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**Datasheet for the decision  
of 24 October 2014**

**Case Number:** T 1595/12 - 3.3.06  
**Application Number:** 03718397.7  
**Publication Number:** 1495102  
**IPC:** C11D17/00, C11D3/22, C11D3/50,  
C11D3/00, D06M13/00, A61L9/01  
**Language of the proceedings:** EN

**Title of invention:**

Compositions comprising a dispersant and microcapsules  
containing an active material

**Applicant:**

THE PROCTER & GAMBLE COMPANY

**Headword:**

Non-aerosol composition packaged in a spray dispenser /  
PROCTER & GAMBLE

**Relevant legal provisions:**

EPC Art. 84, 123(2), 111(1), 114(2)  
RPBA Art. 13(3)

**Keyword:**

Admissibility of claim request filed during oral proceedings ( yes) - reaction to objections raised by the Board  
Clarity (yes) - after amendment  
Added matter (no) - after amendment  
Remittal to the department of first instance (yes) -  
inventive step to be assessed anew in respect of amended claim 1

**Decisions cited:**

**Catchword:**



**Beschwerdekammern  
Boards of Appeal  
Chambres de recours**

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Case Number: T 1595/12 - 3.3.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.06**  
**of 24 October 2014**

**Appellant:** THE PROCTER & GAMBLE COMPANY  
(Applicant) One Procter & Gamble Plaza  
Cincinnati, OH 45202 (US)

**Representative:** Pierce, Christopher James  
Hoyng Monegier LLP  
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**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 2 March 2012  
refusing European patent application No.  
03718397.7 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** B. Czech  
**Members:** L. Li Voti  
U. Lokys

## Summary of Facts and Submissions

- I. This appeal lies from the decision of the Examining Division to refuse European patent application no. 03 718 397.7.
- II. The Examining Division decided that the claims according to the then pending main request and auxiliary request complied with the requirements of Articles 123(2) EPC and that their subject-matter was novel over the cited prior art, but that the subject-matter of claim 1 according to both requests then on file lacked inventive step in the light of a combination of two prior art documents (labelled D5 and D3).  
Claim 1 according to the then pending main request reads as follows:

*"1. A non-aerosol fabric refresher composition packaged in a spray dispenser for providing controlled-release of an active material, said composition characterized in that it comprises:*

*(a) from 0.001% to 1%, by weight of said composition, of microcapsules containing at least one of the following:*

*(i) an active material; wherein said active material is selected from perfumes and*

*(ii) an encapsulated odor control agent;*

*wherein said active material and said odor control agent are contained in the same microcapsules; in different microcapsules; or both,*

*(b) a dispersant;*

*(c) less than 5% by weight of said composition of a surfactant; and*

*(d) at least 80% by weight of said composition of water as aqueous carrier."*

Claim 1 according to then pending auxiliary request differs from that according to said main request only insofar as it additionally requires dispersant (b) to be present in a concentration of "0.005% to 1% by weight".

III. In its statement of the grounds of appeal the Appellant contested the reasoning of the Examining Division and submitted a set of claims corresponding to that according to the main request decided upon by the Examining Division, as well as an experimental report.

IV. In a communication pursuant to Article 15(1) RPBA, the Board expressed its preliminary opinion that the claims according to pending main request *inter alia* did not appear to meet the requirements of Article 84 EPC and that their compliance with Article 123(2) EPC was questionable.

The Board remarked *inter alia* that, taking into account the wording of the claims,

- the term "*microcapsules*" as such (dimensions),
- the material necessarily contained in such microcapsules and
- the difference between the dispersant (b) and the surfactant (c)

were unclear.

V. The Appellant submitted by letter of 24 September 2014 eight sets of amended claims supposed to address the Board's concerns.

VI. During the oral proceedings held on 24 October 2014, following a discussion of outstanding deficiencies of the pending claims under Articles 84 and 123(2) EPC, the Appellant withdrew all the previously submitted

claim requests and submitted a new set of claims as main and sole request.

The Appellant did not disapprove the Board's express intention to remit the case to the department of first instance for further prosecution on the basis of the newly submitted claims in case the latter were found to be allowable under Articles 84 and 123(2) EPC.

VII. The Appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the set of claims submitted during oral proceedings.

VIII. The claims according to the (main and sole) request of the Appellant read as follows:

*"1. A non-aerosol fabric treating composition, packaged in a spray dispenser, for providing controlled release of an active material, said composition characterized in that it comprises:*

*(a) from 0.001% to 1%, by weight of said composition, of microcapsules containing the following:*

*(i) an active material wherein said active material is selected from perfumes; and*

*(ii) optionally an odor control agent;*

*wherein if said microcapsules contain both said active material and said odor control agent then said active material and said odor control agent are contained in the same microcapsules; in different microcapsules; or both,*

*(b) from 0.001% to less than 1% of a dispersant providing shear thinning to the composition so that the microcapsules are suspended in the composition and the composition is sprayable as a fine mist;*

*(c) from 0.001% to less than 5% by weight of said composition of a surfactant to improve fabric-surface*

wetting by the composition; and

(d) at least 80% by weight of said composition of water as aqueous carrier;

wherein the composition comprises less than 5%, by weight of the composition, of odor control agent; the microcapsules have an average diameter of from 10 to 100 micrometers; and

said dispersant is selected from the group consisting of acrylates/acrylic polymers, gellan gum, fumed silicas, acrylate/aminoacrylate copolymers, water-swelling clays, and mixtures thereof.

2. A composition of claim 1 wherein said microcapsules comprise a material selected from the group consisting of urea-formaldehydes, melamineformaldehydes, phenolformaldehydes, gelatin, poly(vinyl alcohol), poly(vinyl pyrrolidone), polyacrylates, polyamides, polyurethane, polymethacrylates, polyepoxides, cellulose acetate, cellulose nitrate, cellulose acetate butyrate, ethyl cellulose polyester, polychlorotrifluoroethylene, ethyl/vinyl acetate, saran, polystyrene, zein, paraffin wax, animal wax, vegetable wax, microcrystalline wax, polyethylene wax, poly(oxymethyleneurea), poly(oxymethylenemelamine), and mixtures thereof.

3. A composition according to any of the preceding claims wherein the microcapsules are present in said composition at a level of from 0.001% to 0.5% by weight of the composition.

4. A composition according to any of the preceding claims wherein said dispersant is present in said composition at a level of from 0.001% to 0.9% by weight of the composition, more preferably at a level of from 0.001% to 0.8% by weight of the composition.

5. A composition according to any of the preceding claims wherein said composition further comprises at least one of the following: free perfume that is not contained in said microcapsule, and a solvent, wherein said solvent is present in said composition at a level of less than 10% by weight of the composition, and is selected from the group consisting of monohydric and polyhydric alcohols.

6. A composition according to any of the preceding claims wherein said composition further comprises a non-encapsulated odor control agent, and said odor control agent is selected from the group consisting of uncomplexed cyclodextrin, odor blockers, reactive aldehydes, flavanoids, zeolites, activated carbon, and mixtures thereof; wherein said activated carbon has a particle size of less than 10 micrometers and is present in the composition at a level of less than 1% by weight of the composition; and said zeolites have a particle size of less than 10 micrometers and are present in the composition at a level of less than 1% by weight of the composition."

## **Reasons for the Decision**

### *Admissibility of the claim request submitted during oral proceedings*

1. The amended claim request filed by the Appellant during oral proceedings was submitted in reaction to objections under Article 84 and 123(2) EPC, set out in full detail at the oral proceedings with respect to the claim requests submitted by letter of 24 September 2014.



- 1.1 The Appellant's amendments made to the wording of the claims are straightforward, did not raise complex issues and overcame all pending objections under Articles 84 and 123(2) EPC raised by the Board (*infra*).
- 1.2 Therefore, the Board decided to admit this request into the proceedings despite its late filing (Articles 114(2) EPC and 13(3) RPBA).

*Compliance of the claims at issue with the requirements of Article 84 EPC*

- 1.3 The Board is satisfied that all the claims according to the Appellant's main and sole request comply with the requirements of Article 84 EPC.
- 1.4 In particular, the Board remarks that the claim 1 at issue (see point VIII above), in contrast to the previous versions of claim 1, identifies precisely and unambiguously:

- the content of the microcapsules ("*microcapsules containing the following: (i) an active material wherein said active material is selected from perfumes; and (ii) optionally an odor control agent; wherein **if said microcapsules contain both** said active material and said odor control agent then said active material and said odor control agent are contained in the same microcapsules; in different microcapsules; or both*");

- the average size of the microcapsules ("*the microcapsules have an average diameter of from 10 to 100 micrometers*");

- the type of dispersant (b) ("*said dispersant is*

*selected from the group consisting of acrylates/acrylic polymers, gellan gum, fumed silicas, acrylate/ aminoacrylate copolymers, water-swellaable clays, and mixtures thereof");*

*- the function of dispersant (b) ("a dispersant providing shear thinning to the composition so that the microcapsules are suspended in the composition and the composition is sprayable as a fine mist"); and*

*- the function of surfactant (c) ("a surfactant to improve fabric-surface wetting by the composition").*

Therefore, the clarity objections raised in the Board's communication (see point IV above), and addressed in more detail during oral proceedings, do not apply any longer to the amended wording of claim 1 at issue.

- 1.5 Moreover, the Board is satisfied that the remaining dependent claims 2 to 6 at issue, which were modified, as necessary, to conform with the more limited ambit of claim 1 at issue, are also clear.

*Compliance of the claims at issue with the requirements of Article 123(2) EPC*

2. The Board is satisfied that the claims according to the request at issue comply with the requirements of Article 123(2) EPC.

- 2.1 In particular, the Board finds that claims 1 to 4 at issue find a fair basis in the disclosure of the application as filed (published under PCT as WO 03/089561 A2) as regards a non-aerosol fabric treating composition packaged in a spray dispenser. In this respect, reference is made to claims 1, 6, 9 and 11;

page 3, lines 11 to 12; page 4, line 32 to page 5, line 2; page 5, lines 4 to 12; page 6, lines 16 to 18, 25 to 28; page 7, lines 2 to 4 and 11 to 13; page 8, lines 27 to 29; page 9, lines 5 to 7; page 16, lines 24 to 30 and page 24, lines 5 to 6.

- 2.2 Dependent claims 5 and 6, which now take also into account the respective, more limited disclosure for non-aerosol sprayable fabric treating compositions, find basis in claims 12 and 13 and on page 3, lines 20 to 22; page 15, lines 7 to 9, 17 to 20 and 28 to 29; page 16, lines 8 to 10).

*Remittal*

3. The application had been refused by the Examining Division (see point II above) on the grounds that the subject-matter of claim 1 according to the then pending main request and auxiliary request lacked inventive step in the light of a combination of prior art documents.

- 3.1 However, claim 1 at issue additionally requires that the microcapsules have "*an average diameter of from 10 to 100 micrometers*" and that the dispersant is selected from the specific "*group consisting of acrylates/ acrylic polymers, gellan gum, fumed silicas, acrylate/ aminoacrylate copolymers, water-swelling clays, and mixtures thereof*", and is "*providing shear thinning to the composition so that the microcapsules are suspended in the composition and the composition is sprayable as a fine mist*" from the spray-dispenser in which it is packaged.

- 3.2 These additional technical features were not contained in the wording of claim 1 rejected by the Examining

Division (see point II above). Therefore, the reasoning in the contested decision does not address the combination of the features of the then pending claim 1 with the further selection of a specific diameter for the microcapsules and of specific dispersants able to provide shear-thinning to the composition.

Instead, the reasoning regarding inventive step given in the decision under appeal is focused on the amounts of microcapsules and dispersant required by the wording of the respective claims 1 (see points 1.3.5 and 2.4 of the reasons).

- 3.3 Since the final assessment of inventive step requires that these additional technical features of claim 1, which were not considered and discussed during the first instance proceedings, be taken into account, the Board considers it appropriate to remit the case to the department of first instance pursuant to Article 111(1) EPC.

**Order**

**For these reasons it is decided that:**

The decision under appeal is set aside.

The case is remitted to the department of the first instance for further prosecution.

The Registrar:

The Chairman:



G. Nachtigall

B. Czech

Decision electronically authenticated