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Datasheet for the decision of 14 December 2009

Case Number: T 1389/07 - 3.3.06

Application Number: 02719775.5

Publication Number: 1363599

IPC: A61K 7/50

Language of the proceedings: EN

Title of invention:
Mild moisturizing liquids with soap-like rinse feel

Applicants:
Unilever PLC, et all

Headword:
Soap-like cleansing composition/UNILEVER

Relevant legal provisions:
-

Relevant legal provisions (EPC 1973):
EPC Art. 84

Keyword:
"Clarity (main and 1st to 5th auxiliary requests) - no: undue amount of experimental work required for identifying the ingredients"
"Clarity (6th auxiliary request) - yes"

Decisions cited:
-

Catchword:
-

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Case Number: T 1389/07 - 3.3.06

D E C I S I O N
of the Technical Board of Appeal 3.3.06
of 14 December 2009

Appellants: Unilever PLC
Unilever House
100 Victoria Embankment
London
EC4Y 0DY (GB)

Unilever N.V.
Weena 455
3013 AL Rotterdam (NL)

Representative: James, Helen Sarah
Unilever Patent Group
Colworth Park
Sharnbrook
Bedford
MK44 1LQ (GB)

Decision under appeal: **Decision of the Examining Division of the European Patent Office posted 23 March 2007 refusing European patent application No. 02719775.5 pursuant to Article 97(1) EPC 1973.**

Composition of the Board:

Chairman: P.-P. Bracke
Members: P. Ammendola
U. Tronser

Summary of Facts and Submissions

I. This appeal lies from the decision of the Examining Division to refuse the European patent application No. 02 719 775.5 internationally published as WO 02/074252.

II. Claim 1 of this application as originally filed read:

"*1. A personal cleansing composition having soap-like rinsability comprising:*

(1) 70% to 99% of a lathering surfactant system containing 5 to 35% by wt. of a surfactant composition having a slippery, slightly draggy, or draggy wet skin feel during rinsing after 6 rubbing cycle as measured by in-shower rinsability evaluation method;

(2) 1 to 30% by wt. of a polymer/oil blend comprising:

(a) 10 to 90% of a polymer having MW greater than about 900 and viscosity greater than 10,000 centistoke at 30°C at 1.0 s^{-1} and a tackiness of greater than about 100 grams as measured by tackiness test;

(b) 20% to 90% of a hydrophobic oil,

wherein tackiness of polymer/oil blend is 30 - 400 g measured by tackiness test, wherein viscosity of polymer/oil blend is higher than 3000 centistoke at 30°C at 1.0 s^{-1}; and

wherein average particle size of blend is 20 to 5000 micrometers;

(3) 0.1 to 10% by wt. of organic, inorganic or polymeric stabilizer in amount sufficient to

provide physical stability in the surfactant system of oil droplets at 40°C for over 4 weeks;

wherein composition has less than 0.3 wt% cationic polymer,

wherein composition has draggy or very draggy wet skin feel in less than 8 rubbing cycles as determined by in-shower evaluation method".

III. The decision of the Examining Division was based on three sets of amended claims, forming the then pending main request and 1st and 2nd auxiliary requests.

The First Instance found, *inter alia*, that claim 1 of the then pending auxiliary requests did not comply with Article 84 EPC 1973.

In particular, the Examining Division considered that the tackiness parameters used for characterizing the personal cleansing compositions (hereinafter PCCs) of the invention were unusual parameters and did not comply with the conditions elaborated in the Guidelines for Substantive Examination III, C, 4.7a EPC 1973 because:

- these ingredients could be defined in more concrete terms;

- the tackiness parameter would not be reproducible due to the fact that the description of the tackiness testing protocol at page 26 of the application allowed the operator to freely vary the volume of the tested sample within the range of 0.1 to 0.15 cc;

and

- an undue burden of experimental work was needed for selecting among the huge number of possibilities existing for the polymer and oil ingredients, those whose blends fulfilled the two-fold tackiness requirement of the invention.

The decision under appeal also contained a section with heading "*OBITER DICTUM*" in which the Examining Division indicated that further violations of Article 84 EPC 1973 were caused by:

- the non-reproducible definitions of ingredient "*(1)*" and of the PCC made therefrom, based on an "*in-shower rinsability method*" that was vaguely described and depended on subjective evaluation of the perceivable "*wet skin feel*"

and

- the definition of ingredient "*(3)*" in terms of a result to be achieved that was contrary to the Guidelines for Substantive Examination III, C, 4.7 EPC 1973, because such compound could be defined in more concrete terms and because an undue burden of experimental work would be necessary for selecting compounds fulfilling the stability requirements.

IV. The Applicants (hereinafter "Appellants") lodged an appeal against this decision. In the grounds of appeal they disputed the finding of the Examining Division

only in as far as the lack of clarity of the tackiness parameters was concerned.

In a communication of 7 May 2009 the Board expressed the preliminary opinion that the claims according to the then pending requests violated Article 84 EPC 1973 also for all the above-recalled reasons mentioned in the decision under appeal and that the findings of the First Instance as to the undue burden of trial and error experiments needed for identifying the ingredients of the claimed PCCs were possibly also relevant under the provisions of Article 83 EPC 1973.

The Appellants replied with a letter dated 7 July 2009 also comprising some sets of amended claims.

In a further communication dated 5 August 2009 the Board stressed, *inter alia*, that the Appellants' arguments as to the reproducibility of the tackiness test were unsupported by any evidence and that the examples of the application appeared to prove that the nature of the oil would appreciably influence the tackiness of the polymer/oil blend.

With a letter of 30 September 2009 the Appellants filed a declaration (hereinafter referred to as document (D1)) of Michael P. Aronson, one of the inventors of the present application.

They then filed under cover of a letter dated 23 October 2009, *inter alia*, the sets of amended claims forming their final main request and 1st to 3rd auxiliary requests.

With a letter dated 28 October 2009 the Appellants filed the sets of amended claims forming their final 4th to 7th auxiliary requests.

V. For the present decision it is sufficient to consider the Appellants' final main request and the 1st to 6th auxiliary requests.

Claim 1 of the **main request** differs from claim 1 as originally filed (see above section II) in that:

- the wording "*(1) 70% to 99%*" has been replaced by "*(1) at least 70%*";
- the wording "*(2) 1% to 30%*" has been replaced by "*(2) 1% to 20%*";
- the wording "*a polymer having*" in "*(2)(a)*" has been replaced by "*a polymer selected from polybutene, polyisobutene, polybutadiene, polyisoprene, polyalphaolefin, copolymers of the above and mixtures thereof; having*";
- the wording "*at 1.0 s^{-1}; and*" in "*(2)(b)*"has been replaced by "*at 1.0 s^{-1}; wherein the oil to polymer ratio is in the range 9:1 to 1:8 and*"

and

- the two "*about*" present in "*(2)(a)*" of claim 1 as filed have been deleted.

Claim 1 of the **1st auxiliary request** only differs from claim 1 of the main request for the absence of the wording "*polyisoprene, polyalphaolefin,*" in "*(2)(a)*".

Claim 1 of the **2nd auxiliary request** only differs from claim 1 of the main request in that the wording "*4 weeks;*" in "*(3)*" has been replaced by "*4 weeks, wherein the stabilizer is selected from glycol mono-, di- and*

triesters having 14 to 22 carbon atoms, alkanolamides having 14 to 22 carbon atoms, stearyl stearate, stearyl palmitate, palmityl palmitate, trihydroxystearylglycerol, tristearylglycerol, amine oxides having from 14 to 22 carbon atoms, and carbohydrate gums,".

Claim 1 of the **3rd auxiliary request** only differs from claim 1 of the 2nd auxiliary request for the absence of the wording "*polyisoprene, polyalphaolefin,*" in "*(2)(a)*".

Claim 1 of the **4th auxiliary request** only differs from claim 1 of the main request in that the wording "*a hydrophobic oil,*" in "*(2)(b)*" has been replaced by "*a hydrophobic oil which is selected from petrolatum, mineral oil, sunflower seed oil, soybean oil, caster oil or isopropyl palmitrate,*".

Claim 1 of the **5th auxiliary request** only differs from claim 1 of the 4th auxiliary request for the absence of the wording "*polyisoprene, polyalphaolefin,*" in "*(2)(a)*".

Claim 1 of the **6th auxiliary request** only differs from claim 1 of the 2nd auxiliary request in that the wording "*a hydrophobic oil,*" in "*(2)(b)*"has been replaced by "*a hydrophobic oil which is selected from petrolatum, mineral oil, sunflower seed oil, soybean oil, caster oil or isopropyl palmitrate,*".

VI. The Appellants presented in writing the following arguments.

The "*wet skin feel*" characteristics of ingredient "*(1)*" and of the final PCC as defined in claim 1 of all requests would not violate Article 84 EPC 1973 because the "*in-shower evaluation method*" would just be one of the many tests which had been devised to evaluate and categorise consumer goods. Such kinds of tests would be widely used for judging properties like odour, perfume, taste and mouth feel, to evaluate properties such as the effectiveness of deodorants, the pleasantness or otherwise of perfume, and the pleasantness of foodstuffs. Whilst these evaluations utilised a defined protocol, there would always be a degree of subjectivity in the evaluation, though this would be kept to a minimum by the use of trained evaluators. Hence, the in-shower evaluation method was an objective measure of the performance of a cleansing composition, more indicative of the technical benefit sought than an in vitro test.

With regard to the tackiness parameter, the skilled reader of the application as filed would be given a protocol and a suitable piece of equipment on which to measure tackiness. The experimental data contained in document (D1) would prove that, contrary to the assumption of the Examining Division, the volume of the sample actually placed in the tackiness testing apparatus made little or no difference to the measured force, i.e. for each given sample the same tackiness value would be obtained by the method described in the application, independently as to whether one used a drop with size of 0.1 cc or of 0.15 cc. Therefore, the range of 0.1 to 0.15 cc given for the volume of the sample droplet to be used for testing tackiness would not deprive such parameter of reproducibility.

The invention defined in claim 1 of the main request could be carried out without undue burden, since only occasional failure was possibly to be faced in reproducing it. The task at hand was to select firstly a polymer with a specified tackiness, and secondly to formulate that polymer with a hydrophobic oil to provide a polymer/oil blend which had tackiness within a specified tackiness window. Virtually any oil could be used. Moreover, the skilled reader of the application would be provided with guidance on what polymers are useful, on how to perform the tackiness measurements and on what to do should certain tested polymers have insufficient tackiness. In relation to the polymer, the claims and description described a “Markush-type” grouping of suitable polymers; these polymer groups themselves were well known and recognisable to the skilled person. Some, such as polybutene, polyisobutene, polybutadiene and polyisoprene, were relatively narrow species of single monomer polymers, which could only vary by the number of monomers in the polymer, and hence their molecular weight and chain length. Others like polyalphaolefins were broader groups of polymers, but nevertheless the nature of the polymers was known to the skilled person. In relation to all suitable polymer groups, the skilled reader of the application would be told that suitable polymers should have a certain minimum molecular weight (see page 2, lines 1 to 2 and lines 19 to 23, page 3, lines 22 to 24 and page 17, lines 4 to 9). More description on suitable polymers was to be found in the application as filed on page 2, lines 1 to 3, page 4, lines 16 to 21 and page 16, line 29 to page 17, line l6. Further, on page 28 in Table 2, the skilled person was

given a list of commercially available polymers (and polymer/oil blends), and was told their tackiness values. Moreover, the skilled reader of this Table would easily find out that, not surprisingly, the increasing number after the term “Indopol H” represented an increasing molecular weight of the polymer. He was, thus, given guidance that an increasing molecular weight of polymer was advisable to attain the minimum tackiness which, in any event, was intuitive given that the application told on page 3, lines 22 to 24 that tackiness was related to viscosity. If a polymer would display insufficient tackiness, the skilled person would, thus, be guided to increase its molecular weight.

The definition of the stabilizer ingredient "*(3)*" in claim 1 of the main request only emphasised that the resultant composition would be stable and was supported by extensive disclosure in the description of suitable stabilizers on page 18, line 13 to page 20, line 2. There would be no reason to think the outlined stabilizers would not work. In case the skilled reader would be tempted to try to think of stabilizers within the description of "*organic, inorganic or polymeric*" stabilizer which were not specifically recited in the application, he would not be without general and specific guidance as to what stabilizers will work. Hence also in this respect no undue trial and error experiments were needed to carry out the invention as defined in claim 1 of the main request.

VII. The Appellants requested that the decision under appeal be set aside and the case be remitted to the First Instance for consideration of novelty and inventive

step on the basis of any of the main request or the 1st to 3rd auxiliary requests submitted with letter of 23 October 2009, or the 4th to 7th auxiliary requests submitted with letter of 28 October 2009. Oral proceedings were also requested in case the Board would not find any of these requests acceptable under the criteria of Article 123(2) EPC and of Article 84 EPC 1973.

Reasons for the Decision

1. Clarity of claim 1 of the main request (Article 84 EPC 1973).

1.1 The Board notes preliminarily that the core of the invention is manifestly that of rendering available PCCs providing a "*draggy or very draggy wet skin feeling*". The application indicates also why this property is perceived as important for the final user of the PCCs (see page 1, lines 13 to 18).

The "*in-shower evaluation method*" to be used for determining the provided degree of drag feel has been found non-reproducible by the Examining Division, because such method would be **vaguely described in the original application and subjective**. In particular, ambiguity would be caused by the indication therein that the number of rubbing cycles that should follow the initial perception of drag feel and lead to the final ranking of the "*wet skin feel*", could be "*2 to 3*". Moreover, in the opinion of the First Instance, the final result of such evaluation method would depend on the subjective appreciation made by the evaluators.

The Board notes, however, that the mere existence of these two alternatives as to the number of rubbing cycles following the perception of an initial drag is not *per se* sufficient for concluding that the degree of drag perceived by the evaluators after "*2*" rubbing cycles is likely to be appreciably different from that perceived after "*3*" of such cycles.

Moreover, the fact that such property is defined by means of an evaluation method that requires trained evaluators and relies on the subjective judgement of such persons, is not sufficient for concluding that such method would be unreliable. For instance, in the absence of any evidence to the contrary, it cannot reasonably be predicted that different panels of evaluators would differently classify identical PCCs.

On the contrary, as observed by the Appellants, testing procedures based on the subjective judgement of trained evaluators have reached wide acceptance as source of technically valuable information.

Accordingly, the Board has no reason for doubting of the possibility to obtain a reproducible and consistent ranking of cleansing compositions in terms of "*slippery*", "*slightly draggy*", "*draggy*" or "*very draggy*" "*wet skin feel*" by means of the "*in-shower rinsability evaluation method*" described in the application.

Therefore, the "*wet skin feel*" feature expressed in claim 1 of the main request is not found contrary to Article 84 EPC 1973.

1.2 As to the tackiness requirements also identically expressed in claim 1 of any of the main and 1st to 6th auxiliary requests, the Examining Division has considered this unusual parameter unacceptable because the description of the "*tackiness test*" in the original application at page 26 (from line 1 onwards) **allows to freely choose any volume from 0.1 to 0.15 cc** for the sample to be introduced in the indicated testing apparatus. However, contrary to the assumption of the First Instance, the expert declaration reported in document (D1) renders credible that the skilled person using the testing apparatus indicated in the application would immediately recognise that it is necessary to fill completely the gap between the opposite surfaces of the apparatus that are to be contacted with the liquid to be tested, whereas further amounts of this latter would not contribute to the measured tack force. Indeed, the data reported in document (D1) demonstrate that the tack force measured remains constant even when substantially changing the amounts of sample used.

For these reasons the Board must conclude that the indication of the testing apparatus in the application as filed is sufficient for rendering clear to the skilled person that, as long as the gap between the two opposite surfaces in the testing section of the testing apparatus specified in the original application is completely filled by the sample, any sample volume comprised between the range of 0.1 and 1.5 cc can be used and will necessarily result in substantially the same measured value. Hence, also the tackiness

parameters are found to be reliably determinable and, thus, clear in this respect.

1.3 The Examining Division has considered the unusual tackiness parameters unacceptable because the invention **could be defined in more concrete terms**. A similar objection has been raised by the First Instance in view of the definition of the amount of ingredient "*(3)*" in terms of the stability to be achieved.

The Board notes that according to the jurisprudence of the Boards of appeal of the EPO (see Case Law, 5th Edition 2006, Chapter II B 1.2.2), functional features defining a technical result are permissible in a claim if invention cannot otherwise be defined more precisely **without unduly restricting** the scope of the claims and if these features provided sufficiently clear instruction to reduce them into practice without undue burden over the whole ambit of the claim.

In the present case, the Board considers appropriate to identify the polymer/oil blends suitable as ingredient "*(2)*", *inter alia*, by means of their tackiness, since the application expressly identifies the core of the invention in the finding that the desired soap-like rinse properties of PCCs can be favoured by the presence of such polymer/oil blends displaying a certain tackiness (see page 3, lines 22 to 27, reading "*Unexpectedly, applicants have found that use of specific polymers (i.e., minimum tackiness defined by minimum viscosity) in combination with specific oils provide not only moisturizing benefits, but also can provide good rinsability and soap-like "draggy" feel desirable by many consumers.*").

The Board has no reason to doubt that it is appropriate to define the **amount** of stabilizer, *inter alia*, in terms of a certain level of physical stability to be provided to the PCC.

Therefore it is not apparent to the Board which other more concrete definitions of the ingredients "*(2)*" and "*(3)*" would allow to adequately identify all reasonable variants for the embodiments of the claimed subject-matter.

1.4 The First Instance has then considered in the decision under appeal that an **undue burden of trial and error experiments** is possibly needed for identifying:

– which polymer ingredient possess a tackiness of more than 100 grams, and which hydrophobic oil at which relative amount allows to produce a blend with such polymer displaying a tackiness of 30-400 grams

as well as

– which stabilizer in which amount results in physical stability for over 4 weeks of the final PCC at 40°C.

The Board notes that the method for measuring the tackiness has been found clearly defined and reproducible for the reasons given above at point 2.2. Moreover, the methods for assessing the achievement of the required stabilizing effect are undisputedly conventional. Hence, the Board has no reason to doubt that it is possible to unambiguously establish if a certain composition of matter falls or not in the

claimed area. Additionally, the Board has no reason to dispute the Appellants' statement that the disclosure of the refused application allows to realize, beside the exemplified PCCs, also many other embodiments of the invention (e.g. variants of the examples based on the most preferred alternative ingredients disclosed in the specification) without necessarily facing the need of carrying out trial and error experiments.

Nevertheless, these functional definitions reasonably also embrace further alternatives, in addition to the specific examples identified in the description for these ingredients.

1.4.1 Hence, the Board concurs with the First Instance that the definitions of the ingredients "*(2)*" and "*(3)*" present in claim 1 of the main request require trial and error experimentation in order to identify among a possibly huge number of possibilities(see e.g. point 12 of the decision under appeal), which of the theoretically possible ingredients actually comply with the respective tackiness and physical stability requirements.

Such experimental work would represent an undue burden in case the skilled person can only establish by trial and error whether or not his particular choice of numerous apparently equally suitable alternatives for the possible ingredients of the claimed PCCs will provide the aimed property.

1.4.2 The Board notes that the polymer ingredient "*(2)(a)*" is defined not only by the tackiness parameter but also by limiting the possible polymer ingredients exclusively

to those of a certain hydrocarbon nature, and by indicating a minimum viscosity and molecular weight requirements. The fact that the suitable polymers should have a certain minimum molecular weight and viscosity (as also stressed in the description, see page 2, lines 1 to 2 and lines 19 to 23, page 3, lines 22 to 24 and page 17, lines 4 to 9) amounts to a clear teaching for the skilled person that if the chosen polymer displays insufficient tackiness, then its molecular weight must be increased until the desired minimum tackiness is attained. The same teaching is also intuitive given that the application discloses on page 3, lines 22 to 24 that tackiness is related to viscosity, and is further implicitly confirmed in Table 2 at page 28 of the application, which gives a list of commercially available polymers (and polymer/oil blends) and of their tackiness values. The skilled reader of this Table can easily find out that the increasing number after the term “Indopol H” represents an increasing molecular weight of the polymer. He is, thus, again given guidance that an increasing molecular weight of polymer is advisable to attain the minimum tackiness.

Hence, the Board concurs with the Appellants that the skilled person would require only limited experiments, if any, in order to identify the polymers suitable as ingredient "*(2)(a)*" of the PCC defined in claim 1 of the main request.

1.4.3 However, the Board notes also that the same does not apply to the definition in claim 1 of the main request of the oil ingredient "*(2)(b)*". Indeed, as indicated by the Board and undisputed by the Appellants, the

examples of the application prove that also the nature of the oil appreciably influences the tackiness of the polymer/oil blend. The definition of this ingredient in claim 1 of the main request includes, however, **any** hydrophobic oil, i.e. comprises oils whose chemical and chemical-physical properties are substantially different (ranging from fully paraffinic oil, to vegetable oil containing some hetero-atoms, to their modifications, to silicone oils, etc.). Moreover, the description of the refused application contains no information as to how the nature or the amount of the oil favours or disfavours the achievement of the required tackiness. Hence, it is not apparent on which basis the Appellants alleges that any hydrophobic oil would work, regardless of the possibly very relevant variance in the nature of such chemical compounds.

Therefore, the Board finds not credible that the skilled person, when confronted with an initial failure, may only need few further trial and error experiments in order to indentify which hydrophobic oils at which relative amounts are able to form with a certain polymer ingredient "*(2)(a)*" a blend possessing the desired tackiness.

Thus, already for this reason claim 1 of the main request is found to violate Article 84 EPC 1973 and, hence, this request is not allowable.

1.4.4 Additionally, it is apparent to the Board that a similar deficiency under Article 84 EPC 1973 derives from the fact that this claim does not define the nature of the stabilizer to be used as ingredient "*(3)*".

The finding of the Examining Division has been disputed by the Appellants by only arguing that there would be no reason to presume that the specific stabilizers listed in the specifications of the application as filed would not allow achieving the desired stability.

Although this argument appears *per se* correct, it remains the fact already stressed above, that the claim is not even implicitly restricted to the compounds that are listed in the application as non-limiting examples of the possible stabilizer ingredients. It is also not apparent to the Board (nor alleged by the Appellants), that the chemical compounds capable of stabilizing droplets of polymer/oil blends constitute a conventional group of ingredients whose members are well known to the skilled person.

Hence, the skilled person may, for instance, take into consideration for ingredient "*(3)*" any organic, inorganic or polymeric compound having some affinity for both apolar and polar substances and/or having some structuring ability.

Accordingly, the Board concludes that, even in the absence of any supporting evidence, already the very large number of alternatives with quite distinct chemical-physical properties among which the skilled person could attempt to identify further stabilizers (i.e. stabilizers different from those specifically disclosed in the description of the patent application) renders likely that the skilled person would possibly face repeated failure and, thus, an undue amount of experimental work.

Thus, claim 1 of the main request is found to violate Article 84 EPC 1973 also for this reason.

2. Clarity for the subject-matter of claim 1 of the 1st to 5th auxiliary requests (Article 84 EPC 1973).

2.1 Since, also the versions of claim 1 according to the 1st to 3rd auxiliary requests define the ingredient"*(2)(b)*" as broadly as claim 1 of the main request, these auxiliary requests are also not allowable in view of Article 84 EPC 1973 for the reasons already given above at point 1.4.3.

2.2 Since, also the versions of claim 1 according to the 4th and 5th auxiliary requests define the ingredient "*(3)*" as broadly as claim 1 of the main request, these auxiliary requests are also not allowable in view of Article 84 EPC 1973 for the reasons already given above at point 1.4.4.

3. Clarity for the subject-matter of claim 1 of the 6th auxiliary request (Article 84 EPC 1973).

3.1 The definition of the ingredient "*(2)(b)*" in claim 1 of this request is only limited to four specific classes of hydrophobic oils. This renders credible that only a very limited amount of experimental work is necessary to identify which are the possible ingredients "*(2)*" and, thus, to identify the further embodiments of the claimed subject-matter over the whole breadth thereof.

3.2 The definition of the ingredient "*(3)*" in claim 1 of this request is only limited to few classes of chemical compounds whose variability in terms of chemical-

physical properties is substantially limited. Hence, in the absence of any evidence to the contrary, the Board has no reason for disputing the Appellants' reasoning that all compounds belonging to such classes are sufficiently effective as stabilizer to provide the aimed stability of the claimed PCCs. Hence, it is found credible that also in respect of the ingredient "*(3)*", only a limited amount of experimental work is necessary to identify which are the further embodiments of the claimed subject-matter over the whole breadth thereof.

3.3 Hence, no undue amount of experimental work is implied by the wording of claim 1 of the 6th auxiliary request and, since the reasons indicated above at points 1.1 to 1.3 for rejecting the other objections of the Examining Division as to the clarity of claim 1 of the main request apply equally in respect of the present claim, this latter is found to comply with Article 84 EPC 1973.

4. Basis for the amendments in claim 1 of the 6th auxiliary requests (Article 123(2) EPC).

The differences between claim 1 as originally filed and that of the 6th auxiliary request are already indicated above (compare section II and V of the Facts and Submissions).

The Board is satisfied that claim 1 of this auxiliary request complies with the requirements of Article 123(2) EPC for the following reasons:

No addition of subject-matter results from the replacement of the original range "*70% to 99%*" given

for ingredient "*(1)*" in claim 1 as filed, by means of "*at least 70%*". Indeed, such replacement corresponds to the sole possible meaning of the original range, given that the application identifies minimum amounts of "*1%*" and "*0.1%*" for the two other mandatory ingredients "*(2)*" and "*(3)*" of the claimed PCC.

Page 16, line 30, of the application as filed provides an explicit basis for the limitation "*to 20%*" for the amount of ingredient "*(2)*".

Original claim 4 and page 17, lines 9 to 13 and 25 to 29 provide instead a basis for the list of polymers limiting the ingredient "*(2)(a)*" and for the polymer/oil blending ratio.

Moreover, the original disclosure of the filed application at page 18, lines 25 to 27; from page 18, line 30 to page 19, line 1; page 19, lines 4 to 11 and 15 to 24, supports the limitation of the stabilizer ingredient "*(3)*".

Finally, basis for the limitation of the oil ingredient "*(2)(b)*" introduced in claim 1 of the 6th auxiliary request is found in the original description at page 17, lines 20 to 23, of the application as filed. The Board has noted that the manifestly erroneous expression "*isopropyl palmitrate*" (emphasis added by the Board) has been used in claim 1 instead of the correct chemical name "*isopropyl palmitate*" (compare with page 17, line 23 of the description). Since the sole possible correction of this manifest typing error is self-evident to the chemist practitioner, it may be corrected during the subsequent examination proceedings.

5. Compliance of claim 2 and 3 of the 6th auxiliary request with Article 123(2) EPC and with Article 84 EPC 1973.

The 6th auxiliary request comprises only two further claims. They define preferred embodiments of the PCC of claim 1 and correspond respectively to claims 2 and 6 of the application as originally filed. Hence, the Board finds them allowable in view of the requirements of Article 123(2) EPC and has no reason for objecting to them under the provisions of Article 84 EPC 1973.

6. As the 6th auxiliary request is found to comply with Article 123(2) EPC and with Article 84 EPC 1973, there is no need for the Board to decide also on the 7th auxiliary request or for oral proceedings to be held.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the department of first instance for further prosecution on the basis of claims 1 to 3 according to the 6th auxiliary request filed with letter of 23 October 2009.

The Registrar: The Chairman:

G. Rauh P.-P. Bracke