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**Datasheet for the decision  
of 8 September 2016**

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**Language of the proceedings:** EN

**Title of invention:**

ENHANCED OIL DELIVERY FROM STRUCTURED SURFACTANT FORMULATIONS

**Patent Proprietor:**

Colgate-Palmolive Company

**Opponents:**

Henkel AG & Co. KGaA  
The Procter & Gamble Company

**Relevant legal provisions:**

EPC Art. 56, 114  
RPBA Art. 12

**Keyword:**

Inventive step - main request (no) - first and second auxiliary request (no)

Third auxiliary request - allowed



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Case Number: T 2082/13 - 3.3.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.07**  
**of 8 September 2016**

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**Decision under appeal:** **Interlocutory decision of the Opposition**  
**Division of the European Patent Office posted on**  
**29 July 2013 concerning maintenance of the**  
**European Patent No. 1786388 in amended form.**

**Composition of the Board:**

**Chairman**            J. Riolo  
**Members:**            R. Hauss  
                              D. T. Keeling

## Summary of Facts and Submissions

I. European patent No. 1 786 388 was granted with a set of twenty-two claims, containing two independent claims.

Independent claim 1 is directed to a method of making a composition by mixing water, a cationic guar gum, a specified surfactant component, a limited quantity of salt and an oil phase, following defined method steps.

Independent claim 12, directed to a composition, reads as follows:

*"12. A composition comprising a surfactant component, a salt, and an oil phase, wherein the composition is a spherulite composition and the surfactant component comprises (based on the total weight of the composition):*

*(a) 6 to 8.25 weight% sodium trideceth sulfate;*

*(b) 1.8 to 3.0 weight% of a structuring agent, wherein the structuring agent is selected from lauroamphoacetate and cocoamidopropyl betaine;*

*(c) 1.1 to 3.0 weight% of a foam booster;*

*(d) water; and*

*(e) 0.2 to 0.8 weight% of a cationic guar gum."*

II. Two oppositions were filed against the patent, on the grounds that the claimed subject-matter lacked novelty and inventive step, was insufficiently disclosed and extended beyond the content of the application as filed (Articles 100(a), (b) and (c) EPC).

III. The documents cited in the course of the opposition proceedings included the following:

(3) WO 03/055456 A1

(4) WO 01/05932 A1

IV. The patent proprietor requested the rejection of the oppositions (main request) and submitted a number of auxiliary requests.

In the third auxiliary request, both independent claims were modified in comparison with the claims as granted.

Independent claim 11 of the third auxiliary request was identical in its wording to claim 12 as granted, with the following further limitations:

*"..., wherein the composition has a pH in a range of 5.5 +/- 1, wherein the oil phase comprises a vegetable oil, wherein the oil phase comprises up to 15 weight%, based on the total weight of the composition, wherein the salt is NaCl in an amount of from 1 to 3 weight%, based on the total weight of the composition."*

The sixth auxiliary request, filed by letter of 2 May 2013, recited only those claims of the third auxiliary request which were directed to a method of making a composition, i.e. claims 1 to 10.

V. The decision under appeal is the interlocutory decision of the opposition division, announced on 3 July 2013 and posted on 29 July 2013, rejecting the patent proprietor's main request and first and second auxiliary requests and finding that the patent as amended in the form of the third auxiliary request met the requirements of the EPC.

VI. In the decision under appeal, the opposition division found that independent claims 1 and 12 of the patent as granted (main request) contained added subject-matter. The same applied to corresponding claims of the first and second auxiliary requests (Articles 100(c), 123(2) EPC).

The subject-matter of the third auxiliary request did not extend beyond the content of the application as filed and was sufficiently disclosed. Novelty was also acknowledged. Document (3) was regarded as the closest prior art. With respect to claim 11, the objective technical problem was to provide an alternative cleansing composition allowing oil to be deposited on a substrate. The proposed solution involved lowering the amount of surfactant. Starting from the teaching of document (3) and knowing the prior art cited, the person skilled in the art was not guided to turn to spherulite systems. It was moreover surprising that the amount of oil deposited by the composition on a substrate was not dependent on the surfactant content, as shown in example 2 of the patent in suit. Thus the subject-matter of claim 11 involved an inventive step. Independently, the subject-matter of claim 1 was also considered inventive.

- VII. Opponent 1 and the patent proprietor each filed an appeal against that decision.
  
- VIII. Together with the statement setting out the grounds of appeal, opponent 1 submitted documents (10) and (11).
  - (10) Chemical Abstracts results of search for "analysis of spherulites", 5 December 2013
  - (11) Chemical Abstracts results of search for "detection of spherulites", 5 December 2013
  
- IX. With the statement setting out the grounds of appeal, the patent proprietor requested, as its **main request**, the maintenance of the patent as granted, and filed two auxiliary requests.

Independent composition claim 11 of the **first auxiliary request** corresponds to claim 12 as granted, with the following addition:

*"...wherein the composition has a pH in a range of  $5.5 \pm 1$ , wherein the oil phase comprises a vegetable oil, a mineral oil and a silicone oil, wherein the oil phase comprises up to 15 weight%, based on the total weight of the composition, wherein the salt is NaCl in an amount of from 1 to 3 weight%, based on the total weight of the composition."*

The **second auxiliary request** is identical to the former third auxiliary request which was deemed allowable by the opposition division (see point IV above for the wording of independent claim 11 of that request).

X. In response to the statement of grounds submitted by opponent 1, the patent proprietor furthermore submitted a third auxiliary request by letter of 23 April 2014.

The ten claims of the **third auxiliary request** are identical to claims 1 to 10 of the second auxiliary request directed to a method of making a composition, all claims directed to compositions having been deleted.

XI. In a communication issued in preparation for oral proceedings and advising the parties of the board's preliminary opinion, the board mentioned the following points (see points 5.1 and 5.7 of the communication):

- The objection raised by the appellant (opponent 1) with regard to lack of inventive step of the main request seemed to relate only to composition claim 12 and its dependent claims, since no arguments about, or mentioning, the method claim had been presented.



- In the context of inventive step, it might be discussed whether or not spherulites were to be regarded as a distinguishing feature over the lamellar composition 2 disclosed in example 1 of document (3), and what might be the technical effect of that structural feature, and whether the comparative tests reported in example 2 of the patent in suit were suitable to show a technical effect, linked to a technical feature distinguishing the composition from that of document (3), over the scope claimed.

XII. Oral proceedings were held on 8 September 2016 with the participation of both appellants.

In the course of the oral proceedings, the appellant (opponent 1) declared that it had no objection to the claims of the third auxiliary request.

XIII. The arguments presented by the appellant (patent proprietor) may be summarised as follows:

*Main request - inventive step*

The composition defined in claim 12 differed from composition 2 of example 1 disclosed in document (3) in the concentrations of sodium trideceth sulphate and lauroamphoacetate and in the presence of spherulites.

The objective technical problem was to provide a composition with a high deposition of oil onto a substrate, such as the human skin, during washing.

Having regard to the prior art, it was surprising that a spherulite composition with lower concentrations of spherulite-forming surfactants could provide enhanced or equivalent oil deposition. Although not showing an exact comparison with the example formulation of document (3), the experimental data provided in the patent in suit rendered it credible that at least a

similar degree of oil deposition was indeed achieved, while document (3) did not discuss oil deposition at all and did not hint at spherulite systems.

Even if the technical problem was formulated in a less ambitious manner as the provision of an alternative composition, the claimed composition was not an obvious solution to that problem, since document (3) did not guide the reader to consider a spherulite structure and consistently taught much higher concentrations of sodium trideceth sulphate and lauroamphoacetate. Document (4), cited by the appellant (opponent 1) in combination with document (3), had no relevance, because it related to spherulite systems which were based on completely different essential components.

*First and second auxiliary requests - inventive step*

With respect to the independent composition claim in both auxiliary requests, the same arguments applied as for claim 12 of the main request.

*Admission of documents (10) and (11)*

The late-filed documents (10) and (11) lacked relevance.

- XIV. The arguments presented by the appellant (opponent 1) may be summarised as follows:

*Main request - inventive step*

Starting from the teaching of document (3), and specifically composition 2 of example 1, the objective technical problem was the provision of an alternative conditioning composition.

Document (3) was concerned with lamellar systems, of which spherulite systems were a sub-group, as taught in document (4) and in the patent in suit itself.

Considering the process of preparation used according to document (3) (example 5), it was even likely that the compositions of document (3) contained spherulites. The choice of lower surfactant concentrations was obvious from the general teaching of documents (3) and (4). Thus the person skilled in the art seeking to solve the objective technical problem would arrive without inventive effort at a composition according to claim 12.

The experiments described in the patent in suit did not provide an adequate comparison with the example composition of document (3), nor did they show a technical effect which could be obtained over the entire scope of claim 12.

*Admission of the first auxiliary request*

The first auxiliary request was a new request which should have been filed during the first-instance proceedings and therefore should not now be admitted.

*First and second auxiliary requests - inventive step*

With respect to the independent composition claim in both auxiliary requests, the same arguments applied as for claim 12 of the main request.

*Admission of documents (10) and (11)*

Documents (10) and (11) were cited as evidence of the knowledge of the person skilled in the art.

- XV. The appellant (patent proprietor) requested that the decision under appeal be set aside and the oppositions rejected (main request) or, in the alternative,
- that the decision under appeal be set aside and that the patent be maintained according to the first auxiliary request, filed on 6 December 2013 with the

proprietor's statement setting out the grounds of appeal, or

- that the appeal of opponent 1 be dismissed (second auxiliary request), or

- that the patent be maintained on the basis of the third auxiliary request, filed by letter of 23 April 2014.

The appellant (patent proprietor) also requested that documents (10) and (11) not be admitted into the proceedings.

XVI. The appellant (opponent 1) initially requested that the decision under appeal be set aside and that the patent be revoked. It also requested that the first auxiliary request not be admitted into the proceedings.

Subsequently, it declared that it had no objection to the claims of the third auxiliary request (see point XII above).

Thus the final request of the appellant (opponent 1) was that the decision under appeal be set aside and that the main request be rejected, that the first auxiliary request not be admitted or auxiliarily be rejected and that the second auxiliary request also be rejected.

XVII. Opponent 2 (party as of right pursuant to Article 107 EPC) did not submit any requests or observations during the appeal proceedings.

## Reasons for the Decision

### 1. Main request - inventive step

#### *Patent in suit*

1.1 The patent in suit aims to provide surfactant-based compositions, in particular body-wash products, for suspending an oil and depositing it on a substrate such as hair, skin or wool (paragraphs [0001], [0002]).

1.2 According to claim 12 as granted, this is achieved by a spherulite composition comprising a salt, an oil phase and a specified surfactant component which also includes a cationic guar gum.

#### *Closest prior art*

1.3 Document (3) has been proposed by the opposition division and the appellants as the starting point for the assessment of inventive step. The board sees no reason for selecting a different starting point.

1.4 Document (3) relates to aqueous free-flowing non-Newtonian shear-thinning surfactant compositions which are capable of stably suspending water-insoluble benefit agents, such as oils, e.g. shampoos or skin cleansing compositions (see document (3): claim 13; page 1, lines 8 to 21; page 15, line 20 to page 16, line 3; page 29: lines 3 to 5).

1.5 The board considers that the stated purpose of suspending an oil as a benefit agent in a surfactant-based personal-care composition implies that the oil is to be delivered to the skin or hair. Moreover, document (3) explicitly defines the "benefit agent"

as an agent that is to be delivered into, or onto, the skin and/or hair (page 15, lines 20 to 23). Thus it is evident that the compositions of document (3) serve the same purpose as those of the patent in suit.

- 1.6 With composition 2 of example 1 (table I), explicitly meant to illustrate compositions showing non-Newtonian shear-thinning behaviour (see page 30, lines 8 to 9), document (3) discloses a formulation having a pH between 4.0 and 6.5 and containing 14.6% sodium trideceth sulphate, 4.8% sodium lauroamphoacetate, 3% Cocamide MEA, water, 0.5% guar hydroxypropyl trimonium chloride, 3.0% sodium chloride, 6.7% sunflower oil and 3.3% petrolatum, which may be prepared as disclosed on page 37, line 17 to page 38, line 15. The total surfactant concentration is 22.4%.

*Technical problem*

- 1.7 The composition of claim 12 as granted differs from this specific example composition of document (3) by lower concentrations of sodium trideceth sulphate in the range of 6 to 8.25% by weight, and specific structuring agent (lauroamphoacetate) in the range of 1.8 to 3.0% by weight.

Furthermore, the term "spherulite" is not mentioned in document (3). It is however essential, according to the teaching of that document, that the compositions have non-Newtonian shear-thinning properties and the ability to suspend components in a stable manner (see document (3): claim 1 and page 2, lines 11 to 18). Such properties are known characteristics of lamellar phase surfactant compositions, pointing to a lamellar structure (see document (3): page 5, lines 3 to 7).

- 1.8 In the framework of the problem-and-solution approach employed by the boards for assessing inventive step, the technical effects achieved by the claimed subject-matter when compared with the closest prior art are assessed, and the objective technical problem is defined on the basis of the technical effects actually achieved. Thus it has to be established whether a technical effect is credibly achieved by the claimed composition over the scope claimed, in comparison with the example composition of document (3).
- 1.9 The patent in suit (see paragraphs [0001] to [0003] of the patent specification) states that the invention provides "enhanced" delivery of an oil phase to a substrate. It is acknowledged that spherulite-based formulas with lamellar surfactant phases which form structured systems are known in the art and are used to enhance the stability of body-wash formulas containing significant amounts of emollients and oils. Thus, increased concentrations of oils can be incorporated into the products with the potential to deliver higher concentrations to the skin surface, when compared to rod-like micelle formulations, which are considered less suitable as delivery vehicles. It is also mentioned that the majority of body-wash products are formulas based on entangled rod-like micelles, which are different from lamellar systems. Thus the notion of "enhanced" delivery is evidently meant to relate to an overall comparison with standard body-wash products. It cannot be inferred from such a general statement that enhanced oil deposition is obtained in comparison with the example composition disclosed in document (3).
- 1.10 The appellant (patent proprietor) argued that the comparative tests described in examples 1 and 2 of the patent in suit showed that a surprising technical

effect was obtained with the composition as defined in claim 12, viz. it was surprising that a composition with lower concentrations of spherulite-forming surfactants was stable and provided a similar level of oil deposition.

1.11 According to the established jurisprudence of the boards of appeal, a surprising technical effect demonstrated in a comparative test can be taken as an indication of inventive step. The nature of the comparison must be such that the alleged advantage or effect is convincingly shown to have its origin in a distinguishing feature of the claimed subject-matter compared with the closest prior art (see Case Law of the Boards of Appeal of the European Patent Office, 8th edition 2016, I.D.10.9). Thus it has to be established whether examples 1 or 2 relied on by the appellant (patent proprietor) demonstrate a technical effect of the claimed subject-matter.

1.12 Example 1 of the patent in suit relates to the comparison of a spherulite composition (sample 1A) and an oil-in-water emulsion (comparative sample 1B) in a "standard wool binding assay" with regard to the delivery of oil onto a wool swatch (see also figure 1). The comparative sample, apart from containing sunflower oil and water, has no component in common with the example composition of document (3) and therefore it does not reproduce or adequately represent that composition. It follows that example 1 cannot show a comparison with the closest prior art.

Furthermore, in view of the prior knowledge as acknowledged in the patent in suit (see point 1.9 above), it cannot be regarded as surprising in itself that spherulite compositions such as sample 1A are



capable of suspending oil and delivering it to a wool (or keratin) substrate.

- 1.13 Example 2 of the patent in suit describes a comparison, again with regard to oil deposition on a wool swatch, which involves four spherulite compositions.

The compositions tested each contain 0.7% by weight cationic guar gum, 8% by weight sodium chloride and 10% by weight sunflower oil.

Two compositions contain 1% by weight cocomonoethanolamide and 20.5% by weight of a surfactant mixture with the name "MIRACARE SLB-365". The two remaining compositions contain 0.9% by weight cocomonoethanolamide and 29.8 or 31% by weight of "MIRACARE SLB-365".

MIRACARE SLB-365 is described as a mixture containing sodium trideceth sulphate, lauroamphoacetate and cocomonoethanolamide at a proportion of 48% of active ingredients (see tables 3 and 7 of the patent specification).

Thus the compositions with 20.5% MIRACARE contain 10.8% by weight of surfactant (including the additional cocomonoethanolamide), and the compositions with 29.8 or 31% MIRACARE contain 15.2 or 15.8% by weight of surfactant.

- 1.13.1 The definition of claim 12 as granted allows for a maximum of 8.25% sodium trideceth sulphate, 3.0% lauroamphoacetate and 3.0% of a foam booster, adding up to 14.25%. Cocomonoethanolamide is a foam booster (see page 5, lines 27 to 28 of the patent in suit).

While it is conceivable that those compositions of example 2 which contain a total of more than 15% of those surfactants might in this regard represent

the example formulation of document (3), it cannot be confirmed that the compositions of example 2 which contain 10.8% of surfactants are in conformity with the definition of claim 12 as granted.

This is due to the fact that the quantitative composition of MIRACARE SLB-365 (as used in the experiment of example 2 at a time before the priority date in 2004) is not indicated in the patent in suit. The statement in paragraph [0032] of the patent in suit describing a surfactant premix said to be "similar" to a commercial material available as MIRACARE SLB-365 does not provide any information in that respect. As a consequence, it cannot be verified whether the concentrations of sodium trideceth sulphate, lauroamphoactetate and foam booster were within the ranges defined in claim 12.

In the absence of that information, the board is not convinced that example 2 shows a comparison of the claimed subject-matter with the closest prior art.

- 1.13.2 It might be added that the scope of claim 12 is not in fact restricted with regard to the total amount of surfactants which may be present, since upper limits are specified only for sodium trideceth sulphate and lauroamphoacetate or cocoamidopropylbetaine. It follows that a comparative test in which the claimed invention is represented only by compositions with a total concentration of surfactants under 11% by weight does not cover the entire scope claimed, which also includes compositions having the same total concentration of surfactants as the example composition of document (3). Based on the available information, and contrary to the appellant's (patent proprietor's) view, it cannot be excluded that the presence or absence of further

surfactants would affect the properties of the compositions and the extent of oil deposition.

1.13.3 The board therefore comes to the conclusion that example 2 does not show an adequate comparison of the subject-matter of claim 12 with the example composition of document (3).

1.14 In view of the considerations set out under points 1.9, 1.12 and 1.13 above, it cannot be confirmed that any specific technical effect is obtained by the claimed composition over the entire scope claimed, in comparison with the closest prior art.

1.15 In the absence of proof of such a technical effect, the technical problem in respect of claim 12 as granted must be defined as the provision of a further oil-suspending surfactant composition suitable for delivering an oil to a keratinic substrate.

*Obviousness of the solution*

1.16 Assuming that the technical problem is solved by the spherulite composition as defined in claim 12, it has to be established whether it would have been obvious, having regard to the state of the art, to arrive at that solution by selecting a spherulite composition with the defined concentrations of sodium trideceth sulphate and specific structuring agent.

1.17 Spherulite structure

While document (3) mentions lamellar compositions, it does not indicate whether the compositions are spherulite compositions.

As acknowledged in the patent in suit (see paragraphs [0003] to [0004]), it was however known that spherulite systems have a lamellar structure and are suitable

for suspending oils as benefit agents in body-wash products.

It is furthermore mentioned in document (4), as a general teaching, that structured surfactant systems can be used for suspending oils in personal-care formulations (see page 1, paragraph 1; paragraph bridging pages 4 and 5) and that many structured surfactant systems fall between dispersed lamellar (containing surfactant bilayers arranged as parallel plates) and spherulite (containing surfactant bilayers arranged as concentric shells), involving both types of structure (page 2, paragraph 4 to page 3, paragraph 1). In this context, the board sees no reason not to take into account the general teaching of document (4), which is not in any way restricted to compositions containing specific ingredients, as argued by the appellant (patent proprietor).

Hence the suitability and equivalent function of spherulite systems for the intended purpose of suspending and delivering oils from a surfactant-based composition were known, as was the fact that intermediate forms exist, while the prior art does not contain information which would have discouraged the person skilled in the art from choosing a spherulite-containing composition.

#### 1.18 Concentration ranges

The concentration ranges defined in claim 12 as granted, of 6 to 8.25% by weight for sodium trideceth sulphate and 1.8 to 3.0% by weight for the mandatory structuring agent selected from lauroamphoacetate and cocoamidopropyl betaine, are lower than the concentrations of 14.6% and 4.8% disclosed for composition 2 of example 1 of document (3) (see point 1.6 above).

The required concentration ranges are however covered by the general teaching of document (3) (page 7, lines 16 to 17 and page 13, lines 20 to 22), according to which

- the concentration of anionic surfactant is typically from 5% to 30% by weight and
  - the total amount of active nonionic surfactants and amphoteric and/or zwitterionic surfactants is typically 1 to 20% by weight of the composition,
- given that sodium trideceth sulphate is an anionic surfactant and that amphoacetate and betaine fall into the amphoteric/zwitterionic surfactant category.

1.18.1 The appellant (patent proprietor) argued that document (3) nevertheless taught away from lower concentrations, since the formulation examples disclosed in document (3) all contained comparatively high concentrations of the relevant surfactants, and that the lower limits of the preferred concentration ranges were also higher, viz. from 10% by weight anionic, and from 3% by weight amphoteric/zwitterionic surfactant.

In reply to the argument that the wording of claim 12 does not exclude the presence of further anionic surfactants other than sodium trideceth sulphate and of structurants other than lauroamphoacetate and cocoamidopropyl betaine, and therefore also covers embodiments within the preferred concentration ranges of document (3), the appellant (patent proprietor) furthermore contended that other surfactants would not have been regarded as essential for forming lamellar or spherulite compositions.

1.18.2 The board considers that these arguments are not convincing, since document (3) does not give the reader any specific reason to believe that the compositions

would not work, or would not be stable, over the entire ranges disclosed as "typical" concentration ranges of the surfactants, or that only a combination of sodium trideceth sulphate with lauroamphoacetate or cocoamidopropyl betaine would provide the desired structure and properties of the compositions.

With regard to the latter point, the board also observes that the choice of mandatory structuring agent was not limited in the original application on which the patent in suit is based (published as WO 2006/023591 A1), and in one claimed embodiment concerning the preparation of a spherulite-containing composition the choice of surfactants was not restricted at all (see claim 15 of the application as filed). In other embodiments, the upper limit for sodium trideceth sulphate was higher than 8.25%, viz. 10% by weight.

1.19 In view of the considerations set out under points 1.17 and 1.18 above, the board concludes that the solution to the technical problem as defined in claim 12 would have been obvious to the person skilled in the art.

1.20 With regard to the appellant's (patent proprietor's) argument that it was surprising that a composition with lower concentrations of the relevant surfactants was stable and could provide a high level of oil deposition, the board has the following observations:

As discussed above, it has not been shown that the level of oil deposition obtained with the composition of claim 12 in comparison with the composition of the closest prior art is enhanced, high or equivalent over the scope claimed (see point 1.14). Such an effect was accordingly not taken into account in the formulation of the technical problem.

Assuming nevertheless that the level of oil deposition which can be obtained with the compositions of claim 12 is in general satisfactory, such a result would not be surprising in view of the prior knowledge, mentioned in the patent in suit, that spherulite compositions provide a good level of oil deposition compared to other body-wash formulas (see point 1.9 above).

The board is not aware of any reason why the person skilled in the art would have expected that compositions containing lower amounts of surfactants would necessarily deposit lower amounts of oil on a substrate, or that compositions with the claimed concentrations of sodium trideceth sulphate and specific structurants would lack stability. The cited prior art and the patent in suit are silent in that regard. Hence the assumptions of the appellant (patent proprietor) to that effect are at best speculative.

The appellant's (patent proprietor's) argument must therefore fail.

- 1.21 For these reasons, the subject-matter of claim 12 as granted does not involve an inventive step within the meaning of Article 56 EPC.
2. Admission of the first auxiliary request
  - 2.1 The first auxiliary request was filed together with the patent proprietor's statement setting out the grounds of appeal. Pursuant to Article 12(1), 12(2), and 12(4) second half-sentence, RPBA, the request is thus to be taken into account in the proceedings.
  - 2.2 The board moreover sees no reason not to admit this request into the proceedings under Article 12(4), first half-sentence, RPBA. Since the request is very similar

to the second auxiliary request which was already in the proceedings (see point IX above) and does not shift the basis of the discussion or raise any complex new issues, it would be disproportionate to insist that it should have been presented in the first-instance proceedings.

3. First and second auxiliary requests - inventive step
- 3.1 Claim 11 of each of the first and second auxiliary requests contains some further limitations in comparison with claim 12 of the main request (see point IX above), for instance with regard to the pH value and the composition of the oil phase.
- 3.2 However, there is no evidence that any specific technical effect is obtained by the composition of claim 11 of either auxiliary request, due to any such further technical feature distinguishing that composition from the example composition of document (3).
- 3.3 Accordingly, the appellant (patent proprietor) did not rely on any additional distinguishing features to support an argument in favour of inventive step. In fact, both appellants stated that their argumentation with regard to inventive step remained the same as in the context of claim 12 of the main request (see points XIII and XIV above).
- 3.4 In light of point 3.2 above, the board agrees with the appellants' view that the assessment of inventive step is not affected by the amendments.
- 3.5 As a consequence, the subject-matter of claim 11 of each of the first and second auxiliary requests does not involve an inventive step within the meaning of



Article 56 EPC, for the same reasons as set out for claim 12 of the main request.

4. Third auxiliary request

4.1 The third auxiliary request was filed by the patent proprietor in response to the grounds of appeal presented by opponent 1. The claims of this request are identical to claims 1 to 10 of the former third auxiliary request considered in the decision under appeal, and the present third auxiliary request is also identical to the former sixth auxiliary request presented during the first-instance proceedings (see points IV, IX and X above). Pursuant to Article 12(1), 12(2), and 12(4) RPBA, the request is thus to be taken into account in the appeal proceedings.

4.2 The third auxiliary request was not under attack during the appeal proceedings; in fact, the appellant (opponent 1) declared that it had no objections to the claims of this request (see point XVI above).

4.3 The claims of the present third auxiliary request were among the claims deemed to be allowable in the decision under appeal. As established in point 4.2 above, they are outside the scope of the appeal of opponent 1. It follows that the third auxiliary request is to be allowed.

5. Admission of documents (10) and (11)

5.1 Documents (10) and (11) were admitted at the outset of the oral proceedings, since they had been filed by the appellant (opponent 1) together with its grounds of appeal in accordance with Article 12(2) RPBA (see point VIII above) and did not raise any complex new issues (Article 12(4) RPBA and Article 114 EPC).

5.2 The parties did not subsequently rely on those documents in the discussion of inventive step which determined the present outcome.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent on the basis of claims 1 to 10 of the third auxiliary request and a description to be adapted.

The Registrar:

The Chairman:



S. Fabiani

J. Riolo

Decision electronically authenticated