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Case Number: T 0456/11 - 3.3.07

Application Number: 94925418.9

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Language of the proceedings: EN

Title of invention:
NEW PHARMACEUTICAL COMPOSITIONS FOR TOPICAL USE CONTAINING HYALURONIC ACID AND ITS DERIVATIVES

Patent Proprietor:
FIDIA FARMACEUTICI S.p.A.

Opponent:
Maria Clementine Martin Klosterfrau Vertriebsgesellschaft mbH

Relevant legal provisions:
EPC Art. 123(2)

Keyword:
Amendments - added subject-matter (yes)

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Case Number: T 0456/11 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 14 January 2015

Appellant: (Patent Proprietor)	FIDIA FARMACEUTICI S.p.A. Via Ponte della Fabbrica 3/A 35031 Abano Terme (PD) (IT)
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Respondent: (Opponent)	Maria Clementine Martin Klosterfrau Vertriebsgesellschaft mbH Gereonsmühlengasse 1-11 50670 Köln (DE)
Representative:	Von Rohr Patentanwälte Partnerschaft mbB Patentanwälte Partnerschaft Rüttenscheider Straße 62 45130 Essen (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 27 December 2010 revoking European patent No. 0716596 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	J. Riolo
Members:	R. Hauss
	P. Schmitz

Summary of Facts and Submissions

I. The present appeal lies from the decision of the opposition division, pronounced on 8 December 2010 and posted on 27 December 2010, revoking European patent No. 716596.

II. The application as originally filed (published as WO 95/03786) contains twenty-five claims.

Claims 1, 20, 21, 22 and 24 are independent claims.

Claims 1, 2 to 4, 6, 9, 10, 14 to 17 and 20 as filed read as follows:

"1. A pharmaceutical composition, comprising a pharmaceutically effective amount of an acidic polysaccharide and/or a derivative thereof, a gaseous vehicle, and a pharmaceutically acceptable carrier or excipient.

2. The pharmaceutical composition according to claim 1, wherein said acidic polysaccharide or derivative thereof is a member selected from the group consisting of hyaluronic acid, a pharmaceutically acceptable salt of hyaluronic acid, a partial or total ester of hyaluronic acid with an alcohol, a partial or total intermolecular ester of hyaluronic acid, a partial or total intramolecular ester of hyaluronic acid, a crosslinked ester of hyaluronic acid, an alginic acid ester, an ester of carboxymethyl-cellulose, an ester of carboxymethylchitin, an ester of carboxymethyl starch, a gellan ester, a crosslinked gellan ester, a pectic acid ester, and a pectinic acid ester.

3. The pharmaceutical composition according to claim 2, wherein said acidic polysaccharide is hyaluronic acid.

4. The pharmaceutical composition according to claim 3, wherein said hyaluronic acid has a molecular weight of between about 30,000 and about 730,000 Daltons.

...

6. The pharmaceutical composition according to claim 2, wherein said partial or total ester of hyaluronic acid with an alcohol is hyaluronic acid partially or totally esterified with benzyl alcohol or ethyl alcohol.

...

9. The pharmaceutical composition according to claim 1, wherein said gaseous vehicle is selected from the group consisting of n-butane, isobutane, nitrogen, and sterile compressed air.

10. The pharmaceutical composition according to claim 1, further comprising a surfactant.

...

14. The pharmaceutical composition according to claim 10, which is in the form of a foam.

15. The pharmaceutical composition according to claim 1, wherein the acidic polysaccharide is present in the form of a micronized powder.

16. The pharmaceutical composition according to claim 15, wherein said micronized powder has a mean particle size of from about 0.1 to about 100 µm.

17. The pharmaceutical composition according to claim 15, which is in the form of a spray powder.

...

20. Use of an acidic polysaccharide or a derivative thereof to produce a pharmaceutical spray composition."

III. European patent No. 716596 was granted on the basis of thirty amended claims.

IV. The patent was opposed under Articles 100(a), (b) and (c) EPC on the grounds that the claimed subject-matter lacked novelty and inventive step, was not disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art, and extended beyond the content of the application as filed.

V. In the course of the opposition proceedings, the patent proprietor submitted an amended main request and fifteen auxiliary requests, all filed with letter of 8 October 2010, and a sixteenth auxiliary request, filed in oral proceedings on 8 December 2010.

VI. In the impugned decision revoking the patent the opposition division found that, in each of the pending requests, the definition of claim 1 extended beyond the content of the application as filed (Article 123(2) EPC).

VII. The appellant (patent proprietor) lodged an appeal against that decision.

With the statement setting out the grounds of appeal the appellant filed a new sixteenth auxiliary request.

The appellant requested that the decision under appeal be set aside and that the case be remitted to the opposition division for further prosecution on the basis of the main request or auxiliary requests 1 to 15 filed during the opposition proceedings with letter of 8 October 2010, or auxiliary request 16 filed with the grounds of appeal.

Independent claims 1 and 8 of the **main request** read as follows:

"1. A pharmaceutical composition for topical treatment of skin ulcers, sores, wounds and/or burns, comprising

a pharmaceutically effective amount of an acidic polysaccharide or a derivative thereof selected from the group consisting of hyaluronic acid having a molecular weight of between about 30,000 and about 730,000 Daltons and a partial or total ester of hyaluronic acid with benzyl alcohol or ethyl alcohol;

a gaseous vehicle selected from the group consisting of n-butane and iso-butane and

a pharmaceutically acceptable carrer [sic] *or excipients,*

said pharmaceutical composition being in the form of a micronized spray powder or said pharmaceutical composition further comprising a surfactant and being in the form of a foam.

8. Use of an acidic polysaccharide or a derivative thereof selected from the group consisting of hyaluronic acid having a molecular weight of between about 30,000 and about 730,000 Daltons and a partial or total ester of hyaluronic acid with benzyl alcohol or ethyl alcohol;

and a gaseous vehicle selected from the group consisting of n-butane and iso-butane

for the manufacture of a pharmaceutical composition for treatment of burns, sores, ulcerations and wounds,

said pharmaceutical composition being in the form of a micronized spray powder or said pharmaceutical composition further comprising a surfactant and being in the form of a foam."

Claim 1 of the **first auxiliary request** corresponds to claim 1 of the main request but does not contain the words *"for topical treatment of skin ulcers, sores, wounds and/or burns"*.

Independent claim 8 of the first auxiliary request is identical to claim 8 of the main request.

Claim 1 of the **second auxiliary request** corresponds to claim 1 of the main request, but further specifies that the mandatory gaseous vehicle is selected from n-butane and that the pharmaceutical composition is in the form of a micronized spray powder.

Independent claim 5 of the second auxiliary request corresponds to claim 8 of the main request, but further specifies that the mandatory gaseous vehicle is selected from n-butane and that the pharmaceutical composition is in the form of a micronized spray powder.

Claim 1 of the **third auxiliary request** corresponds to claim 1 of the second auxiliary request but does not contain the words *"for topical treatment of skin ulcers, sores, wounds and/or burns"*.

Independent claim 5 of the third auxiliary request is identical to claim 5 of the second auxiliary request.

Independent claims 1 and 8 of the **fourth auxiliary request** read as follows:

"1. A pharmaceutical composition for topical treatment of skin ulcers, sores, wounds and/or burns, comprising

a pharmaceutically effective amount of an acidic polysaccharide or a derivative thereof selected from the group consisting of hyaluronic acid having a molecular weight of between about 30,000 and about 730,000 Daltons;

a gaseous vehicle selected from the group consisting of n-butane and iso-butane and

a pharmaceutically acceptable carrier or excipients,

said pharmaceutical composition being in the form of a micronized spray powder or said pharmaceutical composition further comprising a surfactant and being in the form of a foam.

8. Use of an acidic polysaccharide or a derivative thereof selected from the group consisting of hyaluronic acid having a molecular weight of between about 30,000 and about 730,000 Daltons;

and a gaseous vehicle selected from the group consisting of n-butane and iso-butane

for the manufacture of a pharmaceutical composition for treatment of burns, sores, ulcerations and wounds,

said pharmaceutical composition being in the form of a micronized spray powder or said pharmaceutical composition further comprising a surfactant and being in the form of a foam."

Claim 1 of the **fifth auxiliary request** corresponds to claim 1 of the fourth auxiliary request but does not contain the words *"for topical treatment of skin ulcers, sores, wounds and/or burns"*.

Independent claim 8 of the fifth auxiliary request is identical to claim 8 of the fourth auxiliary request.

Claim 1 of the **sixth auxiliary request** corresponds to claim 1 of the fourth auxiliary request, but further specifies that the mandatory gaseous vehicle is selected from n-butane and that the pharmaceutical composition is in the form of a micronized spray powder.

Independent claim 5 of the sixth auxiliary request corresponds to claim 8 of the fourth auxiliary request, but further specifies that the mandatory gaseous vehicle is selected from n-butane and that the pharmaceutical composition is in the form of a micronized spray powder.

Claim 1 of the **seventh auxiliary request** corresponds to claim 1 of the sixth auxiliary request but does not contain the words *"for topical treatment of skin ulcers, sores, wounds and/or burns"*.

Independent claim 5 of the seventh auxiliary request is identical to claim 5 of the sixth auxiliary request.

Independent claims 1 and 8 of the **eighth auxiliary request** read as follows:

"1. A pharmaceutical composition for topical treatment of skin ulcers, sores, wounds and/or burns, comprising

a pharmaceutically effective amount of an acidic polysaccharide or a derivative thereof selected from the group consisting of a partial or total ester of hyaluronic acid with benzyl alcohol or ethyl alcohol;

a gaseous vehicle selected from the group consisting of n-butane and iso-butane and

a pharmaceutically acceptable carrer [sic] *or excipients,*

said pharmaceutical composition being in the form of a micronized spray powder or said pharmaceutical composition further comprising a surfactant and being in the form of a foam.

8. Use of an acidic polysaccharide or a derivative thereof selected from the group consisting of a partial or total ester of hyaluronic acid with benzyl alcohol or ethyl alcohol;

and a gaseous vehicle selected from the group consisting of n-butane and iso-butane

for the manufacture of a pharmaceutical composition for treatment of burns, sores, ulcerations and wounds,

said pharmaceutical composition being in the form of a micronized spray powder or said pharmaceutical composition further comprising a surfactant and being in the form of a foam."

Claim 1 of the **ninth auxiliary request** corresponds to claim 1 of the eighth auxiliary request but does not

contain the words *"for topical treatment of skin ulcers, sores, wounds and/or burns"*.

Independent claim 8 of the ninth auxiliary request is identical to claim 8 of the eighth auxiliary request.

Claim 1 of the **tenth auxiliary request** corresponds to claim 1 of the eighth auxiliary request, but further specifies that the mandatory gaseous vehicle is selected from n-butane and that the pharmaceutical composition is in the form of a micronized spray powder.

Independent claim 5 of the tenth auxiliary request corresponds to claim 8 of the eighth auxiliary request, but further specifies that the mandatory gaseous vehicle is selected from n-butane and that the pharmaceutical composition is in the form of a micronized spray powder.

Claim 1 of the **eleventh auxiliary request** corresponds to claim 1 of the tenth auxiliary request but does not contain the words *"for topical treatment of skin ulcers, sores, wounds and/or burns"*.

Independent claim 5 of the eleventh auxiliary request is identical to claim 5 of the tenth auxiliary request.

Claim 1 of the **twelfth auxiliary request** reads as follows:

"1. Use of an acidic polysaccharide or a derivative thereof selected from the group consisting of hyaluronic acid having a molecular weight of between about 30,000 and about 730,000 Daltons and a partial or total ester of hyaluronic acid with benzyl alcohol or ethyl alcohol;

a gaseous vehicle selected from the group consisting of n-butane and iso-butane and

a pharmaceutically acceptable carrer [sic] *or excipients,*

for the manufacture of pharmaceutical composition for treatment of burns, sores, ulcerations and wounds, said pharmaceutical composition being in the form of a micronized spray powder or said pharmaceutical composition further comprising a surfactant and being in the form of a foam."

Claim 1 of the **thirteenth auxiliary request** corresponds to claim 1 of the twelfth auxiliary request, but further specifies that the acidic polysaccharide or derivative thereof is selected from the group consisting of hyaluronic acid having a molecular weight of between about 30,000 and about 730,000 Daltons.

Claim 1 of the **fourteenth auxiliary request** corresponds to claim 1 of the twelfth auxiliary request, but further specifies that the acidic polysaccharide or derivative thereof is selected from the group consisting of a partial or total ester of hyaluronic acid with benzyl alcohol or ethyl alcohol.

Claim 1 of the **fifteenth auxiliary request** corresponds to claim 1 of the twelfth auxiliary request, but further specifies that the mandatory gaseous vehicle is selected from n-butane, and the pharmaceutical composition is in the form of a micronized spray powder.

Independent claims 1 and 13 and dependent claims 3, 7, 15 and 19 of the **sixteenth auxiliary request** read as follows:

"1. A pharmaceutical composition for topical treatment of skin ulcers, sores, wounds and/or burns, comprising a pharmaceutically effective amount of an acidic polysaccharide or a derivative thereof selected from the group consisting of a partial or total ester of hyaluronic acid with benzyl alcohol or ethyl alcohol;

a gaseous vehicle selected from the group consisting of n-butane and

a pharmaceutically acceptable carrer [sic] *or excipients.*

3. The pharmaceutical composition according to claim 1, further comprising a surfactant.

7. The pharmaceutical composition according to claim 3, which is in the form of a foam.

13. Use of an acidic polysaccharide or a derivative thereof selected from the group consisting of a partial or total ester of hyaluronic acid with benzyl alcohol or ethyl alcohol;

and a gaseous vehicle selected from the group consisting of n-butane

for the manufacture of a pharmaceutical composition for treatment of burns, sores, ulcerations and wounds.

15. Use according to claim 13, wherein said composition further comprises a surfactant.

19. Use according to claim 15, wherein said composition is in the form of a foam."

VIII. In a communication issued in preparation for oral proceedings and advising the parties of the board's preliminary opinion, the board mentioned *inter alia* the following points:

- In the application as filed it was mentioned (page 6: lines 23 to 29) that a number of different nonionic or anionic surfactants could be present and that a foam was consequently produced upon application; however, that disclosure was restricted to nonionic and anionic surfactants. A combination of the acidic polysaccharide embodiments from dependent claims 4 or 6 with the

embodiment according to which the pharmaceutical composition comprised a surfactant (not restricted to the presence of a mandatory anionic or nonionic surfactant) and was in the form of a foam was not apparent in the application as filed. That gave rise to doubt with regard to the basis in the application as filed for claim 1 of the main request and first, fourth, fifth, eighth and ninth auxiliary requests and the independent use claims of the main request and the first, fourth, fifth, eighth, ninth and twelfth to fourteenth auxiliary requests (paragraphs 3.6 and 4.3 of the board's communication).

- In the context of claim 1 of each of the second, third, sixth, seventh, tenth and eleventh auxiliary requests it might be asked if the application as filed contained a direct and unambiguous disclosure of micronised spray powders containing n-butane and one of the specific acidic polysaccharides recited in those claims. The same doubt applied to the independent use claims of the second, third, sixth, seventh, tenth, eleventh and fifteenth auxiliary requests (paragraphs 3.7 and 4.4 of the board's communication).

- The above-mentioned objections under Article 123 EPC did not apply to independent claims 1 and 13 of the sixteenth auxiliary request.

- If one of the appellant's requests were found to meet the requirements of Article 123 EPC the board would be inclined to remit the case to the department of first instance.

IX. In reply to the appellant's statement of grounds and to the board's communication the respondent (opponent) submitted counter-arguments (letters dated 18 August 2011 and 11 December 2014).

X. With letter of 12 December 2014, without presenting further submissions, the appellant announced that it would not attend the oral proceedings.

XI. Oral proceedings took place on 14 January 2015 in the absence of the appellant.

The respondent requested that the appeal be dismissed. The respondent further requested that the case be remitted to the opposition division if the board found that one of the pending requests did not contain added subject-matter.

XII. The appellant's arguments concerning the requirements of Article 123(2) EPC can be summarised as follows:

Support for the claim feature specifying that the acidic polysaccharide was to be selected from the group consisting of hyaluronic acid having a molecular weight of between about 30,000 and about 730,000 Daltons and a partial or total ester of hyaluronic acid with benzyl alcohol or ethyl alcohol could be found in claims 1, 2, 4 and 6 of the application as filed.

The formulation of the pharmaceutical composition as a foam was supported by claims 10 and 14 of the application as filed.

The formulation as a micronised spray powder was supported by claims 15 and 17 of the application as filed and also by the passage on page 18, lines 3 to 5 of the description (example 22) which mentioned that sprays consisting of dry, micronised powders guaranteed excellent coverage.

The definition of the gaseous vehicle being selected from n-butane or from the group consisting of n-butane and isobutane was supported by the passage on page 6, lines 10 to 20 of the description and by examples 4

to 20 of the application as filed. In those example formulations which contained hyaluronic acid or alcohol esters of hyaluronic acid, or which were in the form of foams or micronised spray powders, n-butane or isobutane were exclusively used as the carrier gas; in particular, n-butane was used in micronised spray powder formulations, and especially in combination with benzyl or ethyl esters of hyaluronic acid (examples 17 to 20 of the application as filed).

XIII. The respondent's arguments can be summarised as follows:

The embodiments according to which the acidic polysaccharide was selected from hyaluronic acid having a molecular weight of between about 30,000 and about 730,000 Daltons and a partial or total ester of hyaluronic acid with benzyl alcohol or ethyl alcohol were not generally disclosed in the description as filed, and they were not combined with further technical features. The description confined itself to listing isolated features in separate paragraphs. As a consequence, only the claims could be consulted as a possible basis for the subject-matter of all requests. The dependencies of the claims in the application as filed (in particular, claims 1 to 4, 6, 9, 10, 14, 15 and 17) did not allow for a combination of all features required in independent claim 1 of the main request. When mentioned in the description, the relevant features were only disclosed in the context of specific embodiments and could not be taken out of context to be combined with the required classes of acidic polysaccharides or derivatives thereof. The examples could not serve as a basis for isolated technical features because that would give rise to unallowable intermediate generalisation. The same objections applied to claim 1 of the first to sixteenth auxiliary requests.

Reasons for the Decision

1. Main request (Article 123(2) EPC)

1.1 Independent claims 1 and 8 of the main request specify that the acidic polysaccharide or derivative thereof which is present in a pharmaceutically effective amount is selected from the group consisting of:

- hyaluronic acid having a molecular weight of between about 30,000 and about 730,000 Daltons and

- a partial or total ester of hyaluronic acid with benzyl alcohol or ethyl alcohol.

Also, in one of the claimed alternative product forms the pharmaceutical composition comprises a surfactant and is in the form of a foam.

1.2 In the application as filed it is disclosed that *inter alia* hyaluronic acid (of various molecular weights) or the partial and total esters of hyaluronic acid with various alcohols can be used as the acidic polysaccharide or derivative thereof (see the description, page 3: lines 24 to 34; page 5: lines 7 to 14). Claim 2 as filed, which corresponds to the cited passage on page 3, recites the same choices for the acidic polysaccharide or derivative. In claims 4 and 6 (both of which are dependent on claim 2) "hyaluronic acid which has a molecular weight of between about 30,000 and about 730,000 Da" (claim 4) and "hyaluronic acid partially or totally esterified with benzyl alcohol or ethyl alcohol" (claim 6) are more specifically mentioned. A disclosure corresponding to the wording of claim 4 or of claim 6 is not found in the text of the description.

1.3 In the description of the application as filed it is disclosed that a number of different nonionic or

anionic surfactants may be present, such as poly-oxyethylene derivatives of sorbitan esters and bi- and trivalent metal soaps, and that a foam is consequently produced upon application which can be easily rubbed into wounds (page 6: lines 23 to 29).

That disclosure is however restricted to nonionic and anionic surfactants. The term "surfactant" is not mentioned anywhere else in the description. The more general feature which requires that the composition should comprise "a surfactant" and be in the form of a foam is only found in the combination, by back-reference, of claims 14, 10 and 1 of the application as filed.

1.4 Since claims 14 and 10 are dependent only on claim 1, the claim dependencies do not enable a combination with the acidic polysaccharide embodiments of claims 4 or 6. Nor is a combination of the surfactant-containing foam embodiment (not requiring the mandatory presence of anionic or nonionic surfactants) with the acidic polysaccharide embodiments from dependent claims 4 or 6 disclosed anywhere else in the application as filed.

1.5 Even were the feature "being in the form of a foam" to be regarded as not further limiting with regard to the surfactant-containing composition, the application as filed still does not disclose the general feature "comprising a surfactant" in combination with the acidic polysaccharide embodiments of claim 4 or of claim 6, since the description refers only to certain anionic and nonionic surfactants, and dependent claim 10 concerning surfactants in general is dependent only on claim 1 and cannot be combined with claims 4 or 6.

1.6 Thus, the combination of features defined in claim 1 and mentioned in point 1.1 *supra* does not find support in the application as filed. The same objection applies to

independent claim 8, which contains the same unsupported combination of features (see point VII. *supra*).

1.7 As a consequence, the subject-matter of claims 1 and 8 of the main request extends beyond the content of the application as filed and does not meet the requirements of Article 123(2) EPC.

2. First auxiliary request (Article 123(2) EPC)

2.1 The combination of features recited in point 1.1 *supra* is likewise present in claims 1 and 8 of the first auxiliary request (see point VII. supra), so that the same objection applies as explained in the context of the main request.

2.2 As a consequence, the subject-matter of claims 1 and 8 of the first auxiliary request extends beyond the content of the application as filed and does not meet the requirements of Article 123(2) EPC.

3. Second auxiliary request (Article 123(2) EPC)

3.1 Independent claims 1 and 5 of the second auxiliary request specify that the acidic polysaccharide or derivative thereof which is present in a pharmaceutically effective amount is selected from the group consisting of:

- hyaluronic acid having a molecular weight of between about 30,000 and about 730,000 Daltons and

- a partial or total ester of hyaluronic acid with benzyl alcohol or ethyl alcohol.

Additionally, the gaseous vehicle is selected from n-butane, and furthermore, the pharmaceutical composition is in the form of a micronised spray powder.

3.2 As already mentioned (see point 1.2 *supra*) the specific classes of acidic polysaccharides listed as alternative

options in claim 1 are mentioned as such in the text of the application as filed only in claims 4 and 6.

Dependent claims 9 and 15 to 17 are the only claims in the application as filed in which n-butane, micronised powder and spray powder are mentioned. Independently of the question whether the exact definition of said features in those claims is the same as in the second auxiliary request, none of those claims is linked by its dependencies to claims 4 or 6, so that the set of claims as filed does not support any combination of the features of claims 9, 15 or 16 with the acidic polysaccharide embodiments of claims 4 or 6. Claim 9 is dependent on claim 1. Claim 15 is dependent on claim 1, and claims 16 and 17 are dependent on claim 15.

3.3 A list of suitable gaseous vehicles which consists of n-butane, isobutane, nitrogen and sterile compressed air is generally disclosed on page 6, lines 9 to 13 of the description as filed.

The product form of a micronised spray powder is disclosed as one of several possible product forms in a discussion of pharmaceutical applications of the invention on page 18, lines 3 to 5 of the application as filed: "Sprays consisting of dry, micronized powders also guarantee excellent coverage...".

Yet the general part of the description as filed contains no indication that one of the acidic polysaccharide embodiments of claims 4 or 6 should specifically be combined, in a composition which is in the form of a micronised spray powder, with n-butane as the carrier vehicle.

3.4 The appellant has cited the formulation examples of the application in support of the combinations in question. None of those examples mentions, however, hyaluronic

acid with a molecular weight of between 30,000 and 730,000 Da or a partial ethyl ester of hyaluronic acid. Thus the formulation examples cannot provide support for the claimed combinations with regard to the entire claimed scope of mandatory acidic polysaccharides.

3.5 In conclusion, the application as filed does not contain a specific disclosure of a micronised spray powder containing n-butane as the gaseous vehicle and hyaluronic acid which has a molecular weight of between about 30,000 and 730,000 Da or hyaluronic acid partially esterified with ethyl alcohol. Thus, the combination of features as defined in claim 1 does not find adequate support in the application as filed. The same objection applies to independent claim 5, which contains the same combination of features (see points VII. and 3.1 *supra*).

3.6 As a consequence, the subject-matter of claims 1 and 5 of the second auxiliary request extends beyond the content of the application as filed and does not meet the requirements of Article 123(2) EPC.

4. Third to fifteenth auxiliary requests

4.1 All independent claims of the third to fifteenth auxiliary requests (see point VII. *supra*) contain one of the combinations of features which have been objected to above in the context of the main request or the second auxiliary request (see points 1. and 3. *supra*).

4.2 As a consequence, the subject-matter of the following claims extends beyond the content of the application as filed and does not meet the requirements of Article 123(2) EPC:

claims 1 and 5 of the third auxiliary request, claims 1 and 8 of the fourth auxiliary request, claims 1 and 8 of the fifth auxiliary request, claims 1 and 5 of the sixth

auxiliary request, claims 1 and 5 of the seventh auxiliary request, claims 1 and 8 of the eighth auxiliary request, claims 1 and 8 of the ninth auxiliary request, claims 1 and 5 of the tenth auxiliary request, claims 1 and 5 of the eleventh auxiliary request, claim 1 of the twelfth auxiliary request, claim 1 of the thirteenth auxiliary request, claim 1 of the fourteenth auxiliary request and claim 1 of the fifteenth auxiliary request.

5. Sixteenth auxiliary request (Article 123(2) EPC)

5.1 Independent claims 1 and 13 of the sixteenth auxiliary request do not require the composition either to be in the form of a micronised powder or to contain a surfactant and be in the form of a foam. Thus the objections raised above under Article 123(2) EPC do not apply to those claims.

5.2 However, in dependent claim 7 and dependent claim 19 it is specified that the composition is in the form of a foam and (by back-reference to dependent claim 3 or to dependent claim 15, respectively) that it contains a surfactant.

5.3 As a consequence, the subject-matter of said dependent claims extends beyond the content of the application as filed and does not meet the requirements of Article 123(2) EPC, for the reasons already explained in the context of the main request (see points 1.1 to 1.5 *supra*).

5.4 The board's written communication issued in preparation for oral proceedings (see point VIII. *supra*) only treated the independent claims of each request. Thus said communication did not contain any objections with regard to the dependent claims of the sixteenth auxiliary request (see point 6.1 of the communication).

The objection to the relevant combination of features was however explained in points 3.6 and 4.3 of the communication in the context of the independent claims of the main request and the first, fourth, fifth, eighth, ninth and twelfth to fourteenth auxiliary requests. The board furthermore mentioned that it would be inclined to remit the case to the department of first instance if one of the appellant's requests were found to meet the requirements of Article 123 EPC (see point 7.2 of the communication).

It was the appellant's responsibility to provide counter-arguments to any objections raised and/or to ensure that its requests did not contain subject-matter giving rise to known objections. The appellant chose not to submit any substantive arguments or amendments in reaction to the board's communication and limited itself to announcing that it would not attend the oral proceedings (see point X. *supra*).

Under these circumstances, it cannot surprise the appellant that the dependent claims of the sixteenth auxiliary request were examined and found to give rise to an objection of which the parties had already been notified with regard to the same combination of features.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

S. Fabiani J. Riolo

Decision electronically authenticated