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**Datasheet for the decision
of 11 April 2013**

Case Number: T 1617/10 - 3.3.07
Application Number: 03000043.4
Publication Number: 1329214
IPC: A61Q 5/02, A61Q 5/12,
A61K 8/73, A61K 8/365,
A61K 8/34, A61K 8/46
Language of the proceedings: EN

Title of invention:
Hair cleansing compositions

Patent Proprietor:
KAO CORPORATION

Opponents:
Henkel AG & Co. KGaA
BEIERSDORF AG

Headword:
Hair cleansing compositions/KAO CORPORATION

Relevant legal provisions:
RPBA Art. 13
EPC Art. 54, 56
EPC R. 99(2)

Keyword:
"Admissibility of the appeal of the opponent (yes)"
"Amendment to the appellant - opponent's case (no)"
"Novelty, main request (no)"
"Inventive step, main and auxiliary request (no): beneficial effect not demonstrated over the closest prior art"

Decisions cited:
-

Catchword:
-



Case Number: T 1617/10 - 3.3.07

D E C I S I O N
of the Technical Board of Appeal 3.3.07
of 11 April 2013

Appellant I:
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted
26 May 2010 concerning maintenance of European
patent No. 1329214 in amended form.**

Composition of the Board:

Chairman: D. Semino
Members: D. Boulois
P. Schmitz

Summary of Facts and Submissions

- I. European patent No. 1 329 214 was granted on the basis of five claims.

Claim 1 as granted read as follows:

"1. A hair cleansing composition comprising the following ingredients (A) to (E):

- (A) an anionic surfactant having a sulfate group,
 - (B) a higher alcohol having 10 to 14 carbon atoms,
 - (C) a cationic guar gum derivative,
 - (D) an organic acid,
- and
- (E) an aromatic alcohol,

wherein said hair cleansing composition has a pH of from 3 to 5.5 when diluted 20-fold by weight with water."

- II. Two oppositions were filed and revocation of the patent in its entirety was requested pursuant to Article 100 (a) EPC for lack of novelty and lack of inventive step.

- III. The present appeal lies from the interlocutory decision of the opposition division, concerning the maintenance of the patent in amended form. The decision was based on a first set of claims filed with letter of 4 May 2009 as main request and on a second set of claims filed with letter dated 19 February 2010 as first auxiliary request.

Claim 1 of the main request corresponded to granted claim 1 with the specification that the higher alcohol having 10 to 14 carbon atoms was "*in an amount of 0.05*

to 5 wt.%". In claim 1 of the first auxiliary request, that amount was specified to be "0.1 to 5 wt.%".

In the decision, the following documents were cited *inter alia*:

- (1) DE 100 05 162 A1
- (2) EP 0 627 216 B1
- (1a) Product Data Sheet "Texapon® N 70"
- (1c) Product Data Sheet "Lanette® O"
- (6) EP 1 123 693 A2
- (11) Internal Note Beiersdorf, spectrum 10848
- (12) Internal Note Beiersdorf, spectra 10848, 8678-8680,
- (15) Experiments filed with the letter dated 19 February 2010.

IV. The opposition division considered that the main request did not comply with the requirements of Article 54 EPC.

Example 2 of document (6), or of its priority document (1), was considered to be novelty-destroying. This example disclosed a composition comprising all components (A) and (C)-(E) listed in claim 1 of the main request. The sole question of dispute related to the presence of component (B), i.e. a higher fatty alcohol having 10 to 14 carbon atoms, in the products Plantacare® 818 UP, Lanette® and Texapon® N 70.

The opposition division came to the conclusion that document (12) showed an average content of 0.4 wt% of lauryl alcohol in Texapon® N 70, and document (1c) showed a content of 0-3 wt% of C14 alcohol in Lanette® O. Thus, example 2 of document (1) or (6) which contained 10.0 wt% of Texapon® N 70 and 0.5 wt% of Lanette® O contained 0.04 wt% (+/-20%) of lauryl

alcohol (C12) and between 0 and 0.015 wt% of C14 alcohol. This gave a total amount of between 0.04 and 0.055 wt% of C10-C14 alcohols.

The opposition division found that this disclosure overlapped with the subject-matter of claim 1, which was sufficient to establish a lack of novelty.

As regards the auxiliary request, the opposition division considered that the lower end value of the range 0.1 to 5 wt% of C10-C14 fatty alcohol was clearly distinguished from the upper end value of the range 0.04-0.055 wt% calculated for example 2 of document (1) or (6). Thus the subject-matter of the first auxiliary request was novel over the prior art.

As regards inventive step, the opposition division considered document (1) or (6) as closest prior art, and the problem to be solved as the provision of hair cleansing compositions having improved properties. The experimental data in document (15) showed that this problem was solved. As the subject-matter of the auxiliary request led to an improved effect which was not obvious from the closest prior art, example 2 of document (1) or (6), alone or in combination with any of the cited documents, an inventive step was acknowledged.

V. Opponent 02 filed an appeal against the decision of the opposition division.

The appellant-opponent requested that the decision under appeal be set aside and that the patent be revoked.

VI. The patent proprietor also filed an appeal against said decision.

The appellant-proprietor requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request or alternatively on the basis of the auxiliary request filed with the grounds of appeal, wherein both requests corresponded to the requests underlying the appealed decision.

- VII. The appellant-proprietor responded to the grounds of appeal filed by the appellant-opponent. In particular, it submitted that the appeal of the appellant-opponent was inadmissible.
- VIII. In the reply to the statement of grounds of appeal of the appellant-proprietor, the appellant-opponent submitted arguments on inventive step and, in order to reproduce the experiments provided by the appellant-proprietor (document (15)), it asked the European Patent Office to require that a sample of compound Emal® 227 be made available to the parties.
- IX. In a communication sent in preparation of oral proceedings, the board gave its preliminary non-binding opinion, namely that the subject-matter of claim 1 of the main request appeared to be novel, and that regarding inventive step of the main and auxiliary requests, a point of discussion would be the relevance of document (15).
The final part of the board's communication included *inter alia* the following sentence concerning any request filed after the communication had been sent:
"Moreover, it has to be recalled that any amended claims to be filed have to meet the requirements of Articles 84 and 123 EPC".

- X. Oral proceedings took place on 11 April 2013, in the presence of the appellants and of opponent 01, which was party as of right in the appeal.

At the end of the oral proceedings, the appellant-opponent withdrew its request that a sample of compound Emal® 227 be made available to the parties.

- XI. The arguments of the appellant-proprietor, as far as relevant to the present decision, may be summarised as follows:

The appeal of the appellant-opponent was not admissible, since it did not enable the Board and the other party to understand why the decision of the opposition division was incorrect regarding inventive step.

Document (15) had been submitted during the opposition proceedings, and a discussion had taken place before the first instance on the amounts of C10-C14 fatty alcohols present in the compositions of document (15). The opposition division had held that a decision on inventive step could be taken independently of this fact, which had no influence on the final decision.

In spite of that, the statement of grounds of appeal of the appellant-opponent consisted only in the repetition of the arguments on the quantities of C10-C14 fatty alcohol in the compositions of document (15). The appellant-opponent's appeal was thus limited to a criticism of the experimental data filed with document (15). It was not possible to determine the legal and factual reasons on which the case for setting aside the decision was based.

The objection under Article 123(2) EPC, raised by the appellant-opponent for the first time during the oral proceedings before the board, should not be admitted, because it was late filed. Moreover, it was unfounded.

As regards novelty of the main request, document (6) did not disclose explicitly the presence of a higher alcohol having 10 to 14 carbon atoms in the amounts specified in the claims. It was also not possible to conclude that the claimed amount was inevitably present as a by-product of some components of the shampoo composition of example 2 of document (6).

There was no evidence of the presence of a higher alcohol having 10 to 14 carbon atoms in the product Plantacare®.

Documents (11) and (12) showed that a very specific batch of Texapon® N 70 contained 0.4 wt.% of lauryl alcohol, but that fact was not sufficient to conclude that all batches of Texapon® N 70 had the same amount of alcohol.

The product Lanette® O comprised a maximum of 3.0 wt.% of lauryl alcohol, as shown by document (1c).

It was therefore not possible to conclude that example 2 of document (6) had inevitably more than 0.05 wt.% of a higher alcohol having 10 to 14 carbon atoms.

As regards inventive step of the main request, the closest prior art should be document (6), in particular example 2.

Document (15) showed examples falling under the scope of the claims. Although the experiments of document (15) were not an exact reproduction of example 2 of document (6), they made it credible that an improvement

in the cosmetic properties was linked to an increase of the content of the higher alcohol having 10 to 14 carbon atoms in the composition. The fact that an improvement was present between compositions comprising respectively 0.05 wt % and 0.1 wt. % of C10-C14 fatty alcohols made it credible that a composition comprising 0.05 wt.% of these alcohols would perform better than a composition with less than 0.05 wt.%.

Furthermore, Table 1 of the patent specification showed the existence of an improvement linked to an increase in the amount of C10-C14 fatty alcohols.

The objective technical problem was thus the provision of a shampoo composition, with improved cosmetic properties. In view of the closest prior art, it was even possible to reformulate the technical problem as the provision of a shampoo composition with improved foam volume as the rating went from "B" for "*Invention product 1*" with a concentration of C10-C14 fatty alcohols of 0.05 wt.% to "A" for "*Invention product 2*" with a concentration of C10-C14 fatty alcohols of 0.1 wt.%.

The addition of a C10-C14 fatty alcohol in the claimed concentration was neither obvious from document (6) nor from document (2).

As regards the auxiliary request, the experiment "*Invention product 1*" of document (15) fell outside the scope of claim 1 of the auxiliary request. That experiment had to be seen as a comparative example which demonstrated the advantages of the claimed composition and supported the presence of an inventive step for the subject-matter of claim 1 of the auxiliary request.

XII. The arguments of the appellant-opponent (opponent 02) and of the party as of right (opponent 01), as far as relevant to the present decision, may be summarised as follows:

As regards the admissibility of its appeal, the appellant-opponent considered that the statement of grounds of appeal had to address the points on which the decision was based, but did not necessarily need to be convincing.

The objection under Article 123(2) EPC raised during the oral proceedings should be admitted. Such an objection should be expected at any time in the proceedings, as it simplified the further discussion on novelty and inventive step and as no experiments from the patent proprietor were needed to this regard.

As regards the main request, the opposition division was right in its decision on novelty.

In particular, documents (11) and (12) showed that the content of fatty alcohols was of 0.5 and 0.4 wt.% in the product Texapon® N 70. The batch analysed in documents (11) and (12) was the same batch, and it showed that the claimed fatty alcohols were present in the claimed range. Commercial products always had a certain concentration of by-products, which remained steady to ensure the consistency of the products' cosmetic properties. The composition of the prior art, namely example 2 of document (1) or (6) therefore inevitably comprised a higher alcohol having 10 to 14 carbon atoms in an amount above 0.05 wt.%. Documents (1a) and (1c), which related to Texapon® N 70 and Lanette® O, supported the same conclusion.

As regards inventive step of the main request, the difference between the subject-matter of claim 1 and example 2 of document (6) was the concentration of C10-C14 fatty alcohols.

Document (15) did not provide any comparison with the closest prior art and the rating used therein was not reliable for comparing the performance of the compositions. The evaluation was performed by five testers giving a rating between 0 and 4 which was arbitrarily translated into the marks "A", "B", "C" and "D". These marks did not make it possible to perform a proper comparison. Moreover, for several properties the marks were the same for the compared compositions. For all those reasons, no improvement could be acknowledged and the problem was simply the provision of an alternative composition.

The incorporation of fatty alcohols at the given concentration in order to solve that problem was obvious in view of document (6) itself and of document (2).

As regards the auxiliary request, the subject-matter of claim 1 was not inventive for the same reasons as given for the main request.

- XIII. The appellant-opponent requested that the decision under appeal be set aside and the patent be revoked.

- XIV. The appellant-proprietor requested that the decision under appeal be set aside and the patent be maintained on the basis of the main request or the auxiliary request filed with the statement setting out the grounds of appeal dated 4 October 2010. Furthermore, he

requested that the appellant-opponent's appeal be rejected as inadmissible.

- XV. The other party (opponent 01) requested that the appellant-proprietor's appeal be dismissed.

Reasons for the Decision

1. *Admissibility*

1.1 The appeal of the appellant-proprietor is admissible.

1.2 *Admissibility of the appeal of the appellant-opponent*

1.2.1 Rule 99(2) EPC stipulates that the statement of grounds of appeal must indicate the reasons for setting aside the decision impugned, or the extent to which it is to be amended, and the facts and evidence on which the appeal is based. The arguments have to be clearly and concisely presented, to enable the board and the parties to understand immediately why the decision was alleged to be incorrect, and on what facts the appellant based his arguments, without first having to make investigations of their own (see decisions cited in Case Law of the Boards of Appeal, 6th edition 2010, VII.E.7.6.1).

1.2.2 The opposition division based its decision on inventive step on the fact that an improvement had been shown by the experimental data contained in document (15). In the statement of grounds of appeal, the appellant-opponent submitted arguments as to why the data in document (15) were not convincing.

The experiments of document (15) were contested on several points, namely on the undefined content of fatty alcohol in the experiments, the verifiability of the experiments and their meaningfulness (see in particular points 2.1, 2.2 and 2.3 of the statement of grounds of appeal). Thus, the appellant-opponent challenged the significance of document (15) in general. Since the opposition division's decision on inventive step was based on this document, the appellant-opponent's line of argumentation why the decision is incorrect is sufficiently clear.

1.2.3 The board observes that the discussion on the calculations of the content of fatty alcohols in the experiments of document (15) was only a part of the argumentation in the statement of grounds, which as a whole and in view of several arguments led the appellant-opponent to conclude that said document did not constitute a proper basis for the presence of an inventive step.

1.2.4 Consequently, the statement of grounds of appeal enables the board and the other parties to understand why the decision on inventive step is alleged to be incorrect. On that basis, the appeal of the appellant-opponent is admissible (Article 108 and Rule 99(2) EPC).

1.3 *Admission into the proceedings of an amendment to the appellant-opponent's case*

1.3.1 During the oral proceedings, the appellant-opponent submitted a new objection under Article 123(2) EPC against the feature relating to the concentration range

of the higher alcohol having 10 to 14 carbon atoms in claim 1 of all the requests.

The appellant-proprietor pointed out that such an objection had never been raised against the main and auxiliary requests which had been discussed already before the opposition division. Admitting an objection at such a late stage would not allow the proprietor to react properly to it.

Moreover, a basis existed for the said feature, in the original description on page 4, lines 9-15.

- 1.3.2 The admission of an amendment to a party's case after the filing of the statement of grounds of appeal and the reply thereto is, as specified by Article 13(1) RPBA, at the board's discretion.
- 1.3.3 This new objection was submitted at a very late stage of the proceedings, against requests submitted with the statement setting out the grounds of appeal by the appellant-proprietor and which underlay the appealed decision. The objection could therefore have been raised considerably earlier.
- 1.3.4 The appellant-opponent submitted that a patent proprietor should always expect this kind of objections, which can be presented at any time of the proceedings. Moreover, according to the appellant-opponent, the final sentence in the board's communication was a clear indication that Article 123(2) EPC might be discussed at any stage of the proceedings.
- 1.3.5 The board however cannot follow this argumentation.

The board agrees that a discussion with respect to Article 123 EPC must definitively address any newly drafted claims. This is also the meaning of the final clause of the board's communication which reads that "*it has to be recalled that any amended claims to be filed have to meet the requirements of Articles 84 and 123 EPC*".

This is however not the case with the claims objected to by the appellant-opponent, which had been on file already before the opposition division, and which had been decided upon in the appealed decision.

1.3.6 Moreover, in the present case, the objection under Article 123(2) EPC appears *prima facie* unfounded, since an explicit basis for the concentration range of the higher alcohol having 10 to 14 carbon atoms in claim 1 of the main and auxiliary requests is to be found in the original description on page 4, lines 9-15 (corresponding to paragraph [0010] of the published application).

1.3.7 For these reasons, the board decides not to admit this objection.

2. *Main request*

2.1 *Main request - Novelty*

2.1.1 Example 2 of document (6) (see paragraph [0060]), or of its priority document (1), discloses a shampoo composition comprising *inter alia*:

- 10.0 wt.% of Texapon® N70, namely sodium polyoxyethylene laurylether sulfate (ingredient (A) of the composition of claim 1 of the main request)

- 0.5 wt.% of Lanette® O, a fatty alcohol with C16-C18 carbon atoms
- 0.3 wt.% of Cosmedia® Guar C 261, namely a cationic guar gum (ingredient (C) of the composition of claim 1 of the main request)
- citric acid to a pH of 4.7 - 5.2, (ingredient (D) of the composition of claim 1 of the main request)
- 0.2 wt.% of Copherol® F 1300, namely a tocopherol (ingredient (E) of the composition of claim 1 of the main request).

2.1.2 It follows that components (A), (C), (D) and (E) from the subject-matter of claim 1 of the main request are all present in this specific example, which is silent on the presence of component (B), namely "*a higher alcohol having 10 to 14 carbon atoms, in an amount of 0.05 to 5 wt.%*".

However, some of the compounds of example 2 of document (6) may contain as by-products one or more fatty alcohols. Therefore, it must be established whether the residue of fatty alcohol having 10 to 14 carbon atoms of some components used in example 2 is present at the claimed total concentration of 0.05 wt% or more.

It appears from the teaching of documents (12) and (1c) that the products Texapon® N70 and Lanette® O used in example 2 may contain residues of C10-C14 fatty alcohol in amounts of respectively 0.4 wt% (+/- 20%) and max. 3 wt%. Document (1a) confirms that the content of unsulfated product in Texapon® N70 goes up to a maximum of 3.5 wt.%, without further details. This amounts to the potential presence of C10-C14 fatty alcohol residues of up to 0.055 wt% in the composition of example 2, which might be over the range limit of

0.05 wt.% claimed in claim 1 of the main request. However, the values disclosed in documents (1a) and (1c), namely "max. 3,5%" of unsulfated product in Texapon® N70 and "max. 3%" of C14 fatty alcohol in Lanette® O, do not refer to a constant concentration of by-products, nor make it possible to conclude that all batches of these products comprise the maximum amount of said by-products, in particular fatty alcohols having 10 to 14 carbon atoms.

Documents (11) and (12) relate to analysis performed on one specific batch of Texapon® N70, and do not make it possible to conclude that all batches of Texapon® N70 have these steady quantities of fatty alcohol.

On that basis, the value 0.055 wt.% is a maximum possible value of the concentration of C10-C14 fatty alcohols due to impurities. The C10-C14 fatty alcohol concentration lies in practice below this value.

- 2.1.3 To establish lack of novelty, it is not sufficient to show that a certain degree of probability exists that the practice of the teaching of the prior art might fall within the scope of the claims in suit. In the absence of literal disclosure, it must be shown that the presence of the missing ingredient in the desired concentration is inevitably obtained by repeating the example of the prior art. The existence of an overlap between the concentration in the claim and the possible fatty alcohol residue content of the composition of example 2 is thus not sufficient to establish a lack of novelty, since it remains dependent on the presence of a possible amount of residue in particular batches of some components of example 2.

2.1.4 Accordingly, as there is neither an explicit disclosure of an amount of "*a higher alcohol having 10 to 14 carbon atoms, in an amount of 0.05 to 5 wt.%*" in example 2 of document (6) or (1), nor an amount of said higher alcohol having 10 to 14 carbon atoms of 0.05 wt.% or higher that is inevitably obtained by repeating that example, novelty over the disclosure of example 2 of document (6) or (1) is established.

2.1.5 Consequently, the subject-matter of claim 1 is not disclosed directly and unambiguously in documents (6) or (1) and is therefore novel, and the main request meets the requirements of Article 54 EPC.

2.2 *Main request - Inventive step*

2.2.1 The present invention as claimed in claim 1 of the main request relates to a hair cleansing composition comprising ingredients (A) to (E), wherein (B) is "*a higher alcohol having 10 to 14 carbon atoms, in an amount of 0.05 to 5 wt.%*".

These compositions have good foamability and high-lubricity foam quality upon washing and smooth touch upon rinsing (see par. [0001] of specification). The higher alcohol is used in particular for making improvements in finish, stability and foam lubricity (see par. [0010] of specification).

2.2.2 Document (6), which constitutes the closest prior art, is concerned with the preparation of shampoo compositions, especially providing improved properties to the treated hair (see par. [0004]). Example 2 of document (6) shows a shampoo composition comprising all

the components (A), (C)-(E) and residues of higher alcohol having 10 to 14 carbon atoms.

The choice of document (6) or (1) as closest prior art was not contested by any party.

2.2.3 The problem as set out in the description of the present invention may be seen as the provision of a hair cleansing composition having improved cosmetic properties, in particular good foamability, high-lubricity foam quality upon washing, smooth touch upon rinsing, and being excellent feeling in use (see paragraphs [0001], [0003], [0006]).

2.2.4 As a solution to this alleged problem, claim 1 of the main request proposes a hair cleansing composition comprising the ingredients (A) to (E), with in particular a higher alcohol having 10 to 14 carbon atoms in an amount of 0.05 to 5 wt.%.

2.2.5 It has to be investigated whether there is sufficient evidence supporting the alleged improvement.

The patent in suit provides in Table 1 comparative examples, but none of them comprises the now claimed guar gum derivative, which is present in example 2 of document (6), and therefore none can be taken into account for demonstrating the achievement of a technical effect.

The patent in suit comprises several other examples of hair cleansing compositions on pages 8-10 of the specification comprising the claimed compounds (A)-(E). However, none of the examples shows any results or data regarding the improvement of cosmetic properties. Nor

does the description give any further data about the improvement of cosmetic properties.

Document (15) has therefore been submitted by the appellant-patentee to demonstrate the existence of an improved effect.

This document discloses two compositions, named "*Invention product 1*" and "*Invention product 2*", which reproduce the composition as disclosed in example 2 of document (6) and comprise additionally a higher alcohol having 10 to 14 carbon atoms in an amount of 0.05 and 0.1 wt% respectively. An evaluation and rating of the cosmetic properties of these "*Invention products*" has been performed as regards the foam volume, the foam lubricity, the fineness of foam, the touch and smoothness upon rinsing, the hair softness and hair luster after drying.

This document does not however provide any comparative data between a composition as disclosed in example 2 of document (6) and the same composition with "*a higher alcohol having 10 to 14 carbon atoms in an amount of 0.05 to 5 wt.%*", which is the distinguishing feature supposedly giving rise to the alleged improvement.

In the case where comparative tests are necessary to demonstrate an inventive step with an improved effect over a claimed area, the nature of the comparison with the closest prior art must be such that the effect is convincingly shown to have its origin in the distinguishing feature of the invention. In particular, in order to show an effect over a prior art example, it is necessary to measure and compare the effects achieved by that example.

In the present case, a reproduction of the relevant example of the prior art is not available, nor is the existence of an improved effect credibly shown by the experiments of document (15). The low number of testers, namely five, combined with the broad range of each rating "A", "B", "C" and "D" of the rating system does not sufficiently show the existence of such an improved effect. Rating "A" corresponds to a rating of 3.5 or higher, while rating "B" corresponds to a rating between 2.5 and 3.5, on a scale going from 0 to 5. The experiment of "*Invention product 1*" shows a uniform evaluation rating of "B" for the tests on the foam volume, the foam lubricity, the fineness of foam, the touch and smoothness upon rinsing, the hair softness and hair luster after drying. The experiments of "*Invention product 2*" show three ratings "B" and four ratings "A" for the same tests. The small difference between the lower range of "A" and the upper range of "B" and the absence of any numbered results combined with the low number of testers, produce results which are not sufficiently clear and do not even render it credible that an improvement has taken place *de facto* between the compositions of "*Invention product 1*" and "*Invention product 2*".

As a consequence, none of the examples in the description of the specification or in the experiments of document (15) succeeds in demonstrating a beneficial effect of the claimed subject-matter over the prior art. It has therefore not been credibly shown that the alleged problem is solved. Consequently, in the absence of any experimental evidence or arguments establishing a minimum plausibility for the presence of an improvement vis-à-vis the closest state of the art, the

problem underlying the present invention can only be seen as the provision of a further hair cleansing composition.

2.2.6 The question to be answered is whether the proposed solution would have been obvious to the skilled person in the light of the prior art.

Document (6) itself suggests several alternatives for the oil in the hair cleansing compositions, including fatty alcohols of C6-C30 carbon atoms, in particular C12-C18 carbon atoms, such as a C14 fatty alcohol (see document (6) par. [0009]). The concentration of this oil should be between 0.1-15 wt.%, preferably 1-5 wt.% (see document (6), par. [0009]).

Consequently, the addition of "*a higher alcohol having 10 to 14 carbon atoms in an amount of 0.05 to 5 wt.%*" is envisaged in document (6), and is a common and obvious solution to the posed problem.

2.2.7 Thus, the subject-matter of claim 1 of the main request is obvious from document (6) or (1). Consequently, the main request does not meet the requirements of Article 56 EPC.

2.3 *Auxiliary request - Inventive step*

2.3.1 The invention as claimed in claim 1 of the auxiliary request relates to a hair cleansing composition comprising the ingredients (A) to (E), wherein the component (B) is a higher alcohol having 10 to 14 carbon atoms, in an amount of 0.1 to 5 wt.%.

As the subject-matter of claim 1 of the auxiliary request differs from the main request only in the

concentration range of the fatty alcohol, the reasoning and the conclusions reached above for the main request apply *mutatis mutandis*.

Document (6), or its priority document (1), still constitutes the closest prior art. Even if the composition of "*Invention product 1*", which comprises an amount of higher fatty alcohol of 0.05 wt%, no longer falls under claim 1, it still does not correspond to the composition of example 2 of document (6) or (1), even if both compositions may contain some residual supplementary quantities of fatty alcohol. Thus an improved effect cannot be based on these experiments (see point 2.2.5 above).

Moreover, as for the main request, a real improvement of the cosmetic properties between "*Invention product 1*" and "*Invention product 2*" is not credibly shown, in view of the rating system used (see point 2.2.5 above).

In the absence of any experimental evidence or arguments establishing a minimum plausibility for the presence of an improvement vis-à-vis the closest state of the art, the problem underlying the invention can only be seen as the provision of a further alternative hair cleansing composition.

The addition of "*a higher alcohol having 10 to 14 carbon atoms in an amount of 0.1 to 5 wt.%*" is envisaged in document (6), which suggests the ranges of 0.1-15 wt.%, preferably 1-5 wt.% (see document (6), par. [0009]), and is therefore a common and obvious solution (see point 2.2.6 above).

2.3.2 Consequently, the auxiliary request does not meet the requirements of Article 56 EPC.

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:

S. Fabiani

D. Semino