, such as the hair. Said compositions are capable of imparting improved cosmetic properties, after one or more applications, which are shampoo-resistant without making the head of hair charged or heavy, while at the same time maintaining good washing power and satisfactory working qualities. In particular, the compositions according to the opposed patent make it possible to improve the disentangling, suppleness and feel of the hair, without a build-up effect ([0012] and [0014] of the patent specification).

4.2 D1 was considered to represent the closest prior art by the opposition division in its decision.

D1 relates to conditioning detergent compositions suitable for use in personal cleansing applications which not only impart cleansing, wet detangling, dry detangling and manageability properties to hair, but which are also relatively non-irritating (col. 1, lines 11-20).

Example 54 in Table 13 was cited in particular. It shows a cleansing composition comprising:

a) one or more anionic surfactants, Cedepal TD-403M (sodium trideceth sulfate),

b) a mixture of two non-ionic surfactants, i.e.

laureth-4 which is an oxyalkylenated C12 fatty alcohol in an amount of 0.4 to 0.8 wt% (cf. D9) and **PEG-80 sorbitan laurate in an amount of 6.5 wt%, the latter being excluded from the subject-matter of claim 1 of auxiliary request 1,**

c) one or more amphoteric surfactants, i.e. cocamidopropyl betaine (Tegobetaine L7) in an amount of more than 2 wt% and laurampho-glycinate amphoteric surfactants

d) a cationic polymer, i.e. Salcare SC30 which has the claimed cationic charge (cf. [0112] of the specification).

Example 54 of D1 does not disclose a composition containing two non-ionic surfactants of the same category as claimed, in particular **the addition of a second nonionic surfactant chosen from saturated or unsaturated, linear or branched, oxyalkylenated C₈ to C₄₀ fatty alcohols** different from laureth-4, **the mixture being present in a total content of at least 3% by weight.**

4.3 The opposition division defined the objective technical problem as the provision of an alternative composition that provides detangling properties to the hair. The respondent agreed with this definition of the problem.

During the oral proceedings, the appellant agreed that both the claimed compositions and those of the closest prior art (D1) imparted detangling properties to the hair and that the objective technical problem could be defined as the provision of an alternative composition which imparts detangling properties to the hair.

4.4 The claimed solution is the addition of a second nonionic surfactant chosen from saturated or unsaturated, linear or branched, oxyalkylenated C₈ to C₄₀ fatty alcohols different from laureth-4, the mixture being present in a total content of at least 3% by weight.

4.5 The examples of the patent in paragraphs [0135]-[0138] and D10 were cited by the opposition division and the appellant in support of the definition of the problem. This point was not contested by the respondent.

4.5.1 The contested patent provides several examples, namely compositions A-G, and a comparative example (see par. [0135]). Composition A comprises laureth-4 and a second non-ionic surfactant (polysorbate-20), that was initially falling within the ambit of claim 1 as granted and was also illustrating the invention. Polysorbate-20 has been excluded from the subject-matter of claim 1 of auxiliary request 1. Compositions B-G comprise a combination of laureth-12 and laureth-4 according to the subject-matter of claim 1 of auxiliary request 1. Compositions A to G provided better cosmetic quality of the feel and better ease of the disentangling than the comparative composition. No conclusion can however be drawn with regard to a possible improvement of compositions B-G over composition A. Therefore, it has to be concluded that composition A had the same effect as compositions B-G.

The results of the comparison between composition A and compositions B-G can be extrapolated to the composition disclosed in D1, since the distinguishing feature is identical. Consequently, it can be concluded that the composition of D1 shows an equivalent disentangling effect than the claimed compositions.

4.5.2 The comparative composition and the composition according to the invention which are shown in the experiments of D10 are both similar to composition A in the opposed patent with regard to the nature of the non-ionic surfactants and differ in the nature of the cationic polymer. The experiments of D10 are therefore

not more relevant than the experimental data already present in the patent specification.

- 4.5.3 In view of the examples of the patent, the opposition division concluded that the experimental data do not demonstrate a technical effect ascribable to the distinguishing feature in view of D1, i.e. the presence of an additional saturated or unsaturated, linear or branched, oxyalkylenated C₈ to C₄₀ fatty alcohol in an amount such that the total amount of non-ionic oxyethylenated fatty alcohol surfactants is more than 3 wt.%.

The Board agrees with the opposition division on this point and does not see any reason to overrule the definition of the objective technical problem.

- 4.6 With regard to obviousness, the appellant relied on documents D2, D3, D5 or D6.
- 4.6.1 D2 discloses skin care compositions which may comprise C₈-C₂₀ fatty alcohol ethoxylates (see column 4, lines 23 to 26 of D2). D2 aims at providing personal care compositions for washing and/or cleansing the human skin which prevent or ameliorate skin dryness, skin wrinkling, chapping and ageing (see column 1, lines 5-9) without leaving the skin with an oily feeling (see column 1, lines 58-61). As D2 relates to skin care compositions, its teaching is irrelevant to the present case.
- 4.6.2 D3 relates to compositions for cleansing and conditioning keratin fibers which may comprise fatty C₆ to C₄₀ alcohol ethoxylates (see page 5 from line 17 to page 6, line 8 of D3). The examples of D3 do not disclose compositions with such non-ionic surfactants.

- 4.6.3 Document D5 mentions the use of fatty alcohol ethoxylates in hair treatment products with cationic polymers. A list of possible non-ionic surfactants is given in paragraph [0247], among which there are polyethoxylated, polypropoxylated and polyglycerolated fatty alcohols comprising 8 to 18 carbon atoms. The paragraph does not disclose the combination of two of those surfactants. D5 discloses examples of shampoos, but without fatty alcohol ethoxylates.
- 4.6.4 D6 relates to hair conditioning shampoos which comprise inter alia from 0.01 to 10% by weight of a fatty compound selected from fatty alcohols, fatty acids, fatty alcohol derivatives and fatty acid derivatives (see par. [0015]). D6 discusses in paragraph [0057] the fatty alcohol derivatives that can be used and mentions fatty alcohol ethoxylates, with a preference for steareth-2, steareth-4, ceteth-2, and mixtures thereof. The examples of D6 do however not comprise such specific surfactants or mixtures thereof, but only fatty alcohols.
- 4.6.5 The opposition division considered that that there was no teaching in the prior art that would, and not simply could, have prompted the skilled person to add an additional oxyalkylenated C₈ to C₄₀ fatty alcohol different from laureth-4 and in a specific amount in the composition of D1.

The Board concurs with the conclusion of the opposition division for the following reasons.

First, D1 teaches away from the claimed solution. Starting from example 54 of D1, a person skilled in the art would not have replaced the non-ionic surfactant

PEG-80 sorbitan laurate by an oxyalkylenated C₈-C₄₀ fatty alcohol to implement a second non-ionic surfactant. D1 teaches two main classes of non-ionic surfactants suitable to be implemented in the surfactant portion of the detergent composition. The first class is constituted by polyoxyethylene derivatives of polyol esters (column 4, lines 28-52), such as PEG-80 sorbitan laurate and polysorbate 20, and the second class is constituted by long chain alkyl polyglucosides or polyglucosides (column 4, lines 53-63). These options exclude saturated or unsaturated, linear or branched, oxyalkylenated C₈-C₄₀ fatty alcohols as defined in claim 1 of auxiliary request 1. In fact, the reason why laureth-4 is used in example 54 results from the incorporation of the product Euperlan PK 3000 which is a pearlescent or opacifying agent (see D1, column 13, lines 56-65).

Thus, a composition comprising a mixture of two different non-ionic surfactants chosen from saturated or unsaturated, linear or branched, oxyalkylenated C₈ to C₄₀ fatty alcohols in a total content of at least 3% by weight is not known from any cited document, even less in the context of providing a composition that imparts detangling properties to the hair in the presence of a cationic polymer. None of the cited documents indeed relates to detangling.

Consequently, starting from D1, a person skilled in the art would not have been prompted to substitute PEG-80 sorbitan laurate by an oxyalkylenated C₈-C₄₀ fatty alcohol for providing an alternative composition that provides detangling properties to the hair.

4.7 The claimed solution is not obvious and auxiliary request 1 meets the requirements of Article 56 EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairwoman:



A. Vottner

Y. Podbielski

Decision electronically authenticated