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Datasheet for the decision of 27 April 2007

Case Number: T 0734/05 - 3.3.06

Application Number: 98919400.6

Publication Number: 0983057

IPC: A61K 7/50

Language of the proceedings: EN

Title of invention:
Cleansing products with improved moisturization

Applicant/Appellant:
THE PROCTER & GAMBLE COMPANY

Opponent:
-

Headword:
Cleansing product/PROCTER

Relevant legal provisions:
EPC Art. 84

Keyword:
"Clarity (all requests) - no: unclear parameter"

Decisions cited:
-

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0734/05 - 3.3.06

D E C I S I O N
of the Technical Board of Appeal 3.3.06
of 27 April 2007

Appellant: THE PROCTER & GAMBLE COMPANY
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Decision under appeal: **Decision of the Examining Division of the European Patent Office posted 16 March 2005 refusing European application No. 98919400.6 pursuant to Article 97(1) EPC.**

Composition of the Board:

Chairman: P.-P. Bracke
Members: P. Ammendola
J. Van Moer

Summary of Facts and Submissions

I. This appeal lies from the decision of the Examining Division to refuse for lack of clarity (Article 84 EPC) the European patent application No. 98 919 400.6 relating to cleansing products with improved moisturization.

II. The Applicant has filed with the grounds of appeal two sets of claims respectively labelled as main request and first auxiliary request. It has also requested oral proceedings before any decision of the Board to refuse the main or the first auxiliary request.

III. It is sufficient for the present decision to consider the wording of claim 1 of each of these requests.

Claim 1 of the main request reads:

"*1. A disposable, single use personal care cleansing and conditioning product comprising:*
(A) a water insoluble substrate,
(B) a lathering surfactant, and
(C) a conditioning component,
wherein the surface to saturation ratio is greater than or equal to 1.25 at any point on the surface of the substrate, and wherein the product comprise less than 15% by weight of the product of water."

Claim 1 of the first auxiliary request differs from claim 1 as granted only in that the wording "*ratio is*" has been replaced by "*ratio, as defined in the description, is*".

IV. The Board has summoned the Appellant to oral proceedings and has enclosed to these summons a communication expressing the Board's preliminary opinion on the unclarity of the feature "*surface to saturation ratio*" present in these claims.

V. The Appellant provided no written reply to the objections of the Board indicated in this communication, but has only announced with a facsimile dated 23 March 2007 its intention not to be represented at the forthcoming hearing.

VI. The Appellant has requested in writing (see the third paragraph in page 1 of the grounds of appeal) "*the Board to cancel the decision of the Examining Division by saying that the claims of the main and/or of the first auxiliary request meet the requirements of Art. 84 and send back the case to first instance for further prosecution*".

VII. At the end of the oral proceedings that have taken place as scheduled on 27 April 2007 in the announced absence of the Appellant, the Chairman has announced the decision of the Board.

Reasons for the Decision

1. Lack of clarity (Article 84 EPC) of the feature "*surface to saturation ratio*"

The reasons onto the lack of clarity of this feature given hereafter are as the ones already indicated in the Board's communication to the Appellant enclosed to the summons to oral proceedings.

1.1 Claim 1 according to the main request (see above section III of the Facts and Submissions) characterizes the claimed cleansing products by a novel parameter, i.e. the "*surface to saturation ratio*" that must be greater or equal to about 1.25 "*at any point on the surface of the substrate*". Claim 1 according to the first auxiliary request (see above section III of the Facts and Submissions) further specifies that this "*ratio*" must be "*as defined in the description*".

1.2 The Board considers that in order to clearly define a novel parameter it is necessary to unambiguously identify what is to be measured and, in case it is not self-evident, also how to measure it.

Instead, in the present case the skilled person even after reading the whole application, remains puzzled and in doubt as to what the "*surface to saturation ratio*" represents and how to measure it.

1.2.1 This is firstly due to the fact that the generic definitions of this parameter are obscure and not consistent with the only more specific relevant

description, disclosing at pages 25 to 27 a method (allegedly) suitable for measuring it.

Indeed, the "*surface to saturation ratio*" is defined in the application either as "*proportion of conditioning agent on the surface of the substrate versus inside the substrate*" or as "*ratio of the measurement of conditioning agent on the surface of the substrate versus the measurement of conditioning agent within the substrate*" (see page 7, lines 21 to 22, and page 25, lines 13 to 15, of the published application).
Both these definitions are however intrinsically unclear for the reason that it is not apparent whether they refer to a proportion/ratio between the molar or weight amounts of the two sorts of conditioning agent or between their volume amounts, or between something else.

These definitions are also not consistent with the only measuring method disclosed in the application, i.e. that based on (ATR) FT-IR spectroscopy (see pages 25 to 27 of the published application), as this latter does not involve measurements referring to two sorts of conditioning agent. As a matter of fact, whereas the above reported definitions imply two measurements related either to the conditioning agent present on the substrate surface or to the conditioning agent present in the substrate, the ratios reported in the Table at page 27 are obtained by comparing the heights of two (ATR) FT-IR absorbance peaks, only one of which is, however, related to the conditioning agent (present on the substrate surface and in the first 7 microns of this latter), the other being instead apparently

characteristic of the **substrate** only (see in particular from page 26 line 3 to page 27 line 10).

1.2.2 Secondly, the skilled reader of the whole application cannot even arrive at any clear understanding of which kind of measuring protocol allows to verify if the required surface to saturation ratio is present "*at any point on the surface of the substrate*", as required in both in claim 1 of the main request and claim 1 of the auxiliary request.

This is evident already when considering that this expression literally implies, *inter alia*, that no portion of the substrate surface should possibly be totally free of conditioning agent (as this would necessarily imply a point with a "*ratio*" of 0, i.e. of less than 1.25). But this is in open contradiction with the description of the application stating explicitly that the conditioner may be intentionally applied in a "*nonuniform*" way, so that areas of the substrate surface may remain totally free of any conditioner (the paragraph bridging pages 37 and 38 of the published application).

Moreover, the measuring protocol that the skilled person would take into consideration for verifying this requirement would depend, in the absence of any definition in the application, on the subjective evaluation of this person as to how many measurements must be carried on the surface of the product and on which portions of such surface, before being able to conclude with reasonable certainty that the desired ratio is present "*at any point of the surface*".

In particular, the missing information in this respect cannot be derived from the description of the specific method in pages 25 to 27, which neither describes specifically how the probe samples (whose "*surface to saturation ratio*" are reported in the table at page 27) have been prepared, nor indicates whether the reported values are averages of several measures carried out e.g. on several distinct portions of the probe samples or the result of a single measure, nor discloses whether the recorded spectra had been obtained using as probe in the (ATR) FT-IR apparatus the whole disposable article and, in this case, which has been the probe orientation(s) in the apparatus, or by exposing only a certain portion of the surface to the IR radiation, in the latter case, which portion.

1.2.3 Finally, even disregarding the fact that the skilled reader of the whole application is unable to identify with certainty how the (ATR) FT-IR spectra used in the specific measuring method partially disclosed in the application have actually been obtained, the disclosure of this method is manifestly insufficient for teaching to the skilled person how to apply the same method in all those possibly claimed products formed of substrate/conditioning agent pairs that are substantially different from those considered in the Table at page 27.

This is evident when considering that different chemical bonds not only adsorb IR radiation at different wave lengths, but are differently effective in such adsorption and, thus, that different chemical bonds provide peaks in the IR spectra **of different shapes and heights,** depending not only on their amount

but also on the nature of the bond and of the transition which adsorbs the IR radiation.

Hence, the specific method possibly used to measure the experimental "*ratios*" reported in the application only provides univocal results if one is able to identify among the possibly present absorbance peaks which one is to be considered representative of the conditioning agent and which one is to be considered representative of the substrate material.

However, the application provides no clear general instruction as to how the relevant pair of peaks is to be identified for the embodiments of the claimed subject-matter different from those described in the Table at page 27. Indeed, while this latter identifies a pair of absorbency peaks for each of the considered three specific combinations of substrate/conditioner, the skilled person would remain clueless as to how to select the pair of characteristic peaks in the case of any other possible substrate/conditioner combination (e.g. natural sponges with silicones) whose (ATR) FT-IR spectrum does not contain any of the peak pairs indicated in the Table at page 27. Nor would he know how to choose the relevant peaks in the other possible case of spectra containing more than two of the characterizing peaks indicated in the Table. Or in the case where only one of the pairs indicated in the Table is present, but the peak heights cannot be determined with the required precision due to overlap with other absorbency signals.

Therefore, the sole specific measurements vaguely described in pages 25 to 27 cannot possibly allow to identify any method of general applicability for establishing unambiguously the "*surface to saturation ratio*" in all the possibly claimed disposable cleansing products.

1.3 For all the above reasons, the Board finds that the parameter "*surface to saturation ratio*" present in the claims is substantially obscure, even taking into consideration its generic definitions and the partial disclosure of the sole specific method for its measurement in the description of the application.

The Board concludes, accordingly, that claim 1 according to any of the versions in the Appellant's main and first auxiliary requests does not comply with the requirements of Article 84 EPC and, thus, that both requests must be refused.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

G. Rauh P.-P. Bracke