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**Datasheet for the decision  
of 6 August 2010**

**Case Number:** T 0824/09 - 3.3.06

**Application Number:** 00908588.7

**Publication Number:** 1155105

**IPC:** C11D 1/72

**Language of the proceedings:** EN

**Title of invention:**

Automatic dishwashing compositions comprising selected nonionic surfactants

**Patentee:**

THE PROCTER & GAMBLE COMPANY

**Opponent:**

Henkel AG & Co. KGaA  
BASF SE

**Headword:**

Dishwashing compositions/PROCTER

**Relevant legal provisions:**

EPC Art. 123(2)

**Relevant legal provisions (EPC 1973):**

-

**Keyword:**

Extension beyond the application as filed (yes)"

**Decisions cited:**

-

**Catchword:**

-



Case Number: T 0824/09 - 3.3.06

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.06  
of 6 August 2010

**Appellant:** BASF SE  
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**Representative:** -

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**Representative:** Stevermann, Birgit  
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**Respondent:** THE PROCTER & GAMBLE COMPANY  
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**Representative:** Yorquez Ramirez, Maria Isabel  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 10 February 2009  
rejecting the opposition filed against European  
patent No. 1155105 pursuant to Article 102(2)  
EPC 1973.

**Composition of the Board:**

**Chairman:** P.-P. Bracke  
**Members:** G. Dischinger-Höppler  
J. Geschwind

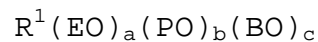
## Summary of Facts and Submissions

I. European patent No. 1 155 105 was granted on the basis of independent Claim 1 which reads:

"1. An automatic dishwashing detergent composition comprising:

(a) from 5% to 90% by weight of the composition of a builder;

(b) from 0.1% to 15% by weight of the composition of a butoxy-capped nonionic surfactant of the formula



wherein  $R^1$  is a linear or branched  $C_6$  to  $C_{20}$  alkyl;  $a$  is from 2 to 30;  $b$  is from 0 to 30;  $c$  is from 1 to 30; and said nonionic surfactant has an X/Y number less than 1.90; wherein X is the sum of the protons attached to carbon atoms that are adjacent to oxygen and Y the sum of all protons attached to carbon atoms within said molecule that are non-adjacent to oxygen;

(c) from 0.1% to 30% by weight of the composition of a source of hydrogen peroxide (b)\*leaching agent;

(d) from 0.0001% to 5% of active enzyme by weight of the composition; and

(e) adjunct materials."

\* added by the Board

- II. Two notices of opposition had been filed against the granted patent, wherein the Opponents sought revocation of the patent, inter alia, on the grounds of Article 100(c) EPC due to extension beyond the content of the application as filed (Article 123(2) EPC).
- III. In its decision, the Opposition Division held that the claims as granted did not extend beyond the content of the application as filed (WO-A-00/50551) and met, therefore, the requirements of Article 123(2) EPC.
- IV. This decision was appealed by Opponent II (hereinafter Appellant).
- V. The Appellant, in writing and during the oral proceedings, held on 6 August 2010 in the absence of Opponent I as announced by letter dated 12 July 2010, submitted arguments why in his opinion Claim 1 as granted contained subject-matter which was originally not disclosed.
- VI. The Respondent (Patent Proprietor) submitted that the subject-matter of Claim 1 was based on the disclosure on pages 3 and 4 of the application as filed where it was disclosed that the claimed dishwashing composition comprised one single butoxy-capped nonionic surfactant present in an amount of from 0.1 to 15%.
- VII. The Appellant requested that the decision under appeal be set aside and the patent be revoked.

The Respondent requested that the appeal be dismissed.

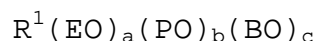
## Reasons for the Decision

### 1. *Amendments (Article 123(2) EPC)*

1.1 According to the original version of the present application, the automatic dishwashing detergent for which protection is sought comprises a butoxy capped nonionic surfactant system (see 'summary of the invention' on page 2, lines 7 to 10 and 'detailed description of the invention' on page 3, lines 27 to 30).

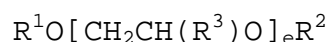
According to the summary of the invention, it is then explained that the automatic dishwashing detergent composition comprises a nonionic surfactant (b) selected from the group consisting of

(i) a nonionic surfactant of the formula



wherein  $R^1$  is a linear or branched  $C_6$  to  $C_{20}$  alkyl;  $a$  is from 2 to 30;  $b$  is from 0 to 30;  $c$  is from 1 to 30; and said nonionic surfactant has an X/Y number less than 1.90;

(ii) a nonionic surfactant of the formula



wherein  $R^1$  is a linear or branched, saturated or unsaturated, aliphatic or aromatic hydrocarbon radical having from 1 to 30 carbon atoms;  $R^2$  is a linear or branched, saturated or unsaturated, aliphatic or

aromatic hydrocarbon radical having from 1 to 30 carbon atoms, optionally containing from 1 to 5 hydroxy groups; and further optionally substituted with an ether group;  $R^3$  is H, or a linear aliphatic hydrocarbon radical having from 1 to 4 carbon atoms; e is an integer having an average value of 1 to 40, wherein  $R^2$  can optionally be alkoxyated, wherein said alkoxy is selected from ethoxy, propoxy, butyloxy and mixtures thereof; and

(iii) mixtures thereof.

Further, the nonionic surfactant (b) is present in an amount of from 0.1 to 15% by weight of the composition (page 2, line 11 to page 3, line 3).

The same types and amounts of nonionic surfactants (b) are mentioned in the detailed description of the application as filed and in original Claim 1 (see Claim 1, page 4, lines 18 to 23 and page 5, line 21 to page 6, line 5).

- 1.2 It is apparent that the surfactants of formulae (i) and (ii) are butoxy-capped only if the terminating group is a butoxy group. Assuming that the order of alkoxy groups in the formula is identical with the order in the molecule, this may be the case for formula (i). However, in formula (ii), a terminating alkoxy group, such as a butoxy group, is only optional, so that at least the nonionic surfactants of formula (ii) comprise embodiments which are not butoxy-capped.

The Board is, therefore, convinced that, the above statement in the summary and the detailed description of the invention (point 1.1) with respect to the

presence of a butoxy capped nonionic surfactant system in the automatic dishwashing detergent simply means that the nonionic surfactants (b) mentioned in original Claim 1 as well as in the original summary and detailed description of the invention comprise at least one butoxy capped nonionic surfactant of formula (i) and/or (ii).

- 1.3 According to the application as filed, the automatic dishwashing detergent composition 'may further contain optional co-surfactants' (page 7, line 7 to page 9, line 11).

Even though such co-surfactants may be also nonionic, it is in the Board's view self-evident for the skilled reader that such optional co-surfactants cannot be identical with the above mentioned nonionic surfactants (b). This is confirmed on page 3, lines 9 to 11, where it is stated that surfactants other than (b) may be present as 'adjunct materials (d)'.

- 1.4 It follows that the automatic dishwashing detergent composition as disclosed in the original Claim 1, the summary of the invention and the detailed description of the invention as filed comprises at most 15% by weight of nonionic surfactants of formulae (i) and/or (ii).

- 1.5 Claim 1 as granted requires that the automatic dishwashing detergent composition comprises 0.1% to 15% by weight of the composition of a butoxy-capped nonionic surfactant of the formula



1.6 In the Appellant's view, the claimed subject-matter was derivable from the original detailed description of the invention as a specific embodiment since the terms '**a** butoxy capped nonionic surfactant system' and '**the** nonionic surfactant' on pages 3 and 4 of the application as filed referred to the same surfactant, namely surfactant of formula (i) which was butoxy-capped since no butoxy groups need be included in the surfactants of formula (ii).

1.7 The Board does not concur with the Appellant's view since it is in contradiction with the invention as presented in the application as filed where the automatic dishwashing detergent composition is described to comprise up to 15% by weight of surfactants of formula (i) and/or formula (ii) (point 1.3).

In particular, as the Respondent chose to give Claim 1 as granted the wording "composition comprising ... (b) from 0.1% to 15% by weight of the composition of a butoxy-capped nonionic surfactant of the formula  $R^1(EO)_a(PO)_b(BO)_c$ ", the claimed subject-matter is not limited to nonionic surfactants of formula (i). Hence, Claim 1 as granted does not exclude the presence of nonionic surfactants of formula (ii) and covers, therefore, embodiments containing more than 15% by weight of nonionic surfactants of the formulae (i) and (ii). Such subject-matter is not disclosed in the application as filed.



The Board, therefore, finds that the amendments made in Claim 1 as granted violate the provisions of Article 123(2) EPC.

2. Since no allowable request is on file, there is no basis for further prosecution of the present case.

## **Order**

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

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:

G. Rauh

P.-P. Bracke