

**Internal distribution code:**

- (A)  Publication in OJ  
(B)  To Chairmen and Members  
(C)  To Chairmen  
(D)  No distribution

**Datasheet for the decision  
of 3 February 2011**

**Case Number:** T 0295/08 - 3.3.10

**Application Number:** 00957612.5

**Publication Number:** 1204405

**IPC:** A61K 7/48

**Language of the proceedings:** EN

**Title of invention:**

Skin cleansing composition with improved stability

**Patentee:**

Colgate-Palmolive Company

**Opponent:**

Unilever PLC  
HENKEL KGaA

**Headword:**

Skin cleansing composition/COLGATE-PALMOLIVE

**Relevant legal provisions:**

EPC Art. 56, 114(2)  
RPBA Art. 12(4)

**Keyword:**

"Admissibility of evidence filed with the statement setting  
out the grounds of appeal (yes)"  
"Inventive step (yes) - unexpected improvement made credible"

**Decisions cited:**

T 0197/86, T 0270/90, T 0355/97, T 1208/97, T 1072/98,  
T 0540/01, T 0881/01, T 0836/02, T 0176/04, T 2017/07

**Catchword:**

-



Case Number: T 0295/08 - 3.3.10

**DECISION**  
of the Technical Board of Appeal 3.3.10  
of 3 February 2011

**Appellant:** Colgate-Palmolive Company  
(Patent Proprietor) 300 Park Avenue  
New York NY 10022-7499 (US)

**Representative:** Jenkins, Peter David  
Page White & Farrer  
Bedford House  
John Street  
London WC1N 2BF (GB)

**Respondent I:** Unilever PLC  
(Opponent 1) Unilever House  
Blackfriars  
London EC4P 4BQ (GB)

**Representative:** Baker, Colin John  
Potter Clarkson LLP  
Park View House  
58 The Ropewalk  
Nottingham NG1 5DD (GB)

**Respondent II:** Henkel KGaA  
(Opponent 2) VTP (Patente)  
D-40191 Düsseldorf (DE)

**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 17 December 2007  
revoking European patent No. 1204405 pursuant  
to Article 102(1) EPC 1973.

**Composition of the Board:**

**Chairman:** P. Gryczka  
**Members:** J.-C. Schmid  
F. Blumer

## Summary of Facts and Submissions

I. The Appellant (Proprietor of the patent) lodged an appeal on 4 February 2008 against the decision of the Opposition Division posted on 17 December 2007 revoking European patent No. 1204405, independent claim 1 reading as follows:

"1. An aqueous composition comprising

- a. at least 1 wt. % of a surfactant or mixture thereof;
- b. a silicone in quantities of from 0.1 to 8 wt. % of the composition and having a minimum average particle size above 2  $\mu\text{m}$  (microns);
- c. a hydrocarbonaceous material in quantities of from 0.1 to 8 wt. % of the composition;
- d. a cationic polymer in quantities of from 0.02 to 1 wt. % of the composition;
- e. a combination of a polyacrylate thickening polymer and an acrylate methacrylate copolymer wherein the ester group of the methacrylate is alkyl of 12 to 20 carbon atoms, said alkyl having fourteen to twenty-six ethoxy groups and the acrylate is one or more monomers of acrylic acid, methacrylic acid or one of their simple esters in quantities sufficient to provide both viscosity and visual phase stabilization, the polyacrylate is 0.5 to 2.0 wt.% of the composition and the acrylate methacrylate copolymer is 0.1 to 1.0 wt.% of the composition, and;
- f. the balance water."

II. Notices of Opposition had been filed by the Respondents I and II (Opponents (1) and (2)

respectively) requesting revocation of the patent in suit in its entirety on the grounds of lack of novelty and inventive step (Article 100(a) EPC) and of insufficient disclosure (Article 100(b) EPC), citing *inter alia* documents

- (1) WO-A-00/21495,
- (3) US-A-5 376 146
- (4) EP-A-0 920 853 and
- (7) WO-A-99/13837.

III. The Opposition Division held that the subject-matter of claims 1 as granted was novel over document (1) since this document (1) did not disclose specifically the combination of features (a)-(d) with the combination of the polyacrylate and acrylate methacrylate copolymer, but lacked an inventive step with respect to document (7) which was considered to represent the closest prior art. In the absence of any data supporting a synergic effect for the combination of a polyacrylate thickening polymer with an acrylate methacrylate copolymer, the technical problem underlying the patent-in-suit was merely to be seen in the provision of alternative compositions. However, the use of the combination of these two polymers in cosmetic compositions was obvious, since both polymers were known as viscosity stabilizers.

IV. At the oral proceedings before the Board, held on 3 February 2011, wherein Respondent I was not represented as communicated with its letter of 29 December 2010, the Appellant defended the maintenance of the patent in suit as granted and on the basis of three auxiliary requests submitted on 24 December 2010.

V. According to the Appellant the subject-matter of claim 1 as granted involved an inventive step. Starting from document (7) as the closest prior art, the technical problem underlying the patent-in-suit was not merely to provide an alternative composition, but was to provide a composition with enhanced viscosity stability. The test report filed on 21 April 2008 with the statement setting out the ground of appeal demonstrated that this problem was solved across the scope of claim 1. This test report should be admitted into the proceedings since it was filed with the grounds of appeal and addressed directly the statement in the decision under appeal that in the absence of data supporting an effect with respect to viscosity and visual phase integrity, the subject-matter of claim 1 was considered to lack an inventive step. Composition 25 of this test report was within the scope of claim 1 since it comprised the cationic polymer within the claimed 0.02 to 1 wt% range. The 2,5wt. % of polyquaternium-7 indicated in table A actually related to the commercial product Merquat 7 which contained only 8.5 to 9.8% of the active polyquaternium-7. There was a typing error in the content of petrolatum in composition 26 as clearly apparent from the corresponding percentage, 100 grams actually should read 10 grams. The acrylic polymer Carbomer® 934 in the tested composition was not a polymer within the meaning of the polyacrylate polymer of claim 1, those polymers being restricted to copolymers of two or more monomers comprising acrylic acid, methacrylic acid or one of their simple esters according to page 8, lines 51 to 52 of the patent-in-suit. The fact that dependent claim 7 indicated the presence of a further polyacrylic acid

lightly to moderately crosslinked polymer in the composition implied that the polyacrylate polymer indicated in claim 1 could not be a homopolymer, otherwise there would be an inconsistency between claims 1 and 7. The only difference between compositions 25, 26 and 27 was the ratio of Aculyn® 22 and/or Aculyn® 33. The three compositions having the same content of acrylic polymers had similar magnitudes of viscosity as represented by  $G''$  (loss modulus). However, composition 25 according to the invention had the highest degree of elasticity ( $G'$ ) indicating that this composition had more structure than compositions 26 and 27, and thus enhanced viscosity stability over time. Hence, the enhancement of viscosity stability was reflected by the lower value of  $\tan \delta = G''/G'$  of composition 25. There was no hint in the prior art to formulate the claimed composition in order to enhance the viscosity stability. Neither document (3) or (4) was concerned with stabilizing the viscosity of an aqueous composition comprising silicon and hydrocarbonaceous material. These documents related to a two-part hair colouring composition and the acrylate polymer was only used in the developer part of the kit.

VI. As regards novelty, Respondent I submitted in writing that the Opposition Division constrained the disclosure of document (1) to its specific examples. The test report filed by the Appellant in the statement setting out the grounds of appeal should not be admitted in the proceedings being late filed. Moreover, the comparison was not fair because this test report did not present any comparison with a composition according to claim 1, since composition 25 contained 2,5 wt.% of cationic polymer and hence was outside the scope of claim 1 of

the patent-in-suit. In addition no particule size was quoted for the 60000 cst dimethicone component used in the compositions of the test report, while claim 1 required that the silicon has a minimum average particle size above 2 microns. The patent-in-suit related to stabilisation, in the form of emulsion integrity, temperature and shear stability, and viscosity and visual phase integrity. No explanation was provided as to how plots concerning Loss and Elastic moduli parameters related to the benefits described in the patent-in-suit for the claimed compositions, i.e. the purported extra stability of the compositions. Furthermore the data sheets for the material Aculyn® 33 and Aculyn® 22 filed by the Appellant strongly hinted at the alleged benefits. In particular, Aculyn® 22 was recommended for use in cosmetic and toiletry products and was said to provide synergistic interaction with organic clays, as well as high yield value and particulate stabilisation. Hence synergy with other materials would not be entirely surprising.

VII. According to Respondent II, starting from document (7) as the closest prior art, the technical problem underlying the patent-in-suit could only be seen in the provision of an alternative composition. The test report filed by the Appellant could not shown any improvement of the claimed compositions since the comparison was not carried out either with a composition according to the closest prior art document (7) or with the examples of the patent-in-suit. Composition 25 of this test report was even not a composition according to claim 1 since it contained 2,5 wt. % of polyquaternium-7, whereas claim 1 of the

patent-in-suit required the cationic polymer to be within the range of 0.02 to 1 wt. % of the composition. Furthermore composition 26 was indicated to contain 100 grams of petrolatum whereas composition 25 and 27 only 10 grams. As to the results it was not apparent whether the observed difference in the  $\tan \delta$  value was significant with respect to the viscosity stability because those  $\tan \delta$  differences appeared only as a theoretical value for which the relationship to the real viscosity stability over time of the composition was unknown. Furthermore it was not credible that the enhancement of viscosity stability occurred for each composition claimed having the indicated amount of the two acrylate polymers. Document (7) taught that Aculin® 22 and Aculin® 33 were suitable stabilizing agents. It was therefore obvious to use a mixture of these two stabilizers to provide mere alternative compositions, all the more because documents (3) and (4) taught that a mixture of Aculyn® 33 and Aculyn® 22 could be used in a cosmetic composition in any proportion. Therefore, the claimed subject-matter lacked an inventive step.

VIII. The Appellant requested that the decision under appeal be set aside and that the patent be maintained as granted, or, subsidiarily, on the basis of auxiliary requests 1 to 3 as filed with letter dated 24 December 2010.

The Respondent I requested in writing that the appeal be dismissed.

The Respondent II requested that the appeal be dismissed.



IX. At the end of the oral proceedings the decision of the Board was given orally.

### **Reasons for the Decision**

1. The appeal is admissible.
2. *Late filed evidence (Article 114(2) EPC)*
  - 2.1 Respondent I objected to admitting the test report filed with the Appellant's Statement of the Grounds of Appeal into the proceedings for the reason that it was late-filed.
  - 2.2 According to Article 12(4) RPBA, the Board shall take into account all facts, evidence and requests submitted by the parties with the statement of the grounds of appeal and the reply to it but may hold inadmissible facts, evidence and requests which could have been presented during the first instance proceedings.
  - 2.3 The submission by an Appellant of new evidence in the Statement of the Grounds of Appeal to overturn the appealed decision is to be considered as a normal action of a losing party (see decision T 1072/98, point 2.3 of the reasons; T 540/01, point 2 of the reasons, neither published in OJ EPO). The test report was filed as a response to the reasoning of the decision of the Opposition Division that in absence of data supporting a synergistic effect no inventive step could be acknowledged to the claimed compositions when considering the teaching of document (7). Having regard

to the present factual situation, the Appellant was entitled to overcome the findings of the contested decision and, thus, to file this new evidence with the purpose to show an effect of the claimed compositions over those of the prior art document (7) rendering claim 1 inventive.

Thus, in the present case, the test report filed with the Statement of the Grounds of Appeal is to be taken into consideration in these appeal proceedings.

*Main Request*

3. *Insufficiency of disclosure*

Although raised as a ground for opposition, the Respondents did not maintain the objection of insufficiency of disclosure of the invention. The Board has no reason to raise that objection on its own in these appeal proceedings.

4. *Novelty*

Although the Opposition Division clearly indicated that document (1) did not disclosed specifically the combination of features (a)-(d) with the combination of the polyacrylate and acrylate methacrylate copolymer, Respondent I submitted that the Opposition Division constrained the disclosure of document (1) to its specific examples. Respondent I, however, did not indicate which section of document (1) disclosed that combination, nor did the Board on its own find any passage in document (1) disclosing the combination of features as required by claim 1. Hence, The Board sees

no reason to depart from the finding of the Opposition Division to arrive at the conclusion that the subject-matter of claim 1 is novel over document (1).

5. *Inventive step*

According to the established jurisprudence of the Boards of Appeal it is necessary, in order to assess inventive step, to establish the closest state of the art, to determine in the light thereof the technical problem which the invention addresses and successfully solves, and to examine the obviousness of the claimed solution to this problem in view of the state of the art. This "problem-solution approach" ensures that inventive step is assessed on an objective basis and avoids an *ex post facto* analysis.

5.1 *Closest prior art*

Document (7) is concerned with the stabilisation of aqueous detergent composition comprising water-insoluble organosilicone compounds. This document describes aqueous compositions comprising 4.00 to 50.00 % of an anionic surfactant, 0.1 to 6.00 % of a dimethicone or a silicone, 0.01 to 3.00 % of a cationic polymer, which further comprise an hydrocarbonaceous material such as petrolatums and 0.10 to 5.00 % of an acrylic stabilising agent which is selected from the group consisting of polyacrylic acid, acrylates copolymer and derivatives thereof (see claim 1 and 32). Suitable acrylic stabilising agents include among other Aculyn® 22 (Acrylates/steareth-20 methacrylate copolymers), Aculyn® 33 (acrylate copolymers) or Carbopol® 907 (polyacrylic polymers) (see page 9,

lines 7 to 15 and table B on page 22). Although the general teaching of document (7) encompasses the use of mixtures of stabilizing agents, in the working examples of this document, a single acrylic stabilising agent is used, i.e. there is no concrete disclosure of a combination of two or more stabilising agents, let alone of the two specific agents required by claim 1.

The Board considers, in agreement with the Opposition Division and the Parties, that document (7) represents the closest state of the art, and, hence, takes it as the starting point in the assessment of inventive step.

#### 5.2 *Technical problem underlying the patent in suit*

In view of document (7), the Appellant submitted that the technical problem underlying the patent in suit consisted in providing a composition having enhanced stability with respect to viscosity in relation to time.

#### 5.3 *Solution*

The proposed solution to this problem is the composition according to claim 1 characterized in that the acrylic stabilizing agent comprises the combination of a polyacrylate thickening polymer and an acrylate methacrylate copolymer as defined in claim 1, the polyacrylate being 0.5 to 2 wt.% of the composition and the acrylate methacrylate copolymer being 0.1 to 1 wt.% of the composition.

5.3.1 The Appellant and Respondent II were divided with respect to the meaning of the term "polyacrylate thickening polymer" in claim 1.

The Appellant argued that acrylate homopolymers, such as the acrylic polymer material Carbomer 934<sup>®</sup> used in the compositions of its test report, were not polyacrylate thickening polymers as required by claim 1, since according to page 8, lines 51 and 52 of the patent-in-suit the polyacrylate thickening polymer according to claim 1 had to be an acrylate methacrylate copolymer. This was contested by Respondent II.

5.3.2 To support its interpretation of polyacrylate polymer meaning exclusively copolymer of acrylic and methacrylic acid, and thus excluding homopolymers of acrylic acid, the Appellant relied on dependent claim 7 requiring in its opinion the presence of a further component in the composition, namely a polyacrylic polymer, which according to page 9, lines 23 to 25 of the patent-in-suit was a homopolymer of polyacrylic acid, implying therefore that the polyacrylate thickening polymer defined in claim 1 could not be a homopolymer, otherwise there would be an inconsistency between claims 1 and 7.

5.3.3 Dependent claim 7, however, requires the presence of a particular acrylic acid polymer in the composition, i.e. a polyacrylic acid lightly to moderately crosslinked polymer. Consequently, the Board sees no reason why defining in dependent claim 7 a particular polyacrylate polymer falling under the more generically defined polyacrylate polymers of claim 1 would introduce inconsistency between these claims.

In addition the Appellant's restrictive interpretation of claim 1 in the light of the description would amount

to read into the claim features appearing only in the description and then relying on such features to provide additional requirements. This would not be to interpret claims but to rewrite them, thereby depriving the claims of their intended function (see T 881/01, point 2.1 of the reasons; T 1208/97, point 4 of the reasons; T 2017/07, point 2.7 of the reasons; neither published in OJ EPO).

Hence, the Appellant's argument that the polyacrylate thickening polymer as set forth in claim 1 is limited to the acrylate methacrylate copolymers described on page 8, lines 51 to 52 of the patent-in-suit, thereby excluding homopolymers of acrylic acid, is devoid of merit. Consequently, the acrylic polymer Carbomer 934<sup>®</sup> used in the compositions of table A of the test report on which the Appellant relies (see point 5.4 below) is a polyacrylate thickening polymer as required by claim 1.

#### 5.4 *Success*

- 5.4.1 In order to demonstrate that the technical problem as define above has effectively been solved by the claimed compositions, the Appellant relied on the results of the comparison set forth in the experimental report filed with the letter setting out the grounds of appeal. In this test report three silicone-containing aqueous compositions comprising the same content of acrylic stabilizer agent were compared in relation to their viscoelasticity behaviour. These compositions differ from each other exclusively by the formulation of the acrylic polymer.

5.4.2 The acrylic stabilizer of composition 25 consists of 0.4 wt. % of an acrylic polymer (Carbomer<sup>®</sup> 934), 0.84% of another acrylic polymer (3% by weight of Aculyn<sup>®</sup> 33 comprising 28% active material) and 0.45% of an acrylate steraeth-20 methacrylate copolymer (Aculyn<sup>®</sup> 22). This composition thus comprises 1.24 wt.% of a polyacrylate and 0.45 wt.% of the acrylate polyethoxylated-alkyl methacrylate copolymer and hence is according to claim 1 of the patent-in-suit.

The acrylic stabilizer of composition 26 consists of 1.29 wt.% of the acrylate polyethoxylated-alkyl methacrylate copolymer (Aculyn<sup>®</sup> 22) and of 0.4 wt. % of the acrylic polymer Carbomer<sup>®</sup> 934. Composition 26 thus comprises 0.4 wt.% of polyacrylate and 1.29 wt.% of acrylate polyethoxylated-alkyl methacrylate copolymer and falls therefore outside of the scope of claim 1 requiring at least 0.5 wt. % of polyacrylate and at most 1% of acrylate polyethoxylated-alkyl methacrylate copolymer. Hence this composition reflects the general teaching of the prior art.

The acrylic stabiliser of composition 27 consists of 0.4 wt. % of the acrylic polymer Carbomer<sup>®</sup> 934 and 1.29 wt.% of the polyacrylate (Aculyn<sup>®</sup> 33). This composition thus comprises 1.69 wt.% of the polyacrylate but no acrylate polyethoxylated-alkyl methacrylate copolymer and therefore falls outside of the scope of claim 1. Hence this composition also reflects the prior art.

5.4.3 According to the Respondents, composition 25 was not a composition according to claim 1 since it contained 2,5 wt. % of polyquaternium-7, whereas claim 1 of the

patent-in-suit required the cationic polymer to be within the range of 0.02 to 1 wt. % of the composition. However, the Appellant indicated with the letter of 24 December 2010 that the compositions of the test report actually included 2.5 wt.% of the commercial product Merquat 7 containing an active content of about 8.5 to 9.8% of polyquaternium-7. Therefore the Board is satisfied that composition 25 comprises the cationic polymer within the 0.02 to 1 wt% range recited in the claim.

According to Respondent I there was no indication whether the 60,000 cst dimethicone used in the compositions of the test report was a silicone according to the invention satisfying the particle size criterion as indicated in claim 1. However, the patent-in-suit indicates that suitable preferred silicones include polydimethyl siloxanes with viscosity ranging from 350 to 100,000 cst at 25°C (see page 6, lines 4 to 6). Accordingly, in the absence of any evidence to the contrary, the Board is satisfied that the polydimethyl siloxane having a viscosity of 60,000 cst of the test report has a minimum average particle size above 2 microns as required by claim 1.

According to Respondent II, the comparison was not fair since composition 26 was indicated to contain 100 grams of petrolatum whereas composition 25 and 27 only 10 grams. However, as explained by the Appellant, there was a clerical error in table A, 100 should read 10. This is supported by the test report in which each composition is indicated to contain 2 wt.% of petrolatum. Hence, the Board is satisfied that each of



the compared composition contains the same amount of petrolatum.

- 5.4.4 Both the viscous and elastic characteristics of the three compositions were measured. They are represented in the plot by the parameters  $G''$  (loss modulus) and  $G'$  (storage modulus) respectively. According to the submission of the Appellant during the oral proceedings before the Board, the smaller is the  $\tan \delta$  value ( $G''/G'$ ), the greater is the structure in composition and, hence, the more stable is the composition over time.

The results indicated that the three compositions have a similar magnitude of viscosity ( $G''$ ) over a temperature range of 20°C to 60°C (see the plot on page 7). However, composition 25 according to the present invention has the lower  $\tan \delta$  (about 1.3), followed by composition 26 (about 1,8) and composition 27 which has the worse value (between 2.5 and 4 depending on the temperature).

The comparisons between compositions 25 and 27 and between composition 26 and 27 reveals that the combination of polyacrylate polymer and acrylate polyethoxylated-alkyl methacrylate copolymer in a silicon-containing aqueous composition provides better composition structure, thereby better viscosity stability over time, than the presence of the same amounts of polyacrylate polymers.

Furthermore, the comparison between compositions 25 et 26 reveals that the combination of polyacrylate polymer and acrylate polyethoxylated-alkyl methacrylate

copolymer within the claimed content range, that is 1.24 wt.% of polyacrylate and 0.45 wt.% of acrylate polyethoxylated-alkyl methacrylate copolymer, provides better composition structure, thereby better viscosity stability over time, than the same amount of the same combination of polymers but in different proportions, i.e. contents of 0.40 wt.% of polyacrylate and 1.29 wt.% of acrylate polyethoxylated-alkyl methacrylate copolymer, which are outside the content ranges of these polymers required by claim 1 of the patent-in-suit.

Hence, this test report truly reflects the impact of the essential technical feature distinguishing the claimed composition from that of the closest prior art, namely the choice of the acrylic stabilising agent comprising the combination of a polyacrylate polymer and an acrylate polyethoxylated-alkyl methacrylate copolymer in combination with their amounts in the composition. Therefore, in view of the data presented in this test report, and in the absence of any evidence or fact to the contrary, the distinguishing feature of the claimed composition, i.e. to the specific combination of the acrylic stabilisers in the specific amounts, as defined in claim 1 results in an enhanced viscosity stability over time.

For these reasons, the Board is satisfied that the technical problem underlying the patent-in-suit has been successfully solved by the proposed solution.

5.4.5 According to Respondent I, the results of the tests report do not relate to the benefits of the

compositions indicated in the patent-in-suit, in particular to the viscosity stability over time.

However, as convincingly explained by the Appellant,  $\tan \delta$  is directly correlated to the viscosity stability over time by being an indicator of the structure of the composition. Accordingly in the absence of any evidence to the contrary that argument cannot convince the Board.

According to Respondent II, it is not apparent whether the observed difference in the  $\tan \delta$  value is significant with respect to the viscosity stability because those  $\tan \delta$  differences appear only as theoretical values for which the relationship to the real viscosity stability over time of the composition is unknown.

However, the difference reported in the comparative report have been demonstrated by carrying out measurements objectively by means of a precise and reproducible technical measurement method. Moreover, the differences observed in viscoelasticity properties of the compositions are not negligible because a difference of about 0.5 units and 1.2 in the  $\tan \delta$  is considerable with respect to the absolute values measured, i.e. about 1.3, 1.8 and 2.5 respectively. As a consequence, in the absence of evidence to the contrary, which is incumbent on the parties contesting the experimental results, i.e. the Respondent II, the improvement of the viscosity stability over time is considered to be credible. Therefore, the results of the experimental report filed by the Appellant cannot be dismissed on the basis of the Respondent II' mere

allegation that the magnitude of the enhanced viscosity stability over time is not clearly quantified.

Respondent II also contested the fairness of the test report since the test report had not been carried out either with the examples of the patent-in-suit or with the compositions disclosed in document (7).

According to the established jurisprudence, in the case where comparative tests are chosen to demonstrate an inventive step with an improved effect over a claimed area, the nature of the comparison with the closest state of the art must be such that the effect is convincingly shown to have its origin in the distinguishing feature of the invention. For this purpose it may be necessary to modify the elements of comparison so that they differ only by such a distinguishing feature (see T 197/86, EPO OJ 1989, 371, points 6.1.2 and 6.1.3 of the reasons).

This test report is pertinent since it truly reflects the impact of the essential technical feature distinguishing the claimed composition from the closest prior art (see point 5.4.4 above). Thus, the comparison provided by this test is fair and to be taken into consideration when assessing inventive step.

- 5.4.6 Respondent II argued that it was not credible that the enhancement of viscosity stability occurs for all compositions having the claimed amounts of the two acrylate polymers.

The Board first notes that the claimed ranges, i.e. 0.5 to 2.0 wt.% of polyacrylate and 0.1 to 1.0 wt.% of

acrylate polyethoxylated-alkyl methacrylate copolymer, are rather narrow. Furthermore, the test report compares composition 26 comprising those polymers in amounts outside the claimed range, namely having 0.4 wt.% of polyacrylate (i.e. close to the claimed lower limit of 0.5 wt%) and 1,29 wt.% of acrylate polyethoxylated-alkyl methacrylate copolymer (i.e. close to the upper limit of 1.0 wt%) and composition 27 comprising 1,69 wt.% of polyacrylate (i.e. close to the upper limit of 2 wt%) but comprising no acrylate polyethoxylated-alkyl methacrylate copolymer (i.e. close to the lower limit of 0.1 wt. %) with composition 25 comprising both polymers in amounts within the claimed range.

On account of the nature of the invention, it is reasonable to expect that the shown effect progressively decreases when going from the relative amounts of these polymers present in composition 25 to those relative amounts present in compositions 26 and 27 respectively. Hence, the Board sees no technical reasons why the effect shown relating to the viscosity stability would not also be supposed to occur for any composition comprising those two polymers across the ranges claimed.

According to the established jurisprudence of the Boards of Appeal, each of the parties to the proceedings carries the burden of proof for the facts it alleges. If a party, whose arguments rest on these alleged facts, does not discharge its burden of proof, this goes to the detriment of that party and such a party may not shift the onus of proof onto the other party (see T 270/90, OJ EPO 1993, 725, point 2.1 of the

reasons; T 355/97, point 2.5.1 of the reasons; T 836/02, point 4.5 of the reasons; T 176/04, point 5.6.3 of the reasons; all but T 270/90 not published in OJ EPO).

The Respondent neither substantiated its allegation of non-achievement of the effect for compositions comprising 0.5 to 2.0 wt.% of polyacrylate and 0.1 to 1.0 wt.% of acrylate polyethoxylated-alkyl methacrylate copolymer as indicated in claim 1, nor filed corroborating evidence. As there is no apparent and compelling technical reason why this should be the case, and in the absence of any supporting evidence, the Respondent II by merely expressing doubts has not discharged its burden of proof, with the consequence that these unsubstantiated doubts are not to be taken into account by the Board.

5.4.7 Hence, the Board holds that the technical problem underlying the patent-in-suit has been successfully solved by the proposed solution, i.e. the compositions according to claim 1 characterized by the presence of 0.5 to 2.0 wt.% of polyacrylate and 0.1 to 1.0 wt.% of acrylate polyethoxylated-alkyl methacrylate copolymer.

5.5 Finally, it remains to be decided whether or not the proposed solution to the problem underlying the patent in suit is obvious in the light of the state of the art.

Document (7) does not address any comparison between acrylic stabilizing agents listed therein, all being disclosed as equivalent. Furthermore, that document does not comprise any pointer to improve the viscosity stability of a composition already comprising an acrylic stabilising polymer. Accordingly, document (7)

cannot suggest any stability enhancement due the claimed combination of stabilising agents, let alone in the claimed amounts. Consequently, document (7) does not render obvious the proposed solution to the technical problem underlying the patent in suit.

During the oral proceedings before the Board, Respondent II exclusively addressed document (3) and (4) in order to support its objection of obviousness. These document teaches *inter alia* that a mixture of Aculyne® 33 and Aculyne® 22 can be used in the aqueous developer of a two part aqueous composition for colouring hair.

However these documents do not address the problem underlying the patent in suit, i.e. improving the viscosity stability (cf. point 5.2 supra). For this simple reason those documents cannot give any hint on how to solve the technical problem underlying the patent-in-suit.

Accordingly, there is no suggestion in documents (3) or (4) to support the Respondent II's submissions that it was obvious to replace the polyacrylic acid polymer in the composition of document (7) with the mixture of two polymers as defined in claim 1 in order to provide a composition with enhanced viscosity stability. For this reason, the Respondent's argument must be rejected.

In the written proceedings, Respondent I also referred to the leaflets of Aculyne® 22 and Aculyne® 33 filed by the Appellant with the letter of 12 December 2008. The Board, however, notes that no publication dates are indicated on these documents which are merely marked

©Rohm and Haas, 2006 and dated September 2002.  
Accordingly in view of the priority date of 18 August 1999 of the patent-in-suit these documents do not belong to the state of the art pursuant to Article 54(2) EPC and therefore cannot be considered for the purpose of inventive step within the meaning of Article 56 EPC. That Respondent I's submission regarding the disclosure of the leaflets Aculyn® 22 and Aculyn® 33 with respect to inventive step should therefore be disregarded.

- 5.6 Hence, the Board concludes that the subject-matter of claim 1, and by the same token, that of dependent claims 2 to 22 involves an inventive step within the meaning of Article 56 EPC.

*Auxiliary requests 1 to 3*

6. Since the main request is considered to be allowable, it is not necessary to decide on the lower-ranking auxiliary requests 1 to 3.



**Order**

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

1. The decision under appeal is set aside.
2. The patent is maintained as granted.

The Registrar

The Chairman

C. Rodríguez Rodríguez

P. Gryczka