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**Datasheet for the decision
of 20 August 2010**

Case Number: T 1425/07 - 3.3.06

Application Number: 00928693.1

Publication Number: 1181008

IPC: A61K 7/50

Language of the proceedings: EN

Title of invention:

Anti-dandruff and conditioning shampoos containing certain cationic polymers

Applicant:

THE PROCTER & GAMBLE COMPANY

Opponent:

-

Headword:

Anti-dandruff shampoo/PROCTER

Relevant legal provisions:

-

Relevant legal provisions (EPC 1973):

EPC Art. 56

Keyword:

"Inventive step (yes) - advantageous technical effect not predictable"

Decisions cited:

-

Catchword:

-



Case Number: T 1425/07 - 3.3.06

D E C I S I O N
of the Technical Board of Appeal 3.3.06
of 20 August 2010

Appellant:
(Applicant)

THE PROCTER & GAMBLE COMPANY
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Cincinnati, OHIO 45202 (US)

Representative:

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Decision under appeal:

Decision of the Examining Division of the
European Patent Office posted 26 February 2007
refusing European application No. 00928693.1
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 is from the decision of the Examining Division refusing the European patent application No. 00 928 693.1, published as WO 00/66080, relating to antidandruff conditioning shampoos containing certain cationic copolymers.

II. This decision was based on the following patent application documents:

Claims:

Claims 1 to 6 and 7(part) as published,
Claims 7(part) and 8 to 10 as filed with the letter of 16 February 2004,
Claims 11 to 13 as filed with the letter of 26 January 2005;

Description:

pages 1 to 4, 9, 10, 12, 14 to 17, 21, 23, 36 and 38 to 41 as published,
pages 5 to 8, 11, 13, 18 to 20, 22, 24 to 35 as filed with the letter of 16 February 2004,
page 37 as filed with the letter of 26 January 2005.

III. Claim 1 reads as follows:

"1. A shampoo composition characterised in that it comprises:
a) from 5% to 50%, by weight of the composition, of an anionic surfactant;
b) from 0.01% to 10%, by weight of the composition, of a non-volatile conditioning agent;

c) from 0.1 % to 4%, by weight of the composition, of an anti-dandruff particulate;
d) from 0.02% to 5%, by weight of the composition, of a cationic guar derivative;
i) wherein said cationic guar derivative has a molecular weight from 50,000 to 700,000; and
ii) wherein said cationic guar derivative has a charge density from 0.05 meq/g to 1.0 meq/g;
e) water."

Claims 2 to 10 and 12 define preferred embodiments of the shampoo composition (hereinafter shampoo) of claim 1. Claim 11 defines the non-therapeutic method for providing anti-dandruff efficacy and for conditioning hair by applying a shampoo composition according to any of claims 1 to 10. Claim 13 of the set considered by the Examining Division is not relevant for the present appeal proceedings (see below section V).

IV. The Examining Division found unsupported the Applicant's allegation that the mandatory presence in the claimed shampoos of an anti-dandruff agent (hereinafter AA) in the form of a **particulate** resulted in **superior** conditioning and anti-dandruff efficacy.

The Examining Division considered that the skilled person aiming at shampoos simultaneously providing anti-dandruff efficacy and conditioning would have started from the conditioning shampoos of

document (1) = WO 97/35542

that are disclosed in this citation to also possibly comprise unspecified AAs. The skilled person would have then arrived at the subject-matter of claim 1 by arbitrarily choosing to use particulate AAs in this prior art shampoos.

Therefore, claim 1 was found not to comply with Article 56 EPC 1973.

- V. The Applicant (hereinafter Appellant) lodged an appeal against this decision. During the appeal proceedings it referred to, *inter alia*,

document (A1) = *Chemical and Physical Behaviour of Human Hair*, by Clarence Robbins, Third Edition, Springer Verlag 1994, pages 226-227.

During the appeal proceedings the Appellant has, *inter alia*, reported comparative experimental data (hereinafter the data of 2010) in a letter of 16 July 2010 and filed an amended set of twelve claims with letter of 11 August 2010.

This set of claims differs from that considered by the Examining Division only for the deletion of claim 13.

- VI. In the opinion of the Appellant, the data of 2010 proved that the shampoos of the invention based on particulate AAs have a significantly **superior** anti-dandruff performance versus similar shampoos comprising soluble AAs.

Accordingly, the claimed subject-matter would not be rendered obvious by the disclosure of document (1) that unspecified AAs might also be optionally present in the conditioning shampoos of this prior art.

VII. The Appellant requested in writing that the decision under appeal be set aside and that the patent be granted upon the claim set submitted with letter of 11 August 2010.

Reasons for the Decision

1. Article 56 EPC 1973: claim 1

1.1 The subject-matter of this claim (see above section III of the Facts and Submissions) is a shampoo containing both conditioning and anti-dandruff agents characterized, *inter alia*, by the fact that the AA must be a **particulate**. It is apparent that this requirement implies that the AA must be insoluble.

1.2 The Board notes that the aim of the invention identified in the application is the provision of a shampoo achieving a superior combination of anti-dandruff efficacy and conditioning (see the published application, page 1, lines 7 to 8). Hence, the Board sees no reason to deviate from the findings of the Examining Division, undisputed by the Appellant, that:

a) the shampoos providing excellent conditioning and which may optionally comprise AAs that are disclosed in document (1) represent a reasonable starting point for

the purpose of assessing inventive step for the subject-matter of present claim 1;

and

b) the shampoos defined in this claim only differ from the prior art because in the former the AA must be a **particulate**, whereas in document (1) AAs are only mentioned in general among the optional shampoo ingredients at page 10, lines 344 to 348, **without** disclosing any specific example thereof or specifying their solubility properties or the possible physical form for such ingredients in the shampoo.

1.3 The Appellant has argued that the invention is based on the surprising finding that a superior performance is only achieved when the AA is in the particulate form. This unpredictable advantageous technical effect of the claimed shampoos would be demonstrated by the data of 2010.

1.4 The Board notes that the data of 2010 compare the anti-fungal efficacy against the yeast fungi *Malassezia* obtained by using a shampoo of the invention (comprising a particulate AA) with that obtained by using a similar shampoo comprising instead the soluble AA *piroctone olamine* (also known as *octopirox*).

The Board notes further that the conventional use of *piroctone olamine* as effective AA is acknowledged not only in the application (see page 36, lines 26 to 28) but also in document (A1) (see lines 10 to 12 from the bottom of page 227).

The Board has no reason to disbelieve the Appellant's statement in the letter of 16 July 2010 that *Malassezia* causes dandruff and/or to dispute the assumption - implicit in the Appellant's reasoning - that the results in terms of anti-fungal efficacy reported in the data of 2010 allow a corresponding ranking of the tested shampoos in terms of their anti-dandruff efficacy.

Therefore, the Board considers the data of 2010 a credible evidence that the claimed shampoos have solved vis-à-vis the prior art the technical problem of achieving **superior** anti-dandruff efficacy in shampoos providing anti-dandruff efficacy and conditioning.

1.5 As none of the available citations suggests that particulate AAs are more effective than the soluble ones, the advantageous technical effect proven by the data of 2010 was not predictable in view of the prior art. Hence, the person skilled in the art that aimed at achieving a superior anti-dandruff efficacy in the shampoos of document (1) had **no** incentive to specifically use therein an AA that is in the particulate form and, thus, to arrive at the claimed shampoos.

1.6 Hence, the Board concludes that the subject-matter of claim 1 is not rendered obvious by the prior art and, thus, complies with the requirement of Article 56 EPC 1973.

2. Article 56 EPC 1973: claims 2 to 12
- 2.1 Claims 2 to 10 and 12 define preferred embodiments of the shampoo of claim 1. Hence, their subject matter is non-obvious for the same reasons given above for claim 1.
- 2.2 Claim 11 defines a non-therapeutic method for providing anti-dandruff efficacy and for conditioning based on the application of the shampoo of claims 1 to 10. Therefore, also such method complies with the requirements of Article 56 EPC 1973 for substantially the same reasons indicated above for the claimed shampoos.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Examining Division with an order to grant a patent on the following basis:

Claims 1 to 12 submitted with letter of 11 August 2010;

Description:

pages 1 to 4, 9, 10, 12, 14 to 17, 21, 23, 36 and 38 to 41 as published,
pages 5 to 8, 11, 13, 18 to 20, 22, 24 to 35 as filed with the letter of 16 February 2004,
page 37 as filed with the letter of 26 January 2005.

The Registrar:

The Chairman:

G. Rauh

P.-P. Bracke