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**Datasheet for the decision  
of 15 December 2015**

**Case Number:** T 2140/12 - 3.3.10

**Application Number:** 02255703.7

**Publication Number:** 1284136

**IPC:** A61Q19/00, A61K8/37, C11D10/02

**Language of the proceedings:** EN

**Title of invention:**  
Moisturizing detergent compositions

**Patent Proprietor:**  
Johnson & Johnson Consumer Companies, Inc.

**Opponents:**  
Henkel AG & Co. KGaA  
BASF Personal Care and Nutrition GmbH  
Beiersdorf Aktiengesellschaft

**Headword:**

**Relevant legal provisions:**  
EPC Art. 56

**Keyword:**  
Inventive step - (no) all requests

**Decisions cited:**

**Catchword:**



**Beschwerdekammern  
Boards of Appeal  
Chambres de recours**

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Case Number: T 2140/12 - 3.3.10

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.10**  
**of 15 December 2015**

**Appellant:** Johnson & Johnson Consumer Companies, Inc.  
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**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
20 July 2012 maintaining European patent  
No. 1284136 in amended form.

**Composition of the Board:**

<b>Chairman</b>	P. Gryczka
<b>Members:</b>	R. Pérez Carlón
	T. Bokor

## Summary of Facts and Submissions

- I. The appellant (patent proprietor) lodged an appeal against the decision of the opposition division to maintain European patent No. 1 284 136 in amended form on the basis of an auxiliary request, but not allowing higher ranking requests.
- II. Three notices of opposition had been filed on grounds which included that of lack of inventive step (Article 100(a) EPC).
- III. The documents filed during the opposition proceedings included the following:

D2 EP 0 217 250 A2  
D31 US 5,455,025

During the appeal proceedings, the following document was filed:

D33 EP 1 114 637 A1

- IV. Claim 1 of the main request, which is identical to the main request before the opposition division, reads as follows:

*"A moisturizing detergent composition comprising:*

- a. a cationic polymer;*
- b. an emollient selected from the group consisting of a diester, a triester, or a mixture thereof;*
- c. a monoester emollient; and*
- d. a cleansing surfactant;*

*wherein each monoester, diester, and triester possesses an HLB of from 4 to 11, and*

*wherein the diester or triester results from the reaction of a diester or triester reactant comprised of two or more fatty alkoxyated moieties with a straight, branched or aromatic polyol or poly acid."*

Claim 1 of auxiliary request 1 contains all the features of claim 1 of the main request with the exception of the term "polyol" in its last line.

Claim 1 of auxiliary request 2 differs from claim 1 of auxiliary request 1 in that the polyacid is of structure II as defined in the claim.

Claim 2 of auxiliary request 3 and claim 1 of auxiliary request 4 reads as follows:

*"A moisturizing detergent composition comprising:*

- a. a cationic polymer;*
- b. an emollient selected from the group consisting of a diester, a triester, or a mixture thereof;*
- c. a monoester emollient; and*
- d. a cleansing surfactant;*

*wherein each monoester, diester, and triester possesses an HLB of from 4 to 11, and*

*wherein component b is Di-PPG-2 Myreth-10 Adipate."*

Lastly, claim 1 of auxiliary request 5 reads as follows:

"A moisturizing detergent composition comprising:

- a. a cationic polymer;
- b. an emollient selected from the group consisting of a diester, a triester, or a mixture thereof;
- c. a monoester emollient; and
- d. a cleansing surfactant;

wherein each monoester, diester, and triester possesses an HLB of from 4 to 11, and

wherein component c is glyceryl oleate."

- V. The opposition division decided that the subject-matter of claim 1 of the then pending main request, which is the main request in these appeal proceedings, was not novel.

It also concluded that the subject-matter of claim 1 of the then pending auxiliary request 1, which is auxiliary request 4 in these appeal proceedings, was not inventive. Document D2 was the closest prior art, the problem underlying the claimed invention was providing an alternative moisturising cleaning composition and the solution, which was a composition comprising Di-PPG-2 Myreth-10 Adipate, was not inventive having regard to document D31.

- VI. The parties to these appeal proceedings agreed that document D2 was the closest prior art, and that the problem underlying the invention as claimed in all the requests on file was that of providing an alternative moisturising detergent composition having, like those of the prior art, consumer-acceptable levels of foam.

It was also common ground that, if the subject-matter of claim 1 of auxiliary request 4 were not inventive, all the higher-ranked requests would not be allowable.

VII. According to the appellant, the solution proposed in claim 1 of auxiliary request 4 was a composition characterised in that it contained Di-PPG-2 Myreth-10 Adipate. Document D31, whose general formula embraced this compound, was only concerned with emollience and did not refer to foaming. It was well known that a proper balance of cleaning, moisturising and foaming was difficult to achieve, and the skilled person would not expect that Di-PPG-2 Myreth-10 Adipate could be included in the compositions disclosed in D2 without disturbing said balance, in particular as D2 disclosed that emollients reduced the foam level of cleaning compositions. Furthermore, Di-PPG-2 Myreth-10 Adipate was intended as a replacement to petrolatum, not of triglycerides which were the emollients disclosed in D2. For those reasons, the appellant concluded that the skilled person would not have combined the teaching of documents D31 and D2, and that the subject-matter of claim 1 was thus inventive. With respect to claim 1 of auxiliary request 5, the proposed solution was a composition characterised in that it contained glyceryl oleate. Document D33 related to compositions comprising glyceryl oleate and a propellant, which foamed as a result of different mechanisms. For that reason, the skilled person would not have considered such an emollient as a possible component of the compositions of D2. It was further known that emollients reduced foaming levels. For these reasons, the skilled person would not have combined the teaching of D33 with that of the closest prior-art document D2, with the consequence that the subject-matter of claim 1 was



inventive.

According to the respondents, the solution as proposed in claim 1 of auxiliary request 4 was not inventive because document D31 disclosed Di-PPG-2 Myreth-10 Adipate as a suitable alternative emollient.

The solution proposed in claim 1 of auxiliary request 5, which was a composition characterised by containing glyceryl oleate, was not inventive since document D33 disclosed that this compound was a suitable emollient.

VIII. Respondent 1 informed the board that it would not be attending the oral proceedings, which took place on 15 December 2015.

IX. The final requests of the parties were the following:

- The appellant requested that the decision under appeal be set aside, and that the patent be maintained in amended form on the basis of claims 1-11 filed with letter dated 18 May 2011, as main request, or alternatively that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of any of the auxiliary requests 1 to 3 filed with the grounds of appeal dated 30 November 2012, and further on the basis of auxiliary requests 4 and 5 filed with letter dated 13 August 2015.
- The respondents requested that the appeal be dismissed.

X. At the end of the oral proceedings, the decision was announced.

## Reasons for the Decision

1. The appeal is admissible.

Auxiliary request 4, inventive step

2. Claim 1 of auxiliary request 4, which corresponds to auxiliary request 1 in the opposition proceedings, is directed to a moisturising detergent composition comprising

- a. a cationic polymer,
- b. Di-PPG-2 Myreth-10 Adipate,
- c. a monoester emollient, and
- d. a cleansing surfactant,

wherein each monoester, diester, and triester possesses an HLB of from 4 to 11.

3. Closest prior art

The opposition division and the parties considered that document D2 was the closest prior art for the claimed invention, and the board sees no reason to differ.

Document D2 (see examples 6, 7 and 8) discloses compositions comprising

- a. Polymer JR 400 or Merquat 550 as a cationic polymer,
- b. an emollient such as almond oil (example 6), avocado oil (example 7) or paraffin oil (example 8),
- c. Cetiol HE as monoester emollient,
- d. Texapon N25 as a cleansing surfactant.

It has not been disputed that every mono-, di- and triester in these compositions has an HLB within the limits required by claim 1.

It has further not been disputed that document D2 discloses moisturising detergent compositions which differ from the subject-matter of claim 1 only in that they do not contain Di-PPG-2 Myreth-10 Adipate.

4. Technical problem underlying the invention

The parties and the opposition division considered that, in the absence of any direct comparison with the compositions of document D2 reflecting the effect of the distinguishing feature, the technical problem underlying the claimed invention was providing an alternative moisturising detergent composition having, like those of the prior art, consumer-acceptable levels of foam. The board sees no reason to differ.

5. Solution

The claimed solution is the moisturising detergent composition according to claim 1, which is characterised in that it contains Di-PPG-2 Myreth-10 Adipate as emollient.

6. Success

The board agrees with the opposition division and the parties that, having regard to the data provided in the examples of the patent in suit, the problem formulated in point 4. above is credibly solved by the composition of claim 1.

7. Lastly, it remains to be decided whether or not the proposed solution to the objective problem underlying the patent in suit is obvious from the prior art.

7.1 Document D31 discloses a group of emollients which embraces Di-PPG-2 Myreth-10 Adipate (column 1, line 65 to column 2, line 1). These compounds, useful as a replacement for mineral oil and petrolatum emollient agents (column 6, lines 16-18), are capable of reducing the oily feel of mineral oil without reducing its emollience (column 1, lines 49-50). Improvement in emollience is noticeable when as little as 25% of the mineral oil or petrolatum has been replaced (column 6, lines 20-24).

The skilled person, trying to obtain an alternative moisturising detergent composition to those disclosed in D2, which contain emollients and have good foaming levels, would consider the promising emollients disclosed in document D31 as an alternative to those required by D2 and would thus arrive at the claimed invention without using inventive skills. The specific compound required by claim 1, Di-PPG-2 Myreth-10 Adipate, does not go beyond an arbitrary selection of equally possible alternatives within the compounds embraced by the general formula of document D31.

7.2 The appellant argued that it was well known to be difficult to provide a composition that, at the same time, cleaned, moisturised and provided consumer-acceptable levels of foam, as recognised not only in the patent in suit but also in document D2. For that reason, the skilled person could not be confident that any modification of the compositions of D2 would preserve the required properties and, for that reason, would not have any motivation to replace the emollients

of the compositions of D2 with those disclosed in document D31.

However, the emollients of D31 could be part of foam baths (column 6, lines 14-15) and of aqueous topical preparations comprising detergents (column 6, lines 30 and 37). Although, as argued by the appellant, D31 does not provide specific details about those compositions, these passages show that the skilled person would not consider that the compounds of D31 would be detrimental to the level of foam. On the contrary, the skilled person finds sufficient information in D31 that they are, in principle, suitable components for cleaning compositions with good foaming properties.

- 7.3 The appellant argued that it was known from D2 that the presence of emollients reduced the foaming of detergent compositions. For that reason, the skilled person would not consider modifying the compositions disclosed in D2 by introducing further emollients.

However, D2 discloses that oily emollients were usually incorporated into cleaning compositions in the form of alcohol and glycol solutions and that those solvents, not the emollients, diminished the level of foam. This argument of the appellant is thus unconvincing.

- 7.4 The appellant further argued that the emollients of D31 were intended as a replacement for petrolatum, whereas the compositions of document D2 contained triglyceride emollients such as almond oil or avocado oil. For that reason, the skilled person would not have considered using the emollients of document D31 in the compositions of D2.

However, example 8 of document D2 contains paraffin oil

(mineral oil) as emollient. The skilled person would thus find a hint in the teaching of D31 to replace (some of the) paraffin oil emollient by a compound such as Di-PPG-2 Myreth-10 Adipate.

- 7.5 For these reasons, the claimed compositions are not inventive (Article 56 EPC), with the consequence that auxiliary request 4 is not allowable.

Main request and auxiliary requests 1 to 3, inventive step

8. Since the subject-matter of claim 1 of auxiliary request 4 falls within the subject-matter of claim 1 of each of the main request and auxiliary requests 1 and 2, and is identical to that of claim 2 of auxiliary request 3, the subject-matter of these requests is not inventive for the reasons already explained in points 3. to 7. above, with the consequence that the main request and auxiliary requests 1 to 3 are not allowable.

Auxiliary request 5, inventive step

9. Claim 1 of auxiliary request 5 is directed to a moisturising detergent composition comprising
- a. a cationic polymer,
  - b. an emollient selected from the group consisting of a diester, a triester, or a mixture thereof,
  - c. glyceryl oleate, and
  - d. a cleansing surfactant
- wherein each monoester, diester, and triester possesses an HLB of from 4 to 11.
10. Closest prior art

The parties considered that document D2 was the closest prior art for the claimed invention, and the board sees no reason to differ.

Document D2 (see examples 6, 7 and 8) discloses compositions comprising

- a. Polymer JR 400 or Merquat 550 as cationic polymer,
- b. an emollient such as almond oil (example 6), avocado oil (example 7) or paraffin oil (example 8),
- c. Cetiol HE as monoester emollient,
- d. Texapon N25 as cleansing surfactant

in which every mono-, di- and triester present has an HLB within the limits required by claim 1.

It has not been disputed that document D2 discloses moisturising detergent compositions which differ from those of claim 1 in that they do not contain glyceryl oleate.

11. Technical problem underlying the invention

The parties considered that, in the absence of any direct comparison with the compositions of document D2, the technical problem underlying the claimed invention was providing an alternative moisturising detergent composition having, like those of the prior art, consumer-acceptable levels of foam, and the board sees no reason to differ.

12. Solution

The claimed solution is the moisturising detergent composition according to claim 1, which is characterised in that it contains glyceryl oleate as

emollient.

13. Success

The board agrees with the opposition division and the parties that, having regard to the data provided in the examples of the patent in suit, the problem formulated in point 11. above has been credibly solved by the composition of claim 1.

14. Lastly, it remains to be decided whether or not the proposed solution to the objective problem underlying the patent in suit is obvious from the prior art.

14.1 The skilled person, trying to obtain alternative moisturising detergent compositions with good foaming properties, would turn to a document such as D33, which discloses also compositions with emollients and teaches that glyceryl oleate is a known emollient (column 3, lines 9-13), analogous to PEG 7 glyceryl cocoate (Cetiol HE) and paraffin oil.

The skilled reader would thus consider replacing paraffin oil, which is an emollient in the composition of example 8 of D2, with a different suitable emollient such as by glyceryl oleate in order to get alternative emollient detergent compositions to those of D2, and would thus arrive at the compositions of claim 1 of auxiliary request 5 without using inventive skills.

14.2 The appellant argued that document D33 disclosed glyceryl oleate as an emollient in the context of a very specific system, namely a composition that required a propellant. There was no indication in document D33 as to whether glyceryl oleate would form moisturising cleaning compositions with acceptable



levels of foaming and there was no reason to believe that it could be successfully used in addition to or instead of the components of the systems of D2, since the formation of foam was due to different mechanisms.

However, whether foam is generated by using a propellant or by other different means is irrelevant to the fact that D33 discloses that glyceryl oleate is an emollient compatible with compositions requiring, at the same time, emollience and foaming properties.

14.3 The board thus concludes that the composition of claim 1 of auxiliary request 5 is not inventive (Article 56 EPC), with the consequence that this request is not allowable.

## Order

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

The appeal is dismissed.

The Registrar:

The Chairman:



C. Rodríguez Rodríguez

P. Gryczka

Decision electronically authenticated