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Datasheet for the decision of 15 June 2012

Case Number: T 1685/11 - 3.4.02

Application Number: 05075822.6

Publication Number: 1560043

IPC: G02B1/04, G02C7/04

Language of the proceedings: EN

Title of invention:
Soft contact lenses

Applicant:
Johnson & Johnson Vision Care, Inc.

Opponents:
ELLIS IP LTD
BAUSCH & LOMB INC.

Relevant legal provisions:
EPC Art. 123(2)

Keyword:
Added subject-matter (yes)

Decisions cited:
G 1/93

Europäisches Patentamt | European Patent Office | Office européen des brevets

Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 1685/11 - 3.4.02

D E C I S I O N
of the Technical Board of Appeal 3.4.02
of 15 June 2012

Appellant: (Patent Proprietor)
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 18 May 2011 revoking European patent No. 1560043 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman: A. G. Klein
Members: F. J. Narganes-Quijano
D. Rogers

Summary of Facts and Submissions

I. The appellant (patent proprietor) has lodged an appeal against the decision of the opposition division revoking European patent No. 1560043 (based on European patent application No. 05075822.6).

The oppositions filed by respondent I (opponent I) and respondent II (opponent II) were based on the grounds for opposition under Articles 100(a) and (b) EPC.

II. In its decision the opposition division held that the subject-matter of claim 1 amended according to each of the main and the first to third auxiliary requests then on file contravened the requirements of Article 123(2) EPC. As regards the set of claims amended according to the fourth auxiliary request filed during the first-instance oral proceedings, the opposition division found that the request could not be admitted into the proceedings because it was late filed and *prima facie* not clearly allowable.

III. With the statement setting out the grounds of appeal the appellant submitted sets of claims amended according to a main and an auxiliary request, the claims of the main request being identical to those of the main request underlying the decision under appeal.

During the written appeal proceedings the appellant referred to document

D3: US-A-4182822

on file and submitted documents

D18: "Römpps Chemie-Lexikon", O. A. Neumüller; Franckh'sche Verlagshandlung (DE), 8th ed. (1981), page 969

D19: "Synthesis of silicone graft polymers and a study of their surface active properties" Y. Kawakami *et al.*; Makromol. Chem. Vol. 185 (1984), pages 9 to 18

D20: EP-A-1985645,

and respondent I submitted documents

D21: "Aldrich - Handbook of fine chemicals and laboratory equipment" 2003-2004 (GB); pages 1505 to 1509

D22: "Fluorochem - Silicon compounds: Silanes & silicones"; Gelest Inc. (US) 2008, pages 487 to 520

D23: "Safety of Silicone Breast Implants", S. Bondurant *et al.*; Committee on the Safety of Silicone Breast Implants, Institute of Medicine (US), 1999, Chapter 4: "Silicone Toxology", pages 80 to 113.

IV. Oral proceedings were held before the Board on 15 June 2012.

The appellant requested that the decision under appeal be set aside and that the patent be maintained in accordance with the claims of the main request or, subsidiarily, of the auxiliary request, both filed with the statement of grounds of appeal. The appellant also requested, in the event the Board decided that the main or auxiliary request satisfied the requirements of Article 123(2) EPC, that the case be remitted to the department of first instance for further prosecution.

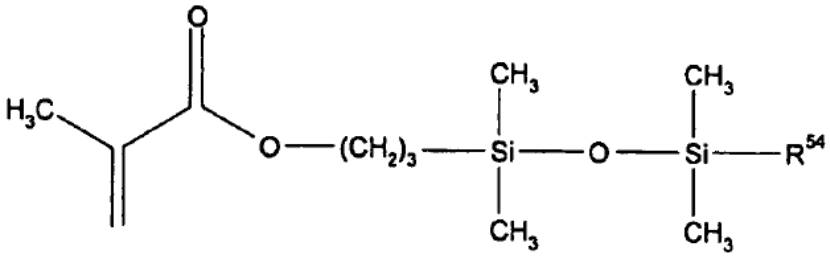
Respondent I requested that the appeal be dismissed, and that if the Board decided that the main or auxiliary request satisfied the requirements of Article 123(2) EPC, the case be remitted to the department of first instance for further prosecution.

Respondent II requested that the appeal be dismissed and that the auxiliary request not be admitted into the proceedings.

At the end of the oral proceedings the Board announced its decision.

V. The wording of claim 1 amended according to the main request reads as follows:

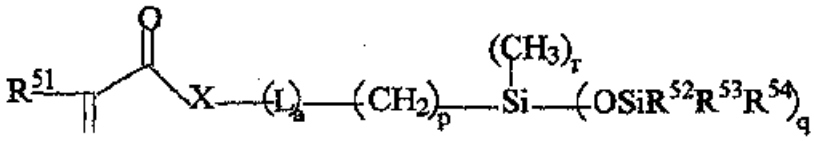
"A method of lowering the modulus of the silicon hydrogel of a soft contact lens comprising curing a reaction mixture comprising a monomethacryloxypropyl terminated polydimethylsiloxane monomer having the structure:



wherein R^{54} is a monovalent polydimethyl siloxane chain comprising up to 100 repeating Si-O units, and said monomethacryloxypropyl terminated polydimethylsiloxane has a number average molecular weight of greater than 700."

The wording of claim 1 amended according to the auxiliary request reads as follows:

"A method of lowering the modulus of the silicon hydrogel of a soft contact lens comprising curing a reaction mixture comprising, as a silicon-containing monomer, mono-methacryloxypropyl terminated polydimethylsiloxane having a number average molecular weight greater than 700 and having the structure:



wherein R^{51} is CH_3, q is 1 and two of R^{52}, R^{53} and R^{54} are methyl and the third is a monovalent polydimethyl siloxane chain comprising up to 100 repeating Si-O units, p is 3, r = 2, X is O and a is 0."

VI. The arguments of the appellant in support of its requests can be summarized as follows:

The essential feature of the invention is the silicone-containing monomer. According to the application as filed the monomer is given by structure I on page 3, and the amended claim 1 is based on the mono-methacryloxypropyl terminated polydimethylsiloxanes disclosed in the application as preferred monomers. The skilled person unambiguously understands "mono-methacryloxypropyl terminated polydimethylsiloxane" as referring to a polydimethylsiloxane capped with one mono-methacryloxypropyl group. Only one end of the polydimethylsiloxane carries a methacryloxypropyl group, and consequently R^{51}, X, p and a in structure I must be CH_3, O, 3, and 0, respectively.

In addition, as evidenced by documents D18 (page 969, entry "Dimethylpolysiloxan"), D19, and D20 (paragraph [0006]), the skilled person understands that a polydimethylsiloxane includes one single chain made up of [-Si(CH_3)$_2$-O-] units arranged in a linear form. If there is more than one poly(dimethylsiloxane) chain in the molecule, this has according to the rules of chemical nomenclature to be expressed by the prefix "bis" or "tris" for two or three chains, respectively, as shown in other examples disclosed in the patent specification (cf. paragraphs [0006], [0017] and [0018]) and in document D3 (formulae bridging columns 3 and 4). The use of the word "terminated" is further evidence that the molecule includes only one siloxane chain; in the silicone art the word "terminated" is not ordinarily used to describe the placement of a methacryloxypropyl group in the interior of a siloxane, as would be the case with a bis- or a tris-polydimethylsiloxane. In addition, an end group such as the butyl group of structure II disclosed in the patent specification is not normally specified in the chemical name of the monomer.

Documents D21 to D23 have been filed late and should not be admitted into the proceedings. In addition, the siloxanes listed in document D21 merely have "polydimethylsiloxane" as one component of the respective name, and the full name includes at least one further name component and shows that the siloxanes have nothing to do with the claimed monomers; thus, from the list of siloxanes it cannot be concluded that the term "polydimethylsiloxanes" encompasses a large number of other materials such as those listed in the document. Similar comments apply with regard to document D22. This document refers to methacrylate and

acrylate functional siloxanes and in particular to methacryloxypropyl terminated polydimethylsiloxanes (page 511) and also to vinyl functional macromers (page 491); the formula on top of the first table on page 511 relates to di-methacryloxypropyl terminated polydimethylsiloxanes that are subsequently listed in the table, and the document confirms what is already shown in document D20. Document D23 does not contribute anything to what is shown in documents D21 and D22.

Accordingly, by "polydimethylsiloxane" it is meant that each Si group carries two methyl groups so that r must be 2, q must be 1, and two of the groups R^{52}, R^{53} and R^{54} must be CH_3. When these meanings are inserted into structure I, the result is the formula of claim 1 of the main request. Therefore, the claimed subject-matter is directly and unambiguously derivable from the application as filed and does not result from an undisclosed selection or combination of features.

The claimed features relating to the number of repeating Si-O units and to the number average molecular weight do not constitute an inadmissible selection of features and do not result from a singling out of alternatives disclosed in the application (cf. page 4, lines 2 to 9 and lines 11 and 12).

The amended claim is also in agreement with the principles set forth in point 9 of the reasons of decision G 1/93. In the present case the new claims are narrower than those of the application as filed, and legal security for third parties is not concerned because nothing was added that was not originally disclosed.

In claim 1 of the auxiliary request the structure of the silicon-containing monomer is as disclosed in the application as filed (structure I). The meanings of R^{51}, X, A, p, r and two of R^{52}, R^{53} and R^{54} were adapted to give the mono-methacryloxypropyl terminated polydimethylsiloxane.

VII. The arguments of respondent I in support of its request are essentially the following:

Only two examples of specific structures of monomers are given in the application as filed, namely "structure I" and "structure II". In order to arrive at the structure of claim 1 of the main request, multiple selections are necessary (methyl for R^{51}, O for X, 0 for a, 3 for p, methyl for R^{52} and R^{53}, 1 for q, and a monovalent siloxane chain for R^{54}). A further selection is that the polydimethylsiloxane has a number average molecular weight greater than 700. The claimed subject-matter results from an undisclosed, and therefore impermissible multiple selection of alternatives.

The preferred monomethacryloxypropyl-terminated polydimethylsiloxanes do not constitute a basis for the amended claim because in these monomers of structure I any of R^{52}, R^{53} and R^{54} can be "ethyl, methyl, benzyl, phenyl or a monovalent siloxane chain", and each of r and q can be 1 or 2. Indeed, according to the common understanding in the field the term "polydimethylsiloxane" is understood to mean any compound that contains at least one polydimethylsiloxane chain and encompasses any compound with a polydimethylsiloxane within its structure. Terms such as "bis" and "tris" are used to denominate specific compounds, but the name "polydimethylsiloxane" designates a class of compounds that can contain more

than just one siloxane chain. In addition, structure I is compatible with the presence of more than one siloxane group and encompasses branching structures; thus, one or more of the groups may be a monovalent dimethylsiloxane chain and/or ethyl, benzyl or phenyl and the resulting monomer would equally be described as a polydimethylsiloxane. This is illustrated by structure II disclosed in the patent as an example of a preferred compound according to structure I; the structure contains a terminal n-butyl group, i.e. a butyl group present on the terminal atom of the polydimethylsiloxane group R^{54}, but not present in its name. If this group with a terminal butyl group is meant to be within the definition of a polydimethylsiloxane, then a polydimethylsiloxane may include, at least at its ends, silicon atoms having alkyl substituents other than methyl.

As an illustration, document D21 lists over 70 materials in the catalogue "Polydimethylsiloxanes" all having very different structures and containing a wide range of other functional groups. Document D22 discloses a compound with a branched structure described as a polydimethylsiloxane (bottom right section of page 491), and other structures (pages 502, 506, 509 to 511, etc.) also described as polydimethylsiloxanes and containing a wide variety of other functional groups, and in particular a wide range of terminal groups. Document D23 shows that the term is used in a generic sense to indicate any material which contains at least one polydimethylsiloxane chain somewhere within its structure (page 86).

In addition, the claimed value of the molecular weight also results from a new combination of features. There is also no disclosure in the application of a method of

lowering the modulus of a lens by curing the specific monomer defined in the claim (cf. example 19 of the application).

The same objections apply to claim 1 of the auxiliary request. This claim makes it more clear that multiple selections are required to arrive at the claimed subject-matter.

VIII. The arguments of respondent II in support of its request are essentially the following:

Claim 1 of the main request defines a specific combination of several features which is not disclosed in the application documents as filed. In particular, neither the specific polydimethylsiloxane monomer defined in the claim nor the use of this specific monomer in a method of lowering the modulus of the silicone hydrogel of a soft contact lens are supported by the application as filed.

Both the original disclosure and claim 1 as granted contemplate the use of any silicone-containing monomer of structure I. The amended claim 1, however, refers to a very specific class of such monomers and is directed to the use of a very specific selection of compounds. There is no basis for restricting R^{52} and R^{53} to a methyl and the monovalent siloxane chain to a monovalent polydimethylsiloxane chain. Even if the parameter r were 1, R^{52}, R^{53} and R^{54} could still be monovalent dimethylsiloxane chains, thus rendering the whole molecule a polydimethylsiloxane; the appellant's assumption that r must be 2 is therefore incorrect and this assumption represents an unsupported selection.

In addition, the polydimethylsiloxane chain according to claim 1 may end with any conceivable chemical group (see structure II) having any molecular weight and the claimed limitation relating to the molecular weight is therefore not supported by the application as filed. There is also no support for the claimed requirement relating to the polydimethylsiloxane chain comprising up to 100 repeating Si-O units.

Finally, as a consequence of the amendments it is unclear in claim 1 what the minimum number of Si-O units should be in order to qualify the substituent as a polydimethylsiloxane chain. In particular, according to structure II the parameter b can be 0 and the compound can have one single siloxane, i.e. one single siloxane unit would appear to be sufficient to qualify the monomer as a polydimethylsiloxane.

The first auxiliary request corresponds with the previous fourth auxiliary request, and this request was not admitted by the opposition division for being late filed. In addition, the request is *prima facie* not suitable to solve the issues discussed so far but raises new issues. In any case, all the above considerations also apply to claim 1 of the auxiliary request.

Reasons for the Decision

1. The appeal is admissible

2. Admissibility of documents D18 to D23

Documents D18 to D20 and documents D21 to D23 were submitted by the appellant and by respondent I,

respectively, in response to the communication annexed to the summons to oral proceedings in which the Board noted that one of the issues to be addressed during the oral proceedings was whether the class of monomers defined in the amended claim 1 could be identified with the class of monomers "monomethacryloxypropyl terminated polydimethylsiloxane monomers" satisfying structure I of the application as filed or whether, on the contrary, the former class constituted only a subclass of the latter class.

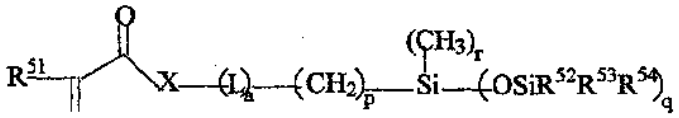
The relevant passages of documents D18 to D23 identified by the parties relate to a plurality of examples of monomers and to the nomenclature used in the documents in the designation of the monomers, and the corresponding submissions of the parties were confined to arguments in support of their respective view on the issue referred to above.

In view of these circumstances, the Board decided during the oral proceedings to admit these documents into the proceedings. The appellant's request not to admit documents D21 to D23 into the proceedings was rejected in view of the fact that the appellant itself referred to document D21 in support of its own submissions and that, in any case, it would have been unfair in the circumstances of the case to admit documents D18 to D20 into the proceedings but to disregard documents D21 to D23 when assessing the issues under consideration.

3. *Main request - Article 123(2) EPC*

3.1 The application as originally filed discloses a silicon hydrogel prepared by curing a reaction mixture comprising a silicone-containing monomer (page 3, lines

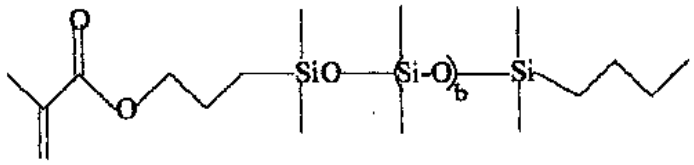
1 to 12). According to the original disclosure, and as reflected by the original claim 1 and also by claim 1 of the patent as granted, the silicone-containing monomer has the following structure:



Structure I

wherein R^{51} is H or CH_3, q is 1 or 2 and for each q, R^{52}, R^{53}, and R^{54} are independently ethyl, methyl, benzyl, phenyl or a monovalent siloxane chain comprising from 1 to 100 repeating Si-O units, p is 1 to 10, r=(3-q), X is O or NR^5, where R^5 is H or a monovalent alkyl group with 1 to 4 carbons, a is 0 or 1, and L is a divalent linking group.

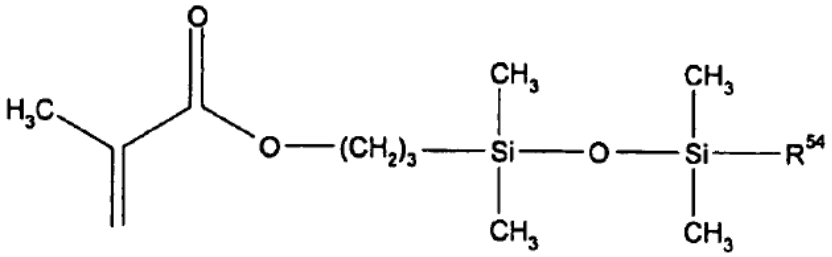
The application as filed specifies on page 4, lines 16 to 24 a list of examples of silicone-containing monomers of structure I, the list including, among other monomers, "mono-methacryloxypropyl terminated polydimethylsiloxanes such as Structure II:



Structure II

where b = 0 or 100". The subsequent paragraph of the application as filed further specifies the preferred silicone-containing monomers of structure I and cites, among other monomers, "mono-methacryloxypropyl terminated polydimethylsiloxanes" (page 4, line 25 to page 5, line 3).

3.2 According to the subject-matter of claim 1 amended according to the present main request - and identical to claim 1 of the main request underlying the decision under appeal - the silicon-containing monomer is a monomethacryloxypropyl terminated polydimethylsiloxane monomer having the structure:



wherein R^{54} is a monovalent polydimethyl siloxane chain comprising up to 100 repeating Si-O units, and said monomethacryloxypropyl terminated polydimethylsiloxane has a number average molecular weight of greater than 700.

3.3 In its decision the opposition division held that the amended features relating to the group R^{54} being defined as a "monovalent polydimethyl siloxane chain", the chain comprising "up to 100 repeating Si-O units", and the number average molecular weight of the monomethacryloxypropyl terminated polydimethylsiloxane being "greater than 700" constituted in combination a selection of features resulting in a specific monomer that was not disclosed in the application as filed. The appellant, for its part, has disputed this finding of the opposition division.

3.4 The Board first notes that according to the definition of structure I given in the application as filed (cf.

point 3.1 above) each of the groups R^{52}, R^{53}, and R^{54} is independently ethyl, methyl, benzyl, phenyl or a monovalent siloxane chain, and that for this structure to result in the specific structure defined in claim 1 amended according to the main request (cf. point 3.2 above) a clear and unambiguous basis is required in the application as originally filed that would justify selecting among the number of possibilities encompassed by structure I those specifically defined in amended claim 1. In particular, the amended claim 1 requires independently selecting, among the equivalent alternatives listed in structure I, two of the groups R^{52}, R^{53} and R^{54} as being constituted specifically by a methyl group and the remaining group as being constituted specifically by a monovalent siloxane chain having the form of a monovalent polydimethyl siloxane chain.

According to the appellant, this clear and unambiguous basis is to be found in the disclosure of the application as filed relating to the monomethacryloxypropyl-terminated polydimethylsiloxane monomer disclosed in the original application as one of the preferred monomers of structure I (point 3.1 above). However, the sole mention of monomethacryloxypropyl-terminated polydimethylsiloxane monomer as a preferred monomer of structure I is in the Board's view insufficient to support the claimed combination of individual alternatives, each selected within the list of equivalent alternatives mentioned above. In particular, according to the amended claim 1, one of the groups R^{52}, R^{53} and R^{54} in the monomer is constituted by one single monovalent polydimethylsiloxane chain, and the two remaining groups are constituted by a methyl group. However, the definition of the groups R^{52}, R^{53} and R^{54} in structure I

is such that the preferred polydimethylsiloxane monomer of structure I, specified in the application as filed, may contain more than just one single monovalent siloxane chain and/or a dimethylsiloxane chain together with an ethyl, a benzyl or a phenyl group, and would still constitute a monomethacryloxypropyl-terminated polydimethylsiloxane monomer within the generic meaning of the term.

The appellant submitted that these alternative structures are excluded by the name "monomethacryloxypropyl-terminated polydimethylsiloxane monomer". This is because the name designates nothing else than a specific monomer, the constituents of which are defined by the terms of the name. The Board cannot follow this line of argument. The chemical name in the case may in principle be interpreted either generically as designating a class of monomers all falling within the denomination "monomethacryloxypropyl-terminated polydimethylsiloxane monomers" or restrictively as designating a specific monomer. However, there is no clear and unambiguous basis in the application as filed for interpreting it in the latter, restrictive manner. On the contrary, the sole explicit developed formula of a monomethacryloxypropyl-terminated polydimethylsiloxane monomer given in the application as filed is structure II on page 4 of the application. Although this structure contains a butyl group at the end of the siloxane chain (see point 3.1 above), the presence of such a group is not reflected by the name of the monomer. In addition, during the oral proceedings the appellant acknowledged that structure II constitutes a specific example of, and was therefore encompassed by the monomethacryloxypropyl-terminated polydimethylsiloxane monomers previously mentioned in the same passage which were therefore to be interpreted

in its context as designating a generic class of monomers. The further submission of the appellant that the groups appended to the siloxane chain of the monomers under consideration, such as the butyl group shown in structure II, are normally not specified in the name of the monomer, runs counter to the appellant's allegation that the specific form of the monomer defined in the amended claim 1 would be clearly and unambiguously derivable from the preferred monomer under consideration.

As regards documents D3 and D18 to D23, the Board notes that documents D3 (paragraph bridging columns 3 and 4) and D19 show that a monomer having a specific structure can be designated by a specific name defining the complete structure, and that documents D18 (page 969, entry "Dimethylpolysiloxan"), D20 (paragraph [0006]), D21 (pages 1505 to 1509) and D22 (page 511) show in particular that the term "polydimethylsiloxane" may specifically designate a monomer constituted by a polydimethylsiloxane chain terminated by some specific group. Nonetheless, documents D22 (page 491, last structure) and D23 (page 86, last paragraph) disclose examples of "polydimethylsiloxanes" in which this term is generically used to designate a class of monomers characterized by including at least a polydimethylsiloxane chain in its structure but otherwise having different structures. It follows that the specific meaning of the term "polydimethylsiloxane" depends on the particular technical context in which it is used. In the case in suit the information content of the application as originally filed is - as already shown in the former paragraph - insufficient to conclude that the term is specifically used in its technical context in the restrictive sense alleged by the appellant.

3.5 The appellant has also submitted that the claims are narrower than those of the application as filed and that nothing has been added that was not originally disclosed, so that the amendments to the claim are in agreement with the principles set forth in decision G 1/93 (OJ EPO 1994, 541). According to this decision "an applicant shall not be allowed to improve his position by adding subject-matter not disclosed in the application as filed, which would give him an unwarranted advantage and could be damaging to the legal security of third parties relying on the content of the original application" (point 9 of the reasons of the decision).

The Board, however, cannot follow the application by the appellant of the mentioned passage of decision G 1/93 to the present case. This is because, as stated by the Enlarged Board of Appeal in the same decision with regard to a claim amended by adding an undisclosed feature: "If such added feature, although limiting the scope of protection conferred by the patent, has to be considered as providing a technical contribution to the subject-matter of the claimed invention, it would [...] give an unwarranted advantage to the patentee contrary to the above purpose of Article 123(2) EPC. Consequently, such feature would constitute added subject-matter within the meaning of that provision. A typical example of this seems to be the case, where the limiting feature is creating an inventive selection not disclosed in the application as filed or otherwise derivable therefrom." (point 16 of the reasons).

In the case under consideration the amended claim involves a multiple selection within a list of equivalent alternatives which, as concluded in point

3.4 above, is not clearly and unambiguously derivable from the content of the application as filed. Furthermore, the amendments were made in response to the grounds for opposition of lack of novelty and of lack of inventive step invoked by the respondents and are therefore supposed - in addition to providing a technical contribution to the claimed subject-matter - to render the claimed subject-matter novel and inventive. It follows that the amendments constitute a (potentially) "inventive selection" not disclosed in the application as filed or otherwise derivable therefrom within the meaning of decision G 1/93. Accordingly, the present situation reflects the "typical example" mentioned in decision G 1/93 of amendments that - contrary to the appellant's submissions - "give an unwarranted advantage to the patentee contrary to the [...] purpose of Article 123(2) EPC".

3.6 In view of the above considerations, the Board concludes that the skilled person could not have clearly and unambiguously derived from the preferred monomers cited in the application as filed the specific monomer defined in claim 1 amended according to the main request.

In view of this conclusion, there is no need for the Board to consider the further submissions of the respondents that the amendments in claim 1 relating to the number average molecular weight "of greater than 700" and to the monovalent polydimethylsiloxane chain comprising "up to 100 repeating Si-O units" also involve an unallowable selection of features.

Accordingly, claim 1 amended according to the main request contravenes the requirements of Article 123(2) EPC.

4. *Auxiliary request*

4.1 Admissibility

The amended set of claims of the auxiliary request was filed with the statement of grounds of appeal and the amendments represent a legitimate attempt on the part of the appellant to overcome the opposition division's negative view on the compliance of the main request with the requirements of Article 123(2) EPC.

Respondent II has requested that the auxiliary request not be admitted into the proceedings on the grounds that the set of claims amended according to this request corresponds essentially to the set of claims of the fourth auxiliary request submitted during the first-instance proceedings and not admitted by the opposition division into the proceedings for being late filed and *prima facie* not clearly allowable. However, when compared with claim 1 of the fourth auxiliary request submitted during the first-instance proceedings, claim 1 of the present auxiliary request has been amended in several respects, and in particular as regards the values of the parameters q, p and a, and the composition of the components X and R^{51} to R^{54}, presumably in an attempt to overcome, among other objections, those considered by the opposition division on a *prima facie* basis for not admitting the previous fourth auxiliary request. Therefore, contrary to the submissions of respondent II, the amended set of claims of the present auxiliary request is substantially different from that of the previous fourth auxiliary

request and in these circumstances the Board sees no reason for not admitting the present auxiliary request into the proceedings. In particular, the second of the alternatives contemplated in Article 12(4) of the Rules of Procedure of the Boards of Appeal and relating to the power of the Board to hold inadmissible "requests which [...] were not admitted in the first instance proceedings" does not apply to the present case.

In view of these considerations, the request of respondent II not to admit the auxiliary request into the proceedings was not followed by the Board. Accordingly, the auxiliary request was admitted into the proceedings.

4.2 Article 123(2) EPC

As submitted by the appellant, claim 1 has been amended according to the auxiliary request in order to bring its formulation closer to that of structure I defined in the application as filed and also in claim 1 of the patent as granted. However, the amendments do not affect the substance of the subject-matter defined in claim 1 of the main request because, as submitted by the respondents, the amended claim 1 results essentially from a mere reformulation of the subject-matter of claim 1 of the main request in the form of rewriting the chemical structure defined in claim 1 of the main request in terms of structure I.

Accordingly, the amendments do not affect the conclusion drawn in point 3 above with regard to the main request. On the contrary, the amended claim 1 explicitly specifies that "two of R^{52}, R^{53}, and R^{54} are methyl and the third is a monovalent polydimethyl siloxane chain" and thus emphasizes the multiple

selection of equivalent alternatives underlying the considerations in point 3 above.

The Board concludes that the amendments to claim 1 of the auxiliary request are contrary to the requirements of Article 123(2) EPC for the same reasons as those already given in point 3 above with regard to claim 1 of the main request.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

M. Kiehl A. G. Klein

Decision electronically authenticated