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Datasheet for the decision of 2 July 2014

Case Number: T 2616/11 - 3.3.06

Application Number: 05250963.5

Publication Number: 1693441

IPC: C11D3/42, C11D3/10

Language of the proceedings: EN

Title of invention:
A particulate laundry detergent composition comprising a detersive surfactant, carbonate and a fluorescent whitening component

Patent Proprietor:
THE PROCTER & GAMBLE COMPANY

Opponents:
Henkel AG & Co. KGaA
UNILEVER N.V. / UNILEVER PLC

Headword:
Laundry detergent composition comprising carbonate and fluorescent whitening agent/PROCTER & GAMBLE

Relevant legal provisions:
RPBA Art. 12(4), 13(1), 13(3)
EPC Art. 52(1), 56, 114(2), 84, 123(2)

Keyword:
Inventive step (Main request) - no
Late filed auxiliary requests - no abuse of procedure (yes)
Late filed evidence - admitted (yes)
Claims - clarity (yes)
Amendments - allowable (yes)
Remittal (yes)

Decisions cited:
G 0007/95

Catchword:

Europäisches Patentamt
European Patent Office
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Case Number: T 2616/11 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 2 July 2014

Appellant 1: (Opponent 1)	Henkel AG & Co. KGaA Henkelstrasse 67 40589 Düsseldorf (DE)
Representative:	Henkel AG & Co. KGaA Intellectual Property (FJI) 40191 Düsseldorf (DE)
Appellant 2: (Opponent 2)	UNILEVER N.V. / UNILEVER PLC Weena 455/100 Victoria Embankment 3013 AL Rotterdam/London, Greater London EC4Y 0DY (NL)
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Respondent: (Patent Proprietor)	THE PROCTER & GAMBLE COMPANY One Procter & Gamble Plaza Cincinnati, OH 45202 (US)
Representative:	Samuels, Lucy Alice Gill Jennings & Every LLP The Broadgate Tower 20 Primrose Street London EC2A 2ES (GB)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 9 November 2011 concerning maintenance of the European Patent No. 1693441 in amended form.**

Composition of the Board:

Chairman	E. Bendl
Members:	P. Ammendola
	U. Lokys

Summary of Facts and Submissions

I. The appeals of Opponents 1 and 2 lie from the interlocutory decision of the Opposition Division concerning the maintenance of European patent no 1 693 441 in amended form.

II. The patent as granted contains ten claims. In particular, granted claim 1 reads as follows (the added wording with respect the corresponding claim 1 as originally filed is underlined):

"*1. A solid laundry detergent composition comprising:*

(a) a detersive surfactant;
(b) from 0wt% to 10wt% zeolite builder;
(c) from 0wt% to 10wt% phosphate builder;
(d) from 1wt% to 50wt% by weight of the composition of carbonate; and
(e) a fluorescent whitening agent;

wherein the composition is in free-flowing particulate form and comprises at least two separate particulate components,
wherein the first particulate component comprises:

(i) a anionic detersive surfactant;
(ii) at least 10wt%, by weight of the first particulate component, of carbonate;
(iii) from 0wt% to 10wt%, by weight of the first particulate component, of a zeolite builder;
(iv) from 0wt% to 10wt%, by weight of the first particulate component, of a phosphate builder; and

(v) from 0wt% to less than 5wt%, by weight of the first particulate component, of a fluorescent whitening agent; and

wherein the second particulate component comprises:

(i) at least 0.20wt%, by weight of the second particulate component, of a fluorescent whitening agent; and
(ii) from 0wt% to less than 20wt%, by weight of the second particulate component, of carbonate,

wherein if the first particulate component comprises a fluorescent whitening agent, then the weight ratio of carbonate to fluorescent whitening agent present in the first particulate component is at least 30:1."

Claims 2 to 9 refer to preferred embodiments of Claim 1, in particular claims 2, 4 and 8 as granted (respectively identical to originally filed claims 3, 6 and 10) read:

"*2. A composition according to claim 1, wherein the first particulate component is substantially free of fluorescent whitening agent.*"

"4. *A composition according to any preceding claim, wherein the second particulate component is substantially free from carbonate.*"

"*8. A composition according to any preceding claim, wherein the first particulate component is in*

spray-dried form, and wherein the second particulate component is in non-spray-dried form."

III. The patent in suit had been opposed on the grounds of lack of novelty and of inventive step by referring to, *inter alia*, documents:

D2 = WO 95/14766 A1,

D3 = US 6,610,645 B2

and

D6 = WO 97/33958 A1.

During the opposition proceedings the Proprietor had filed an amended Main Request.

IV. Claim 1 of this Main Request differs from claim 1 as granted only in that the feature of the second particulate component:

"*(ii) from 0wt% to less than 20wt%, by weight of the second particulate component, of carbonate,*"

was amended to:

"*(ii) from 0wt% to* ***10wt%****, by weight of the second particulate component, of carbonate,".*

V. In the decision under appeal the Opposition Division found that the latter request complied with the requirements of the EPC. In particular, the subject-matter of claim 1, against which the Opponents had raised no objections of lack of novelty, was found non-

obvious for a skilled person searching for an alternative to the **s**olid **l**aundry **d**etergent **compositions** (below **SLD compositions**) disclosed in documents D2 and D6, which also contained a **f**luorescent **w**hitening **a**gent (below **FWA)** and which had a reduced tendency to yellowing.

VI. Both Opponents (below **Appellants**) appealed this decision. In their statements of grounds of appeal they argued that there was no evidence that the SLD compositions disclosed in the patent in suit possessed a reduced tendency to yellowing and that also the prior art disclosed in document D6 *per se* rendered obvious the subject-matter of claim 1. Appellant 1 additionally stressed that the breadth of claim 1 deprived of credibility any allegation of an advantageous technical effect.

VII. The Proprietor (below **Respondent**) maintained with its reply the request maintained by the Opposition Division (Main Request) and filed the experimental report E1 as well as sixteen sets of amended claims labelled 1st to 16th Auxiliary Request.

VIII. Claim 1 of the 16th Auxiliary Request differs from claim 1 as granted (see II *supra*) in that the end of the claim starting from item (v) was replaced by the following passage:

"*wherein the second particulate component comprises:*

(i) *at least 50wt%, by weight of the second particulate component, of a fluorescent whitening agent;*

wherein the first particulate component is substantially free of fluorescent whitening agent; and

wherein the second particulate component is substantially free from carbonate; and

wherein the first particulate component is in spray-dried form, and wherein the second particulate component is in non-spray-dried form."

IX. Appellant 1 filed with letter of 6 March 2013 the documents

D7 = WO 99/42549 A1

and

D8 = WO 98/46715 A1

allegedly in reaction to the Respondent's reply and raised objections of lack of novelty and inventive step against the 1st to 16th Auxiliary Requests on the basis of these two citations.

X. With a letter dated 10 June 2013 Appellant 2 filed an experimental report E2 and objected to the admissibility of the Auxiliary Requests because of their "absurd number".

XI. With the official communication of 21 March 2014 the Board summoned the Parties to oral proceedings to be held on 2 July 2014.

XII. With letter of 2 June 2014 the Respondent filed a 17th Auxiliary Request.

Claim 1 of this request differs from Claim 1 of the 16th Auxiliary Request only in the further restrictions:

- "*from 0wt% to 4wt%*", for the zeolite builder's amount in features "*(b)*" and "*(iii)*"

and

- "*from 5wt% to 25 wt%*", for the carbonate's amount in feature "*(d)*".

XIII. With letter of 5 June 2014 Appellant 1 filed, *inter alia*, document

D9 = US 3,741,911 B1

allegedly in reaction to the Respondent's requests and line of argument. This citation was considered novelty destroying for the Main Request and, thus, also relevant for the assessment of inventive step of this request. In the same letter Appellant 1:

- disputed the admissibility of the Auxiliary Requests of the Respondent because they defined at least four different "groups" of inventions;

- raised objections under Article 123(2) EPC and Articles 83 and 84 EPC 1973 directed to, *inter alia*, the 16th and 17th Auxiliary Request.

XIV. At the oral proceedings held as scheduled before the Board, the debate initially focused on the alleged obviousness of the subject-matter of claim 1 of the Main Request only in view of the documents already submitted during the opposition proceedings, in particular D2 and D6 (below these documents are indicated as **OPPO documents**). Each Party presented its submissions also making reference to the experimental

reports E1 and E2 and without disputing the admissibility of any of these latter into the appeal proceedings.

The Parties thereafter had the opportunity to discuss the admissibility into the appeal proceedings of the Respondent's 1st to 17th Auxiliary Request.

The Board announced the decision to admit all these Auxiliary Requests into the appeal proceedings.

The Respondent then withdrew the 1st to 15th Auxiliary Requests.

With regard to the 16th Auxiliary Request:

- the Parties discussed its compliance with Articles 123(2) and (3) EPC as well as with Article 84 EPC 1973;

- the Parties discussed the Appellants' inventive step objections against claim 1 of this request when starting from document D2 or from document D6;

- the Appellants stated to have further objections under Article 56 EPC 1973 either in view of document D9 (which was in their opinion novelty destroying for claim 1 of the 16th Auxiliary Request) or in view of any of documents D7 to D9 in combination with document D3.

Hence, the Board heard the Parties on the admissibility of documents D7 to D9.

In case documents D7, D8 and D9 were admitted into the proceedings **Appellant 1** and the **Respondent** requested to remit the case to the Opposition Division for further prosecution.

XV. The Parties' final **requests** were as follows:

The **Appellants** requested that the decision under appeal be set aside and that the European patent be revoked.

The **Respondent** requested that the appeal be dismissed or the patent be maintained on the basis of the 16th Auxiliary Request submitted with letter dated 1 October 2012 or the 17th Auxiliary Request submitted with letter dated 2 June 2014.

XVI. The **Appellants'** submissions, as relevant to the present decision, may be summarized as follows:

Main request - Inventive step

The subject-matter of the Main Request was just an obvious alternative to the SLD compositions disclosed in example 16 or 17 of document D6. They stressed that the photo provided with the experimental report E1 allowed no reliable conclusion as to whether the invention example actually was less yellow than the comparative example. Nor were the measured colour parameters a convincing evidence of a reduction of the "*undesirable yellowish hue*" that paragraph [0008] of the patent in suit vaguely mentioned as the technical advantage of the claimed SLD compositions. Moreover, the data in the experimental report E2 proved that it would not be justified to associate more yellowing to the simultaneous presence of FWA and carbonate in the

same particulate, in comparison to the presence of these two ingredients in separate particles.

The Appellants stressed that, even in the hypothetical case that E1 were found to prove an invention example to be less yellowish than the powder used as comparative example, still this latter result was not even similar to, let alone representative of, the prior art of document D6. Thus, there was no possible reason to presume that the level of "yellowish hue" observed by the claimed SLD compositions had also to be inferior to that observed in the compositions of D6, in particular since these latter were explicitly disclosed as remaining acceptably white.

To arrive at the subject-matter of claim 1 as maintained only required to follow the instructions given in the claims and the description of document D6 itself, all pointing to the optional presence of e.g. anionic surfactants in the same "detergent particles" for which the disclosed carbonate's content was possibly as low as 5wt%. Hence, already document D6 *per se* rendered obvious the subject-matter of claim 1 as maintained.

Auxiliary requests - Admissibility

The admissibility into the appeal proceedings of all the Auxiliary Requests filed by the Respondent during the appeal proceedings (of which the 1st to 15th have however been withdrawn during the oral proceedings) was disputed for the following two reasons:

i) the total number of these Auxiliary Requests was unacceptably high;

ii) these Auxiliary Requests defined four different "groups" of inventions and, thus, did not allow to identify any clear line of defence.

16th Auxiliary Request – Clarity

As to the compliance of claim 1 of the 16th Auxiliary Request with Article 84 EPC 1973, the Appellants considered unclear the expressions "*substantially free of fluorescent whitening agent*" and "*substantially free from carbonate*" (these expressions are below also indicated as **the "*substantially free*" features**). In their opinion, these expressions were not equivalent to the option of "*0wt%*" already given in granted claim 1 for the same ingredient amounts. They stressed that even the definitions given in paragraphs [0024] and [0032] of the patent in suit were vague.

In the opinion of these Parties the fact that the same expressions were already present in claims 2 and 4 as granted was no bar to an objection of clarity directed to present claim 1 of the 16th Auxiliary Request which combined the granted claims 1, 2, 4 and 8. The Appellants also cited the questions in the referral G 3/14 pending before the Enlarged Board of Appeal and were of the opinion that, in case the Board dealing with the present appeal were inclined to consider formally inadmissible this objection under Article 84 EPC 1973, the present appeal proceedings were to be stayed until the issue of the decision of the Enlarged Board.

16th Auxiliary Request - Article 123(2),(3) EPC

Also the Appellants' objections to the 16th Auxiliary Request in view of Article 123(2) EPC and those in view of Article 123(3) EPC were all based on the consideration that the "*substantially free*" features of this claim were not the same as the option "*0wt%*", already given in claim 1 as originally filed and as granted.

In particular, since claim 1 of the 16th Auxiliary Request also contained features only disclosed in the original description, such claim comprised a new combination of features which had no basis in the application as filed and, thus, contravened Article 123(2) EPC. A similar objection of added subject-matter also applied to claim 3 of the 16th Auxiliary Request, since this latter now allowed (through its dependence on claim 1) for some small amounts of sodium carbonate in the second particulate.

The "*substantially free*" feature for describing in claim 1 at issue, the amount of FWA in the first particulate component, in combination with the fact that the same claim specified that the weight ratio of carbonate to FWA in this component had to be "*at least 30:1*", resulted in the extension of the claimed subject-matter in comparison to claim 1 as granted. In other words claim 1 of the 16th Auxiliary Request allowed for SLD compositions in which the first particulate component contained some small amounts of FWA and of carbonate, whereby the carbonate to FWA amount ratio was now less than 30:1. Accordingly, claim 1 of the 16th Auxiliary Request contravened Article 123(3) EPC as well.

16th Auxiliary request - Inventive step with regard to the OPPO documents

As to the assessment of inventive step for the SLD composition of claim 1 of the 16th Auxiliary Request in view of the OPPO documents, the Appellants maintained that the claimed subject-matter was an obvious alternative for the skilled person when considering *per se* either document D6 or document D2. Indeed, document D6 would suggest the possibility for the FWA to constitute about 50wt% of an agglomerated particulate to be added to previously spray-dried detergent particles containing the carbonate.

Also document D2 motivated a skilled person starting from the examples, which contain a "postdosed" FWA, to use instead FWA in pure form as well as to reduce the amount of zeolite to as low as 5wt% of the base powder. The Appellants considered irrelevant from the technical point of view whether or not the detergent base particles in document D2 had been obtained by mixing/ granulation or by spray-drying.

Admissibility of D7, D8, D9

The Appellants considered the documents D7 to D9 to be admissible into the appeal proceedings because they were in reaction to the experimental report E1 (documents D7 and D8) or to the 17th Auxiliary Request filed by the Respondent (document D9).

Moreover, at least document D9 anticipated the subject-matter of claim 1 of the 16th Auxiliary Request and, thus, was also of very high relevance for the assessment of inventive step, as established in the Decision of the Enlarged Board G 7/95 (published in OJ

of the EPO 1996, p.626). Documents D7 and D8 were instead of very high relevance for the issue of inventive step when considered in combination with document D3.

The **Respondent's** submissions, as relevant to the present decision, may be summarized as follows:

Main request - Inventive step

None of the available documents addressed the technical problem mentioned in the patent in suit, i.e. the yellowing observed in detergent composition particles containing both the carbonate and the FWA. The photo and the measured numerical values reported in E1 proved that this problem existed and that the subject-matter of the Main Request actually achieved the aimed reduction in yellowing, by segregating the FWA in a distinct particulate component, different from that also containing the carbonate. The experimental report E2 was no convincing evidence of the contrary.

In any case, the subject-matter of claim 1 was not obvious in view of document D6. Indeed, this prior art only suggested that less yellowing was observed when the particulate containing the FWA contained no nonionic detergent surfactants, i.e. solved a different problem in a different way. Hence, it was only with hindsight from the present invention that a skilled person could have started from specifically example 16 (or 17) of this citation.

16th and 17th Auxiliary request - Admissibility

The 16th and 17th Auxiliary Requests were to be admitted into the appeal proceedings as they had been filed

either with the reply to the statements of grounds of appeals (16th Auxiliary Request) or in preparation to the oral proceedings (17th Auxiliary Request) in reaction to the Appellants' objection that the previously filed Auxiliary Requests corresponded to no clear line of defence. The basis and the meaning of each of the Respondent's Auxiliary Requests (including the 16th and the 17th Auxiliary Request) had always been clearly and extensively indicated in the respective accompanying letter, thereby rendering certainly possible for the Appellants to understand the line of defence of the Respondent and to comment thereupon at least at the oral proceedings.

16th Auxiliary Request - Article 84 EPC 1973

As to the objections of the Appellants' to the 16th Auxiliary Request in view of Article 84 EPC 1973, the Respondent stressed that these objections had only been raised at the hearing, i.e. they were unjustifiably late.

In any case, no clarity objection was admissible against the "*substantially free*" features in claim 1 of the 16th Auxiliary Request, since the same expressions were already present in claims 2 and 4 as granted. The Respondent was of the opinion that, in case the Board dealing with the present appeal were instead inclined to consider admissible this objection under Article 84 EPC 1973, the present appeal were to be stayed until the decision of the Enlarged Board on the referral G 3/14.

Finally, none of the Appellant's objections under Article 84 EPC 1973 was founded, since - as also explicitly stated in the patent specification - the

features expressed by using the wording "*substantially free*" corresponded to the only technically reasonable interpretation of the lower end value "*0wt%*" also used in the patent in suit: all these expressions only allowed for those traces (i.e. extremely small amounts) of not deliberately added ingredients that could nevertheless be found in one particulate, e.g. in consequence of possibly occurring unintentional contamination.

16th Auxiliary Request - Article 123(2),(3) EPC

The objections raised with regard to Article 84 EPC 1973 applied *mutatis mutandis* also to the requirements of Article 123(2),(3) EPC.

16th Auxiliary Request - Inventive step with regard to the OPPO documents

As to the assessment of inventive step for the SLD composition of claim 1 of the 16th Auxiliary Request in view of the OPPO documents, the subject-matter of this claim was no obvious alternative for the skilled person who considered either document D6 *per se* or document D2 *per se*. Indeed, the now claimed SLD composition required the FWA to constitute at least 50wt% of the 2nd particulate and, thus, was manifestly contrary to the essential technical teaching expressed at page 27, lines 10 to 12, of document D6 according to which the FWA had to be combined with an at least equal amount of surfactant.

As to document D2 the Respondent stressed that the Examples 1 to 3 in this citation provided no clear information as to whether the "antifoam/fluorescer" ingredient, containing an undisclosed amount of

"fluorescer", that had been "postdosed" (possibly together with one or more of other ingredients also indicated as being "postdosed") to the base granules (made by using a mixer/granulator) in these examples, resulted or not in the presence of a separate particulate containing the FWA, let alone of a separate particulate containing at least 50wt% of the FWA. Even the disclosure at page 12, lines 22 to 28, of this citation contained no clear teaching that the fluorescer to be postdosed "as such" could result in a separate particulate. This was all the more true since in the same passage it was clearly indicated that the term "postdosed" could as well mean "sprayed on". Hence, in this citation the skilled reader finds no clear hint to formulate the SLD composition using a separate particulate component constituted mainly of FWA. The Respondent also rejected the Appellants' unsupported allegation that a skilled person would not consider technically relevant the differences between the detergent particles of document D2, which were obtained by mixing/granulation, and those now defined in claim 1 of the 16th Auxiliary Request which were instead obtained by spray-drying: the technical relevance of this difference was rather self-evident since only the latter possessed a manifestly hollow structure (also acknowledged at page 5, second paragraph of document D6).

Admissibility of D7, D8 and D9

The Respondent considered documents D7 to D9 not admissible into the appeal proceedings because they were filed to raise new novelty objections, despite of the fact that neither during the opposition proceedings nor in the statements of grounds of appeal the

Appellants had at all disputed the novelty of claim 1 as maintained.

Moreover, neither document D7 nor document D8 appeared to possibly render obvious the subject-matter of claim 1 of the 16th Auxiliary Request.

As to document D9 which had been filed just few weeks before the oral proceedings without any justification, the Respondent was not in a position to comment thereupon.

Reasons for the Decision

Admissibility of the experimental reports E1 and E2

1.2 The Board notes that E1 has been filed by the Respondent on 1 October 2012 in reaction to the grounds of appeal. This has not been disputed by the Appellants.

1.3 The Board notes further that E2 has been filed by Appellant 2 with the letter dated 10 June 2013, in response to E1. This has not been disputed by the Respondent.

1.4 The Board notes in addition that the all Parties have extensively commented in writing and orally the experimental reports E1 and E2 without disputing their admissibility into the appeal proceedings.

1.5 Hence, the Board sees no reason for considering the belated filing of these experimental reports to be contrary to procedural economy.

1.6 Thus, and taking also into account the provisions of Article 114(2) EPC 1973 and Article 12(4) and 13(1) RPBA, the Board decides to admit the experimental reports E1 and E2 into the appeal proceedings despite their late filing.

Inventive step vis-à-vis the OPPO documents - Main Request - Claim 1

2. Already upon considering just the inventive step arguments presented by the Parties on the basis of the cited OPPO documents, the Board has come to the conclusion that the subject-matter of claim 1 according to the Main Request (i.e. claim 1 as maintained by the Opposition Division, see IV *supra*) does not comply with Article 56 EPC 1973. The reasons of this conclusion are given below.

2.1 The invention

The invention relates to a SLD composition that is low in zeolite and phosphate builders and comprises carbonate and FWA (see [0001] of the patent in suit). Paragraph [0008] also (vaguely) identifies the aim of the invention to avoid the "*poor particle appearance*" observed in (not further specified) SLD compositions which comprise carbonate and FWA and which tend to develop an "*undesirable yellowish hue*".

2.2 The closest prior art

2.2.1 The Board finds that, as convincingly argued by the Respondent, none of the two OPPO documents cited, as starting point for the assessment of inventive step, i.e. documents D2 ad D6, focuses on the formation of

yellowish hue in detergent particulates which comprise carbonate and FWA.

In particular:

document D2 (see page 2, lines 19 to 25 and page 11, lines 27 to 30) only mentions the yellowing of detergent composition particles containing localized regions of excess alkalinity (in particular those derived from the presence "basic sodium") and alkali-sensitive ingredients, such as the FWAs;

and

document D6 (see page 1, last 8 lines) describes the formation of "yellow or greenish-yellow" FWA-containing powders, possibly as in consequence to the the reaction of the FWAs with detergent surfactants.

Hence, in the opinion of the Board, each of these two documents addresses a technical problem that appears closely related, but not necessarily identical, to that addressed in the patent in suit.

2.2.2 In such a situation where both potentially relevant prior art documents refer to a comparably related problem, the Board finds, in accordance with the established jurisprudence (see the Case Law of the BoA of the EPO, 7th Ed., I.D.3.1) that the closest prior art is represented by the SLD compositions disclosed in documents D2 or in document D6 which have most of the relevant technical features in common with the claimed subject-matter.

D2 differs in at least four features of the subject-matter of claim 1 at issue, because in this prior art

are **not** directly and unambiguously disclosed SLD compositions which comprise in combination two separate particulate components, a particulate containing at least 10wt% of carbonate, not more than 10% of zeolite, and a particulate containing at least 0.20wt% of FWA.

In contrast thereto, the only two features of claim 1 as maintained that are not fulfilled by the compositions of examples 16 and 17 of D6 are:

i) that the total amount of carbonate in the composition should at most be "*50wt%*"

and

ii) the presence of an "*anionic*" detersive surfactant in the first particulate component (the one mandatorily containing the carbonate).

2.2.3 The Respondent has argued that a skilled person would have no reason to select as starting point specifically Example 16 or 17 of document D16 and, thus, that only with hindsight from the present invention such prior art could be taken as starting point for the assessment of inventive step.

2.2.4 The Board finds this argument unconvincing since the skilled person, who in the present case is interested in finding non-yellowing SLD composition containing both carbonate and FWA, could reasonably take into consideration as starting point any FWA- and carbonate-containing composition that is disclosed in document D6 as being and remaining acceptably white. Since document D6 provides a clear indication that (also) the compositions disclosed in Examples 16 and 17 retain for

months a Whiteness Index "above the acceptable level" (see table 5 of Example 16 and the last sentence in the paragraph describing Example 17 in document D6), each of these two examples represents a reasonable starting point for the assessment of inventive step.

2.2.5 Accordingly, the closest prior art is found to be any of Examples 16 or 17 of document D6.

2.3 The technical problem mentioned in the patent in suit

As indicated already above, at point 2.1, the patent in suit states in paragraph [0008] that the SLD compositions according to the claimed invention overcome the tendency to develop "*an undesirable yellowish hue*" observed "*in laundry detergent particles that comprise carbonate and a fluorescent whitening agent*", i.e. the technical problem mentioned in the patent in suit amounts to the provision of FWA- and carbonate-containing SLD compositions with an improved (less yellowing) appearance.

2.4 The solution

The solution to this technical problem proposed in the patent in suit is the SLD composition according to Claim 1 described *supra.*

2.5 Success of the solution

2.5.1 In the Respondent's opinion the presence in the patent in suit of paragraph [0008] should be sufficient for reasonably concluding that all the compositions according to claim 1 as maintained were less yellow than any SLD compositions containing carbonate and FWA known in the prior art. Thus, in the absence of any

convincing evidence to the contrary provided by the Appellants, the same technical advantage was plausibly also existing vis-à-vis the SLD compositions disclosed in the examples of document D6.

In it's view the photographic evidence and the colour measurements provided with the experimental report E1 further supported the credibility of the statement in paragraph [0008] of the patent in suit, since this report demonstrated the improved particle appearance that resulted from incorporating the carbonate and the FWA in separate particles, in comparison to when the same ingredients were instead present in the same particulate component. On the contrary, some of the evidence in E2 was neither representative of the prior art nor of the claimed invention, and the remainder data were not sufficient for depriving the photographic evidence in E1 of its credibility.

2.5.2 The Board notes however that the patent in suit contains no element possibly relevant for predicting whether the particle appearance of the claimed compositions was or not improved also in comparison to the particle appearance of the above-identified closest prior art.

Indeed, paragraph [0008] is the sole passage in the whole patent specifications which mentions the "*yellowish hue*" or the "*poor particle appearance*", and it only states that such yellowish hue has been observed in (not further specified) "*laundry detergent particles that comprise carbonate and a fluorescent whitening agent*".

Thus, the patent in suit only contains a single vague allegation as to the technical problem overcome by the

invention which, besides being unsupported by any further information or experimental comparison in the remainder of the patent, might at most justify the expectation that the undesired yellowish hue is present in any SLD composition of the prior art wherein FWA and carbonate **are present in the same** particulates.

Hence, paragraph [0008] of the patent in suit *per se* cannot possibly justify any reasonable prediction as to the occurrence of undesirable yellowish hue also in the compositions of Examples 16 or 17 of document D6 wherein the FWA and the carbonate are already present in **separate** particles.

2.5.3 Similarly, also the comparative sample of E1 contains the carbonate and the FWA in the same particulate component and, thus, is not representative of the prior art of departure.

Thus, even if one assumes, for the sake of an argument in favour of the Respondent, that the evidence in E1 actually proved that the sample representative of the invention was less yellow than the sample of comparison and that the evidence E2 was not sufficient to demonstrate the contrary, still the photo and the data of E1 would justify no prediction as to whether the level of yellowing of the sample representative of the invention was superior, comparable or inferior to that of Examples 16 or 17 of document D6.

2.5.4 Hence, neither the patent in suit nor the additional experimental evidence E1 render plausible the expectation that the particle appearance of the compositions according to claim 1 of the Main Request is improved also vis-à-vis the compositions disclosed in Examples 16 and 17 of document D6.

2.5.5 The Board stresses finally that, as already discussed above at point 2.2.6, these prior art examples are explicitly described in document D6 to display and retain a more than acceptable level of whiteness. Thus, in the Board's opinion, these compositions of the prior art can reasonably be expected to also possess little tendency to develop any yellowish hue.

2.5.6 Accordingly, the Board concludes that it is **not** credible that the technical problem mentioned in the patent in suit has been successfully solved vis-à-vis the closest prior art.

2.6 Technical problem actually solved over the prior art

Since the technical problem effectively solved over the prior art exemplified in document D6 cannot be formulated in terms of an improvement of particle appearance, it has to be reformulated in a less ambitious way.

It can be seen in the provision of further solid SLD compositions, low in zeolite and phosphate builders and containing FWA and carbonate, which have an acceptable appearance i.e. in the provision of an alternative to the prior art.

2.7 Obviousness of the solution

It remains to be decided whether the composition as claimed was an obvious solution to this technical problem. This boils down to the question whether the skilled person searching for an alternative to the SLD compositions of Example 16 or 17 of this citation, would, or not, have considered obvious to add some

anionic detersive surfactant in the detergent particulate ingredient and to reduce therein the amount of carbonate (thereby arriving at the subject-matter of claim 1 at issue).

2.7.1 The Board notes that already the generic teaching of claim 5 of document D6 suggests the use of an amount of inorganic carrier (which is preferably a carbonate, see D6, page 9, lines 3 to 4) ranging between 5wt% and 80wt% of the detergent particles "a.", as well as the possible presence of anionic detergent surfactants as alternative or in addition to other surfactants.

Thus, to arrive at compositions falling under the scope of claim 1 as maintained the skilled person only needs to arbitrarily replace some of the nonionic surfactant by any anionic surfactant in Example 16 (or 17) and to arbitrarily select any value in the suggested range of between 5wt% and 80wt% of the detergent particles "a." which also results in that this ingredient constitutes between 10wt% and 50wt% of the whole composition.

Such arbitrarily selected modifications of the prior art of departure among those suggested in that very same document are deprived of any inventive merits and, thus, do not involve an inventive step.

2.7.2 Accordingly, the Board finds that the subject-matter of claim 1 as maintained is obvious in view of the teaching of document D6 *per* se and, hence, that this claim does not comply with the requirements of Articles 52(1) and 56 EPC 1973.

2.7.3 Therefore, the Main Request of the Respondent is found not allowable.

Admissibility of the 16th and 17th Auxiliary Request

3. Since the Respondent has withdrawn at the oral proceedings the previously pending 1st to 15th Auxiliary Request (see XIV *supra*), the sole final Auxiliary Requests of this Party are the two sets of amended claims respectively numbered as 16th and 17th Auxiliary Request.

3.1 The Board notes that the 16th Auxiliary Request has been filed (together with the 1st to 15th Auxiliary Request) with the reply to the statements of grounds of appeal, in reaction to these latter.

3.2 The Board also notes that claim 1 of the 17th Auxiliary Request, although filed by the Respondent just one month before the oral proceedings, corresponds to a combination of restrictions which were already present in one or the other of the versions of claim 1 according to the (initially pending) 1st to 16th Auxiliary Requests.

The Board notes further that all these restrictions had already been resumed in a single "model" claim and extensively dealt with in writing by Appellant 1 well before the hearing (see the letter of Appellant 1 dated 6 March 2013).

Hence, the further belated 17th Auxiliary request does not appear *per se* to introduce further complexity to the case, or to raise issues that the other Parties or the Board could not reasonably be expected to deal with without adjournment of the proceedings.

3.3 The sole objections of both Appellants to the admissibility of (also) the 16th and the 17th Auxiliary

Requests presented in writing and during the discussion at the hearing (see X and XIII, *supra)*, were based on the "absurd" number of the initially pending Auxiliary Requests and on the fact that they could be grouped in different "groups" of requests.

However, since the Respondent has abandoned the 1st to 15th Auxiliary Request, and since the subject-matter of claim 1 of the 17th Auxiliary Request is just a further restriction of claim 1 of the 16th Auxiliary Request, the objections presented by the Appellants are no longer relevant and, thus, need not to be discussed here.

3.4 Hence, the Board sees no reason for considering the belated filing of these Auxiliary Request to be contrary to procedural economy and, taking also into account the provisions of Article 114(2) EPC 1973 and Articles 12(4), 13(1) and (3) RPBA, the Board decides to admit the Respondent's 16th and 17th Auxiliary Requests into the appeal proceedings despite their late filing.

Claim 1 of the 16th Auxiliary Request - Clarity

4. The Appellants have disputed the compliance of claim 1 of the 16th Auxiliary Request with the requirements of Article 84 EPC 1973, in view of the fact that claim 1 comprises the "*substantially free*" features (see XVI, *supra*).

In their opinion the used expressions were intrinsically vague and the same applied to the definitions thereof given in the patent specifications. Finally, the fact that the "*substantially free*" features were already present in the granted claims 2

and 4 (see II *supra*) constituted no bar for the Board to consider this objection under Article 84 EPC 1973.

The admissibility of such objection under Article 84 EPC 1973 was instead disputed by the Respondent.

Moreover, both, Appellant 2 and the Respondent, referred to the case G 3/14 pending before the Enlarged Board and requested as an auxiliary measure, in case of a conclusion of this Board on the admissibility of this objection adverse to their respective positions, that the present appeal proceeding be stayed until the decision of the Enlarged Board has been issued.

4.1.1 It has turned out not necessary for the Board to decide on the admissibility of the Appellants' objection under Article 84 EPC 1973 and, thus, on the requests to stay the present appeal until the issue of the decision in case G 3/14. As a matter of fact, in the present case the objected wordings appear sufficiently clear to the Board.

4.1.2 As convincingly argued by the Respondent, a skilled person can only reasonably construe the wording of the claim at issue taking also into account the risk of unintentional contamination resulting in the presence of trace amounts of ingredients that had not been deliberately added. In the opinion of the Board, this argument is of particular weight in the present case due to the intimate contact among the two particulate components in the SLD composition. Hence, for example, it appears plausible to the Board

- that traces of a solid ingredient (initially only present on the surface of one particulate) might spontaneously migrate on the neighboring surface

of the other particulate during the production, handling or storage of the composition,

and/or

- that traces of the other particulate may not be avoided when isolating a sample containing exclusively one sort of particulate from an already fully formulated SLD composition, a sample whose chemical composition is then determined.

In other words, in the present case of SLD compositions that can be made e.g. by mixing two separate particulate ingredients one containing carbonate and no FWA at all, the other containing FWA and no carbonate at all, it appears nevertheless likely that these SLD compositions might comprise (or appear to comprise), in addition to the expected substantial amount of e.g. FWA deliberately added in one of the two particulates, trace amounts of FWA in the other particulate as well. The same applies to the accidental presence of trace amounts of the carbonate ingredient in the particulate initially made using no carbonate. Hence, the Board comes to the conclusion that the claim features expressed by using the wording "*substantially free*" appear in the circumstances of the present case clear to the skilled person, as this feature can only reasonably indicate the possible presence of (detectable) trace amounts of a not deliberately added ingredient, e.g. the technically irrelevant amounts of that ingredient arising for some unavoidable contamination.

This interpretation of the wording is all the more justified in view of the definitions in the patent in suit (see paragraphs [0024] to [0026] and [0030]) of the expressions using the wording "*substantially free*", definitions that confirm that their meaning is just for

contemplating the possible presence of "*not deliberately added*" ingredients.

4.1.3 Incidentally, it is immediately apparent to the Board that the same considerations must necessarily apply also to the value of "*0wt%*" also used throughout the patent in suit to indicate that a certain ingredient was not present in one of the two particulate components.

4.1.4 Thus, in the present case it has turned out apparent to the Board that the requirements of "*0wt%*" as well as the expressions starting with "*substantially free*", as used in the claims and the description of the application as filed and in the patent as granted, have identical meaning and are identically clear: they all can only reasonably be construed as allowing for trace amounts of the relevant ingredient.

4.1.5 Given the clarity of these expressions present in claim 1 of the 16th Auxiliary Request, the Board found that there was no need to stay the present proceedings in view of G 3/14.

Compliance of the claims of the 16th Auxiliary Requests with Articles 123(2) and (3) EPC

5. The Board is satisfied that the claims of this request comply with the requirements of Articles 123(2) and (3) EPC.

The Board notes further that the objections of added subject-matter and extension of protection raised by the Appellants against claim 1 at issue, were all based (see XVI, *supra)* on the assumption that the "*essentially free*" features of these claims were not to

be equated to the corresponding options of using "*0wt%*" for the same ingredient already expressed in claim 1 as originally filed or in claim 1 as granted. Since, in the present case "*essentially free of/from ...*" and "*0wt%*" appear to the Board to have identical meaning, the reasons already given at points 4.1.2 to 4.1.4 *supra* are sufficient for rejecting all of Appellants' objections under Article 123(2) and (3) EPC.

Inventive step vis-à-vis the OPPO documents - 16th Auxiliary Request - Claim 1

6. The Board has decided the issue of inventive step for the subject-matter of claim 1 of the 16th Auxiliary Request only in view of the Appellants' objection based on prior art disclosed in the OPPO documents.

6.1 This claim (see VIII, *supra*) differs from claim 1 of the Main Request only in that the former is now further limited to those SLD compositions wherein:

i) the first particulate is in spray-dried form and substantially free of any FWA and containing at most low amounts of zeolite builder and phosphate builder;

and

ii) the second particulate is in non-spray-dried form and substantially free from carbonate and comprises at least 50wt% of FWA.

6.2 It is undisputed among the Parties that the combination of these additional distinguishing features is certainly present **neither** in the SLD compositions

exemplified in document D6 **nor** in those exemplified in document D2.

However, while the Examples 16 and 17 of document D6 describe compositions with two separate particulates, one containing carbonate and no FWA, low amounts of zeolite builder and no phosphate builder and the other containing FWA and no carbonate, Examples 1 to 3 of document D2 not only do not necessarily contain two separate particulate components, but contain zeolite and carbonate in the same particulate (see 2.2.2, *supra*).

Moreover, whereas the general description in document D6 at least allows for the possibility that the carbonate-containing detergent composition (to which the whitening agent particles are added) can be produced by spray-drying (see document D6, page 5, lines 5 to 8), in document D2 (see document D2 page 15, lines 15 to 18) it is only disclosed to prepare the detergent base powders by using "non-spray-drying" processes and those exemplified in this latter citation are accordingly explicitly described as being prepared using such processes (see document D2 e.g. page 18, lines 5 to 6).

Hence, and in view of the reasons given *supra*, the Board concludes that Examples 16 and 17 of document D6 represent the closest prior art also for the inventive step assessment of the subject-matter of claim 1 of the 16th Auxiliary Request.

Similarly, the reasons given at points 2.3, 2.5 and 2.6 *supra,* are also found to apply in respect of claim 1 at issue and, thus, the sole technical problem that is found actually solved also by the subject-matter of

claim 1 of the 16th Auxiliary Request, is that of providing an alternative to these prior art SLD compositions already having an acceptable appearance.

6.3 Therefore, also the issue of obviousness of the subject-matter of claim 1 of the 16th Auxiliary Request requires to consider, if the subject-matter of claim 1 at issue would appear obvious to a skilled person who started from Example 16 or 17 of document D6 and aimed to the provision of further SLD compositions which have an acceptable appearance.

6.3.1 The subject-matter of claim 1 of the 16th Auxiliary Request additionally differs from any of Examples 16 or 17 of document D6, *inter alia,* in that the now claimed SLD compositions are required to contain in the second particulate at least 50wt% of FWA.

6.3.2 It is apparent to the skilled reader of document D6 that the whole teaching of this document is to incorporate into the FWA-containing particulate an amount of a (preferably anionic) surfactant of at least 50wt% so that this latter prevents the FWA to be exposed to the contact with the ingredients of the other particulate components that are detrimental to the stability of the FWA (see document D6, page 27, lines 5 to to 12). Hence, document D6 *per se* does not render obvious to decrease to 50% or less the amount of surfactant present in the whitener particles used in the examples, but rather points to the other direction: i.e. renders obvious those modifications of the exemplified SLD compositions that retain an excess of surfactant in the whitener particles for better protecting the FWA for exposure.

6.3.3 Hence, document D6 *per se* cannot possibly render obvious (at least one of) the modifications of the prior art of departure required to arrive the subject-matter of claim 1 of the 16th Auxiliary Request.

6.3.4 D2 does not indicate the FWA content of the "antifoam/ fluorescer" ingredient "postdosed" in the exemplified SLD compositions and rather suggests at page 12, lines 21 to 28, the use of a common carrier in combination with the fluorescer and the antifoam. Similarly, the mention on page 12 of document D2 of the possibility of postdosing the fluorescer, *inter alia*, "as such" (see in document D2 page 12, lines 22 to 28) cannot be considered any clear teaching that the fluorescer can be postdosed so as to form a separate particulate made only of FWA. This was all the more apparent since in the referred passage at page 12 of document D2, it is even indicated that the term "postdosed" can as well mean "sprayed on". Hence, also in this citation the skilled reader finds no clear hint to formulate the SLD composition using a separate particulate component constituted mainly or only of FWA and, thus, is not sufficient at motivating the skilled person to go against the teaching of document D6.

6.3.5 Thus, already for the reason that neither D6 *per se* nor its combination with D2 actually point to the possibility of using a separate particulate component made mostly of FWA, the Board finds not convincing the Appellant's objections of lack of inventive step of claim 1 of the 16th Auxiliary Request **based on these OPPO documents.**

Admissibility into the proceedings of documents D7 to D9.

7. The Appellants had further objections against claim 1 of the of the 16th Auxiliary Request based of documents D7 to D9. The Respondent disputed the admissibility of these citations into the appeal proceedings.

7.1 Documents D7 and D8.

7.1.1 These two citations were submitted by Appellant 1 with letter of 6 March 2013 (i.e. some months after the Respondent's reply to the statements of grounds of appeal, but more than a year before the oral proceedings).

7.1.2 The Board considers the fact (stressed by the Respondent and undisputed by Appellant 1) that these documents could have been submitted by the Appellant at least before the limit date for filing its statement of grounds of appeal, insufficient *per se* for concluding that the late filing of these documents was *ipso facto* an intentional abuse of the proceedings.

Moreover, their late filing appears plausibly occasioned by the new experimental report (E1) only filed by the Respondent with the reply to the statements of grounds of appeal.

7.1.3 The Responded has argued that these documents should not be admitted because they were considered by the Appellants to be novelty destroying (also) for claim 1 as maintained. A novelty objection was, in the Respondent's opinion, inadmissible at this stage of the proceedings since the novelty of this claim had not been disputed neither before the Opposition Division nor in any of the statements of grounds of appeal.

However, it has turned out unnecessary for the Board to decide on the admissibility into the appeal proceedings of a new novelty objection, since the Board finds convincing the Appellants' argument, also in line with G 7/95 (to which the Appellant 1 had also made reference already in the letter of 5 June 2014, point "5."), that the allegation that a document anticipates the subject-matter of a claim under issue may also be considered in the context of deciding upon the ground of lack of inventive step.

Thus, the allegation of the Appellants as to the novelty destroying content of such documents D7 and D8, does not deprive of relevance the further allegation that the same prior art disclosure is, in the Appellants' opinion, relevant also in view of the assessment of inventive step.

7.1.4 The Respondent, although stating in writing and orally that **none** of these two citations anticipated the claimed subject-matter or were **more relevant** than the prior art already on file, has **not** given any detailed reason supporting this statement: e.g. has not identified which features of maintained claim 1 would not be disclosed in the relevant passages of these citations (see the letter of Appellant 1 of 6 March 2013, from page 2 to page 5, discussing the alleged disclosure of document D7, in particular with reference to Example 5, and of document D8, in particular with reference to Example 2e) and/or which of the OPPO documents already disclosed the same features in combination.

7.1.5 Under these circumstances the Board has no reason to immediately reject as erroneous or manifestly

irrelevant the combination of features of the present invention that Appellant 1 considered disclosed in the identified examples and passages of the general description of these citations.

7.1.6 Thus, the Board concludes that disclosure provided by means of documents D7 and D8 appears *prima facie* highly relevant (also for the assessment of inventive step of claim 1 of the 16th Auxiliary Request).

7.1.7 In view of the above, and taking also into account the provisions of Article 114(2) EPC 1973 and Article 13(1) RPBA the Board decides to admit documents D7 and D8 into the proceedings.

7.2 Document D9

7.2.1 This document D9 was submitted (together with other citations) by Appellant 1 with letter of 5 June 2014 i.e. about one month before the date of oral proceedings.

7.2.2 The Respondent considered that also document D9 was not to be admitted into the appeal proceedings in view of the extreme lateness of its filing which rendered impossible for this party to properly react.

7.2.3 The Board notes however that also document D9 was submitted (together with other citations) by Appellant 1 with letter of 5 June 2014, in reaction to the immediately preceding filing of a new Auxiliary Request by the Respondent (i.e. the 17th Auxiliary Request filed with letter of 2 June 2014). The Board notes further that the accompanying letter of Appellant 1 (see the section "5." point "b) Offenbarung der D9" discussing Example 2 of document D9) makes it clear on the basis

of which arguments the party considered this citation novelty destroying for claim 1 as maintained and, thus, also highly relevant for the assessment of inventive step.

Hence, also the very late filing of this document neither appears to necessarily constitute an intentional abuse of the appeal proceedings nor is it inadmissible to file an (allegedly) novelty destroying document in support of an inventive step objection.

7.2.4 The Board considers it appropriate to stress that the Respondent and Appellant 1 have **both**:

(a) made new submissions (i.e. the 17th Auxiliary Request filed on 2 June 2014 and document D9 filed on 5 June 2014) after that oral proceedings have been arranged,

and

(b) agreed that the case should be remitted to the Opposition Division in case any of documents D7 to D9 was admitted.

The Board considers appropriate to further stress that:

- Appellant 2 has also not objected to the remittal of the case;

and

- the decision of the Board to admit documents D7 and D8 already justifies remittal of the case to the Opposition Division.

Under these circumstances the Board considered unnecessary to reach a conclusion in view of the provisions of Article 13(3) RPBA, i.e. as to whether the very late filing of document D9 raised issues that the Board or the Respondent could not reasonably be expected to deal with without adjournment of the oral proceedings.

7.3 In view of the above, and taking also into account the provisions of Article 114(2) EPC 1973 and Article 13(1) RPBA the Board decided to admit document D9 into the proceedings.

Remittal of the case

8. Taking into account that patentability issues arising from the admission of documents D7 to D9 into the proceedings have not been addressed before the department of first instance, the Board considers it appropriate to remit the case to the Opposition Division in accordance with the Respondent's and Appellant's 1 request to this end (Article 111(1) EPC 1973).

Order

For these reasons it is decided that:

The case is remitted to the Opposition Division for further prosecution on the basis of 16th Auxiliary Request filed with the letter dated 1 October 2012.

The Registrar: The Chairman:

D. Magliano E. Bendl

Decision electronically authenticated