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Datasheet for the decision of 26 September 2012

Case Number: T 0407/10 - 3.3.06

Application Number: 02714975.6

Publication Number: 1373452

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Language of the proceedings: EN

Title of invention:
Liquid detergent composition exhibiting enhanced alpha-amylase enzyme stability

Patentee:
The Procter & Gamble Company

Opponents:
Unilever N.V. et al.
Henkel AG & Co. KGaA

Headword:
Detergent with enhanced amylase/PROCTER & GAMBLE

Relevant legal provisions:
EPC Art. 123(2)

Keyword:
"Added subject-matter (Main and 1st to 4th Auxiliary Requests: yes - combination of alternative and preferred features"
"Added subject-matter (5th Auxiliary Request): no - combination of preferred features"

Decisions cited:
T 0068/99

Catchword:
-

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Case Number: T 0407/10 **-** 3.3.06

D E C I S I O N
of the Technical Board of Appeal 3.3.06
of 26 September 2012

Appellant: (Patent Proprietor)
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Decision under appeal:
Decision of the Opposition Division of the European Patent Office posted 15 December 2009 revoking European patent No. 1373452 pursuant to Article 101(3)(b) EPC.

Composition of the Board:

Chairman: P.-P. Bracke
Members: P. Ammendola
D. S. Rogers

Summary of Facts and Submissions

I. This appeal is from the decision of the Opposition Division revoking European patent No. 1 373 452 - granted on the International patent application PCT/US02/05512 internationally published under No. WO 02/068575 - concerning a liquid detergent composition exhibiting enhanced α-amylase enzyme stability.

II. The patent application **as filed** and internationally published contains, *inter alia*, an independent claim 1 as well as claims 2 to 10, dependent on claim 1, which define preferred embodiments of the subject-matter of this latter. In particular, claims 1 and 4 as filed read, respectively:

"*1. An aqueous liquid or gel type detergent composition comprising, by weight:*

(1) from about 0.1% to about 15% of boric acid or a boron compound capable of forming boric acid in the composition;

(2) from about 0.1% to about 10% of a polyhydroxy compound selected from the group consisting of ethylene glycol, propylene glycol, 1,2-propanediol, butylene glycol, hexylene glycol, glycerol, mannitol, sorbitol, erythritol, glucose, fructose, lactose, erythritol-1,4-anhydride, and mixtures thereof;

(3) from about 10 to about 100 millimoles of calcium ion per liter of composition;

(4) from about 5% to about 90% of water; and

(5) an α-amylase enzyme selected from the group consisting of:

(a) α-amylase characterised by having a specific activity at least 25% higher than the specific activity of Termamyl® at a temperature range of 25°C to 55°C. and at a pH value in the range of 8 to 10, measured by the Phadebas® α-amylase activity assay and/or;

(b) α-amylase according (a) comprising the amino sequence shown in SEQ ID No. 1 or an α-amylase being at least 80% homologous with the amino acid sequence shown in SEQ ID No.1 and/or;

(c) α-amylase according (a) comprising the amino sequence shown in SEQ ID No.2 or an α-amylase being at least 80% homologous with the amino acid sequence shown in SEQ ID No.2 and/or;

(d) α-amylase according (a) comprising the following amino sequence in the N-terminal: His-His-Asn-Gly-Thr-Asn-Gly-Thr-Met-Met-Gln-Tyr-Phe-Glu-Trp-Tyr-Leu-Pro-Asn-Asp (SEQ ID No.3) or an α-amylase being at least 80% homologous with the amino acid sequence shown (SEQ ID No.3) in the N-terminal and/or;

(e) α-amylase according (a-d) wherein the α-amylase is obtainable from an alkalophilic Bacillus species and/or

(f) α-amylase according to (e) wherein the amylase is obtainable from any of the strains NCIB 12289, NCIB 12512, NCIB 12513 and DSM 935 and/or;

(g) α-amylase showing positive immunological cross-reactivity with antibodies raised against an α-amylase having an amino acid sequence corresponding respectively to SEQ ID No.1, ID No.2 or ID No.3 and/or;

(h) Variant of a parent α-amylase, which parent α-amylase (i) has one of the amino acid sequences shown in SEQ ID No.1, ID No.2 or ID No.4 respectively, or (ii)displays at least 80% homology with one or more of said amino acid sequences, and/or displays immunological cross-reactivity with an antibody raised against an α-amylase having one of said amino acid sequences, and/or is encoded by a DNA sequence wich hybridizes with the same probe as a DNA sequence encoding an α-amylase having one of said amino acid sequence; in which variants:

(i) at least one amino acid residue of said parent α-amylase has been deleted; and/or

(ii) at least one amino acid residue of said parent α-amylase has been replaced by a different amino acid residue; and/or

(iii) at least one amino acid residue has been inserted relative to said parent α-amylase; said variant having an α-amylase activity and exhibiting at least one of the following properties relative to said parent α-amylase: increased thermostability, increased stability towards oxidation, reduced Ca ion dependency, increased stability and/or α-amylolytic activity at neutral to relatively high pH values, increased α-amylolytic activity at relatively high temperature and increase or decrease of the isoelectric point (pI) so as to better match the pI value for α-amylase variant to the pH of the medium."

and

"*4. The detergent composition according to claim 1, wherein said polyhydroxy compound is 1,2-propanediol*.".

Claims 1 to 10 of the patent **as granted** only differ from the originally filed claims with the same number in that the former no longer contain "*about*"s before the figures defining ranges (when originally present in the claims as filed).

III. The patent had been opposed on the grounds of lack of novelty and inventive step (Article 100(a) EPC) and of insufficiency of disclosure (Article 100(b) EPC).

The Opposition Division considered that claim 1 as granted was insufficiently disclosed and that none of the sets of amended claims according to the then pending auxiliary requests complied with Article 123(2) EPC.

IV. The Patent Proprietor (hereinafter "Appellant") lodged an appeal against this decision, thereby filing two sets of amended claims respectively labelled as Main Request and 1st Auxiliary Request.

Claim 1 of the **Main Request** reads:

"1. An aqueous liquid or gel type detergent composition comprising, by weight:

(1) from 0.1% to 15% of boric acid or a boron compound capable of forming boric acid in the composition;

(2) from 0.1% to 10% of a polyhydroxy compound being 1,2-propanediol;

(3) from 18 to 100 millimoles of calcium ion per liter of composition;

(4) from 5% to 90% of water; and

(5) an α-amylase enzyme having a specific activity at least 25% higher than the specific activity of Termamyl® at a temperature range of 25°C to 55°C. and at a pH value in the range of 8 to 10, measured by the Phadebas® α-amylase activity assay and comprising the amino sequence shown in SEQ ID No. 2 or an α-amylase being at least 80%

homologous with the amino acid sequence shown in SEQ ID No.2 as performed via the algorithm described by Lipman and Pearson in Science, 227, 1985, p.1435."

Claim 1 of the **1st Auxiliary Request** differs from that of the Main Request only in that the definition of component "*(5)*" reads:

"*(5) an α-amylase enzyme having the amino sequence shown in SEQ ID No.2 with the Aspartic acid at position 183 and the glycine at position 184 deleted.*"

V. Opponents 1 (hereinafter "Respondents 1") and Opponent 2 (hereinafter "Respondent 2") replied in writing to the grounds of appeal rising objections of insufficiency of disclosure, lack of clarity and added subject-matter.

With a communication dated 17 September 2012 the Board informed the Parties that the requests on file could possibly violate Article 123(3) EPC.

With a letter of 20 September 2012 the Appellant filed two additional sets of amended claims respectively labelled as 2nd and 3rd Auxiliary Request.

Claim 1 of the **2nd Auxiliary Request** differs from claim 1 of the Main Request in that the definitions of components "*(2)*" and "*(5)*" of this latter have respectively been replaced by:

"*(2) from 0.1% to 10% of a polyhydroxy compound selected from the group consisting of ethylene glycol, propylene glycol, 1,2-propanediol, butylene glycol, hexylene glycol, glycerol, mannitol, sorbitol, erythritol, glucose, fructose, lactose, erythritol-1,4-anhydride, and mixtures thereof; wherein said polyhydroxy compound is 1,2-propanediol;*"

and

"*(5) an α-amylase enzyme*

(a) characterised by having a specific activity at least 25% higher than the specific activity of Termamyl® at a temperature range of 25°C to 55°C. and at a pH value in the range of 8 to 10, measured by the Phadebas® α-amylase activity assay and;

(b) comprising the amino sequence shown in SEQ ID No.2 or being at least 80% homologous with the amino acid sequence shown in SEQ ID No.2 as performed via the algorithm described by Lipman and Pearson in Science, 227, 1985, p.1435."

Claim 1 of the **3rd Auxiliary Request** differs from that of the 2nd Auxiliary Request only in that the definition of component "*(5)*" reads:

"(5) an α-amylase enzyme having the amino sequence shown in SEQ ID No.2 with the aspartic acid at

position 183 and the glycine at position 184 deleted."

VI. At the oral proceedings held before the Board on 26 September 2012 the Respondents mentioned for the first time that the amended definition for the minimum amount of component "*(3)*" present in each version of claim 1 according to the Main Request and the 1st to 3rd Auxiliary Requests (i.e. the amended minimum of "*18*" millimoles of calcium ion per liter) contributed in rendering all the pending requests contrary to Article 123(2) EPC.

The Appellant reacted by filing two further sets of amended claims respectively labelled as 4th and 5th Auxiliary Request.

Claim 1 of the **4th Auxiliary Request** and claim 1 of the **5th Auxiliary Request** differ respectively from that of the 2nd Auxiliary Request and that of the 3rd Auxiliary Requests only in that in the definition of component "*(3)*" the value "*18*" has been replaced by "*10*".

Claims 2 to 9 of the 5th Auxiliary Request are substantially identical to claims 2, 3 and 5 to 10 as originally filed except that the former have been renumbered as necessary and do not contain any "*about*" before the figures defining ranges. Hence, claims 2 to 9 of the 5th Auxiliary Request also correspond to claims 2, 3 and 5 to 10 as granted, renumbered as necessary.

VII. The Appellant argued substantially as follows.

The filing of the 4th and 5th Auxiliary Request was in reaction to an objection raised by the Respondents for the first time at the hearing. These requests were admissible because they only differed from the already pending 2nd and 3rd Auxiliary Requests in the reinstatement of the minimum amount of "*10*" millimoles of calcium ion per liter already present in claim 1 as originally filed as well as in granted claim 1, and because their admission would not imply any change in the lines of argument submitted by the Respondents in these appeal proceedings.

Each Appellant's request would be in accordance with the jurisprudence of the Boards on Article 123(2) EPC which, although denying the possibility to combine selections among equivalent alternatives, allowed the combination of features originally disclosed as preferred.

In the present case, only (part of) the amended definition of ingredient "*(5)*" given in claim 1 of the Main Request, 2nd and 4th Auxiliary Requests was based on a selection among alternatives of "equal status" (i.e. was based on one of the equivalent alternatives for the α-amylase ingredient originally listed e.g. at "*(5)(a)*" to "*(5)(g)*" of claim 1 of the application as filed). All the other amendments present in these and in the other versions of claim 1 according to the Appellant's requests were instead all explicitly or implicitly disclosed in the original application as preferred features and, thus, could be combined without violating Article 123(2) EPC.

In particular, the application as filed indisputably indicated that the preferred polyhydroxy compound was 1,2-propandiol and that the preferred α-amylase was that defined in the 1st, 3rd and 5th Auxiliary Requests. Moreover, it would be apparent to the skilled reader of the application as filed:

a) that a minimum amount of ingredient "*(3)*" was critical and, thus, that the disclosure at page 3, lines 21 to 23, implied that "*18*" millimoles of calcium ion per liter was the most preferred lower limit for the concentration of such ingredient;

and

b) that the algorithm described by "*Lipman and Pearson in Science, 227, 1985, p.1435*" (hereinafter LP-algorithm was the sole mentioned in the application as filed (in respect of the algorithm to be used for verifying the % of homology among the amino acid sequences) and, thus, the only algorithm to be preferably used in carrying out the invention.

The Appellant also rejected the Respondents' objections under Article 84 EPC against, *inter alia*, the definition of component "*(2)*" in the 5th Auxiliary Request, by stressing that this definition was literally identical to that of claim 4 as granted and, thus, that it did not create any new unclarity which was not already existing in claim 4 as granted.

VIII. The Respondents considered the 4th and 5th Auxiliary Requests filed by the Appellant at the oral proceedings

to be unacceptably late because the objection against the minimum amount of component "*(3)*" although only first specifically discussed at the oral proceedings was nevertheless part of the objection under Article 123(2) EPC that the Respondents had already raised in writing in their replies to the grounds of appeal. Moreover, the minimum amount of "*18*" millimoles of calcium ion per liter was already present in claim 1 of the Main Request filed at the beginning of the appeal proceedings, hence to reinstate the broader range originally present in claim 1 as granted by means of these belated requests would amount to an extension of the appeal.

All Appellant's requests would violate Article 123(2) EPC since each version of claim 1 according to these requests contained combinations of features that had not been disclosed in the application as originally filed. They also disputed the Appellant's statement that all these amendments except one were originally disclosed as preferred features. Indeed, not only the amended definition of the α-amylase present in claim 1 of the Main Request and of the 2nd and 4th Auxiliary Requests amounted to a selection among the equivalent alternatives disclosed e.g. in claim 1 as originally filed. The amendment of the amount range for component "*(3)*" to "*18 to 100*" millimoles of calcium ion per liter, as well as the indication of the LP-algorithm which was explicitly identified in the application as filed as just one of the possible algorithms were also selections among equivalent alternatives.

Respondent 2 also raised an objection under Article 123(3) EPC against the definition of ingredient "*(2)*"

as present, *inter alia*, in claim 1 of the 5th Auxiliary Requests; it conceded however not to be able to identify a single example of a composition encompassed by such claim that was not already encompassed by claim 1 as granted.

In respect of claim 1 of the 5th Auxiliary Request the Respondent 2 also raised an objection under Article 84 EPC arguing that this claim would not be equivalent to claim 4 as granted. In this respect it pointed out that whereas in the granted claim 4 the wording "*wherein said polydroxy compound*" referred to "*The detergent composition according to claim 1*", in claim 1 of the 5th Auxiliary Request the same wording had instead been incorporated into the definition of ingredient "*(2)*".

IX. The Appellant requested that the decision under appeal be set aside and that the case be remitted to the Opposition Division for further prosecution:

1. upon the basis of the Main Request; or alternatively

2. upon the basis of the 1st Auxiliary Request,

both filed with the written statement of the grounds of appeal; or alternatively

3. upon the basis of the 2nd or the 3rd Auxiliary Request, filed under cover of the letter dated 20 September 2012; or alternatively

4. upon the basis of the 4th or the 5th Auxiliary Request, filed at the oral proceedings before the Board on 26 September 2012.

The Respondents requested that the appeal be dismissed.

Respondent 2 alternatively requested that the case be remitted to the Opposition Division for further prosecution.

Reasons for the Decision

Procedural issues

1. Admissibility of the 4th and 5th Auxiliary Requests

The Respondents have disputed the admissibility of these requests by arguing that they were unjustifiably late filed and possibly resulted in an extension of the appeal.

The Board notes however that:

i) These requests only differ from the 2nd and 3rd Auxiliary Requests in the reinstatement of the value "*10*" for the minimum amount of calcium ion millimoles per liter of composition, as given in claim 1 as originally filed and also in claim 1 of the patent-in-suit as granted, i.e. also in claim 1 of the Main Request refused by the Opposition Division.

ii) The fact that in their reply to the grounds of appeal the Respondents 1 have raised no objection under Article 123(2) EPC against the Main Request and the absence of any reference to the amended minimum value of "*18*" calcium ion millimoles per liter of composition

in the objections in view of Article 123(2) presented in writing by Respondents 1 and 2 justify the Appellant's assumption before the hearing that the Respondents' objections under Article 123(2) EPC were **not** directed against the amended minimum value of "*18*" in the definition of ingredient "*(3)*" as well.

iii) The reinstatement of the concentration range for this ingredient as given in claim 1 as filed and in granted claim 1 has no bearings on the lines of argument presented by the Respondents in support of their objections for the other relevant issues, i.e. for the other objections under Article 123(2) as well as for the objections of lack of clarity, insufficient disclosure and extension of protection.

The Board concludes that the 4th and 5th Auxiliary Requests are manifestly a reaction to a new argument under Article 123(2) EPC only mentioned by the Respondents at the oral proceedings before the Board and that their admission at the hearing does not change the Respondents' case and does not amount to the reintroduction of subject-matter expressly abandoned. Accordingly, the Board decides to admit these requests into the appeal proceedings (Article 13(1) RPBA).

Main request

2. Article 123(2) EPC: claim 1

Claim 1 of this request differs from claim 1 as originally filed (see above Section II and IV of the Facts and Submissions) because the former contains

restricted definitions of components "*(2)*", "*(3)*" and "*(5)*" which may be described as follows.

The definition of component "*(2)*" is manifestly an attempt to restrict such mandatory ingredient to from 0.1 wt% to 10 wt% of 1,2-propanediol (hereinafter this amendment is indicated as "**1,2-propanediol restriction**").

The definition of component "*(3)*" is restricted to from 18 to 100 millimoles of calcium ion per liter of composition (hereinafter this amendment is indicated as "**restricted Ca range**").

The definition of component "*(5)*" is amended under two aspects:

first, by selecting among the alternative definitions for the α-amylases given at "*(5)(a)*" to "*(5)(g)*" of claim 1 as originally filed that definition which corresponds to the simultaneous occurrence of the features of both "*(5)(a)*" and "*(5)(c)*", thereby resulting in a definition wherein the α-amylase must possess not only the required specific activity but also identity or 80% homology to the amino acid sequence SEQ. ID. No.2 (hereinafter this amendment is indicated as "**restriction to (5)(a)+(c)**");

second, by specifying that the evaluation of the required at least 80% homology with the amino acid sequence SEQ. ID. No.2 must be performed by using the LP-algorithm disclosed in the reference indicated at page 4 of the application as filed

(hereinafter this amendment is indicated as "**LP-restriction**").

2.1.1 The Board notes preliminarily that it is not disputed by the parties that each of these amendments is disclosed *per se* in the application as filed.

In particular, in the application as originally filed the passages at page 1, lines 9 to 12; page 2, lines 11 to 19; and page 3, lines 12 to 16, as well as claims 1 and 4, disclose to the skilled reader that the polyhydroxy component "*(2)*" that may be present in an amount of 0.1 to 10% is preferably "*1,2-propanediol*".

The passage at page 3, lines 21 to 23, reading "*The compositions herein also contain from about 10 to about 100, preferably from about 13 to about 50, more preferably from about 15 to about 30, and most preferably from about 18 to about 25, millimoles of calcium ion per liter of composition.*" provides a basis for the restricted Ca-range (according to the jurisprudence summarized in the first paragraph of page 350 of the Case Law of the BoA, 6th Ed., 2010).

The original disclosure for the two restrictions of the α-amylase ingredient "*(5)*" have already been indicated above.

2.1.2 The Appellant's reasoning in support of the compliance with Article 123(2) EPC of such **combination** of amendments is essentially that this latter would not fall under the prohibition to combine features only disclosed in lists of equivalent alternatives, because only the restriction to (5)(a)+(c) was based on one of

such lists. Instead, the formulation of claim 1 of the Main Request would rather be in line with the jurisprudence of the Boards to allow the combination of features originally disclosed as preferred.

2.1.3 The Board concurs preliminarily with the Appellant that, whereas the combination of e.g. two features only originally disclosed in lists of equivalent alternatives is normally found to violate Article 123(2) EPC (see e.g. the case law summarized in the second paragraph of page 321 of the Case Law of the BoA, 6th Ed., 2010), there may be other combinations of features which although not explicitly disclosed in the application as filed are nevertheless derivable from the presence of an (explicit or implicit) pointer thereto. For instance, the fact that certain features are disclosed as preferred in the original application acts as a pointer for the skilled person, as the combination of preferred features is obviously the best way of achieving the technical effects that the invention aims to provide (see e.g. T 68/99, unpublished in the OJ, point 3.2.2 of the reasons).

However, this jurisprudence does **not** consider the combination of a feature not originally disclosed as preferred with a plurality of further restrictions based on preferred features as an amendment in accordance with Article 123(2) EPC.

2.1.4 Hence, in the present case, even assuming in favour of the Appellant that **only** the restriction to (5)(a)+(c) amounted to a selection among equivalent alternatives, the application as filed contains no pointer to the

combination of such alternatives with the other restrictions introduced in claim 1 of the Main Request.

Accordingly, the Board finds that the Main Request violates Article 123(2) EPC and must be refused.

1st Auxiliary Request

3. Article 123(2) EPC: claim 1

3.1 This claim (see above Section IV of the Facts and Submissions) differs from that of the Main Request because the restriction to (5)(a)+(c) for ingredient "*(5)*" has been replaced by the indication of the specific α-amylase explicitly disclosed as particularly preferred in the paragraph bridging pages 5 and 6 of the application as filed and internationally published.

3.2 Also in this request the Board finds that claim 1 contains at least a further amendment that does not correspond to a feature originally disclosed as a preferred feature.

The restricted Ca range of "*from 18 to 100 millimoles of calcium ion per liter of composition*" (although *per se* implicitly disclosed in the already cited passage at page 3 of the application as filed, see above point 2.1.1) is **not** originally disclosed **as preferred** in such passage.

3.3 The Appellant has argued that the immediately following passage at lines 23 to 26 of the same page 3 of the application as filed (reading "*The level of calcium ion should be selected so that there is always some minimum*

level available for the enzyme, after allowing for complexation with components such as builders, fatty acid, etc., in the composition") is an implicit indication that the relevant parameter was just the minimum concentration of the calcium ion and, thus, that the whole restricted Ca range was implicitly disclosed as preferred by the indication at the preceding line 23 of "*18*" millimoles of calcium ion per liter as the most preferable minimum amount.

The Board finds this argument unconvincing. The teaching of lines 23 to 26 of page 3 does not contradict or deprive of relevance the immediately preceding indication of three ranges with three maxima (i.e. "*25*", "*30*" and "*50*") different from "*100*" for the preferable, more preferable and most preferable levels of ingredient "*(3)*". Additionally, it must be stressed that the actual wording at lines 21 to 23 of page 3 does not separately qualify "*18*" millimoles of calcium ion per liter as "the most preferable minimum", but rather the whole interval "*from 18 to 25*" millimoles of calcium ion per liter as the most preferable concentration range.

Hence, the restricted Ca range in its entirety is only implicitly disclosed in the original application as just one of the possible alternatives for the amount range for ingredient "*(3)*" and, thus, cannot be considered as a preferred feature.

3.4 The parties do not dispute that the original application contains no other pointer to the combination of such alternatives for the amount range for ingredient "*(3)*" with the other restrictions

introduced in claim 1 of the 1st Auxiliary Request. Thus, following the same line of reasoning already given for the Main Request, the Board also finds that the subject-matter of this claim 1 is undisclosed in the application as originally filed. Accordingly, the Board concludes that the 1st Auxiliary Request violates Article 123(2) EPC and must be refused.

2nd Auxiliary Request

4. Article 123(2) EPC: claim 1

Claim 1 of the 2nd Auxiliary Request (see above Section V of the Facts and Submissions) comprises the restriction to (5)(a)+(c) and a plurality of other restrictions in combination. Thus, also this request is refused because it is found contrary to Article 123(2) EPC for the same reasons already indicated above at point 2 for refusing the Main Request.

3rd Auxiliary Request

5. Article 123(2) EPC: claim 1

Claim 1 of the 3rd Auxiliary Request (see above Section V of the Facts and Submissions) comprises the Ca range restriction and a plurality of other restrictions in combination. Thus, also this request is refused because it is found contrary to Article 123(2) EPC for the same reasons already indicated above at point 3 for refusing the 1st Auxiliary Request.

4th Auxiliary Request

6. Article 123(2) EPC: claim 1

Claim 1 of the 4th Auxiliary Request (see above Section VI of the Facts and Submissions) comprises the additional restriction to (5)(a)+(c) and a plurality of other restrictions (i.e. a 1,2-propanediol restriction and the LP-restriction) in combination. Thus, also this request is refused because it is found contrary to Article 123(2) EPC for the same reasons already indicated above at point 2 for refusing the Main Request.

5th Auxiliary Request

7. Article 123(2) EPC: claims 1 to 9

7.1 Claim 1 of this request (see above Section VI of the Facts and Submissions) only differs from claim 1 as originally filed (see above Section II of the Facts and Submissions) by the restriction of component "*(2)*" to from 0.1 wt% to 10 wt% of 1,2-propanediol and for the restriction of component "*(5)*" to the specific α-amylase disclosed in the paragraph bridging pages 5 and 6 of the application as filed.

As already indicated above (see points 2.1.1 and 3.1) these two restrictions correspond to the disclosure in the application as filed of, respectively, the **preferred** ingredient "*(2)*" and the **preferred** ingredient "*(5)*".

Hence, the Board finds claim 1 of the 5th Auxiliary Request to comply with Article 123(2) EPC in accordance with the jurisprudence on the combination of preferred features - see above at point 2.1.3.

7.2 The Board notes that the remaining claims 2 to 9 of the 5th Auxiliary Request are substantially identical to claims 2, 3 and 5 to 10 as originally filed except that the former have been renumbered as necessary and do not contain "*about*" before the figures indicating ranges. Thus, the Board finds that these dependent claims comply with Article 123(2) EPC.

8. Articles 83 and 84 EPC and Article 123(3) EPC: claims 1 to 9

8.1 The Respondents have raised no objection under Article 83 EPC against the claims of the 5th Auxiliary Request and the Board is satisfied that the subject-matter claimed in this request is sufficiently disclosed in the application as filed.

8.2 Respondent 2 has objected to claim 1 of this request in view of Articles 84 EPC and of Article 123(3) EPC.

8.2.1 Respondent 2's objection under Article 84 EPC is that the definition of component "*(2)*" in claim 1 of the 5th Auxiliary Request is confusing and is an unclarity not already present in claim 1 or claim 4 as granted (see above Section II of the Facts and Submissions) and, thus, is open to consideration by the Board.

The Board notes however that the presence of the identical wording "*wherein <u>said</u> polyhydroxy compound is*

1,2-propanediol" (emphasis added by the Board) in the definition of ingredient "*(2)*" of claim 1 of the 5th Auxiliary Request and in claim 4 as granted renders the definition of this ingredient in these two claims identically clear (or identically unclear), independently as to whether the above wording is directly added at the end of the definition of ingredient (2) (as in claim 1 f the 5th Auxiliary Request) or preceded by "*The detergent composition according to claim 1*" (as in claim 4 as granted).

Hence, the Board finds that no new lack of clarity, objectionable under Article 84 EPC is introduced by the amendments present in claim 1 of the 5th Auxiliary Request. Thus, the clarity objection of Respondent 2 is also rejected.

8.2.2 As to the issue of the extension of protection under Article 123(3) EPC the Board notes that the subject-matter of claim 1 of the 5th Auxiliary Request corresponds to the subject-matter of claim 4 as granted further restricted to a single specific α-amylase as ingredient "*(5)*".

Respondent 2 was not able to identify a single example of a composition encompassed by claim 1 of the 5th Auxiliary Request that was not already encompassed by claim 1 as granted. The Board is also unable to identify such an example and thus concludes that claim 1 of the 5th Auxiliary Request also complies with Article 123(3) EPC.

8.2.3 The Board comes therefore to the conclusion that the claims of the 5th Auxiliary Request comply with Articles 83, 84 and 123(3) EPC.

9. Since the Appellant and Respondent 2 have both requested the Board to remit the case to the department of first instance for further prosecution in respect of the remaining grounds of opposition and since the Respondents 1 have not objected to this request, the Board decides according to Article 111(1), second sentence EPC, to remit the case to that department for further prosecution.

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 upon the basis of claims 1 to 9 of the 5th Auxiliary Request filed at the oral proceedings before the Board.

The Registrar: The Chairman:

D. Magliano P.-P. Bracke