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**Datasheet for the decision
of 17 April 2018**

Case Number: T 1219/15 - 3.3.07
Application Number: 06780122.5
Publication Number: 1924238
IPC: A61K8/02, A61K8/34, A61K8/41,
A61K8/46, A61Q5/02
Language of the proceedings: EN

Title of invention:
Shampoo containing a gel network

Applicant:
The Procter & Gamble Company

Headword:
Shampoo containing a gel/ P&G

Relevant legal provisions:
EPC Art. 123(2), 83, 111(1)

Keyword:
Amendments - allowable (yes)
Sufficiency of disclosure - (yes)
Appeal decision - remittal to the department of first instance
(yes)



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Case Number: T 1219/15 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 17 April 2018

Appellant: The Procter & Gamble Company
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 8 January 2015
refusing European patent application No.
06780122.5 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman J. Riolo
Members: A. Usuelli
P. Schmitz

Summary of Facts and Submissions

- I. The appeal of the applicant (appellant) lies from the decision of the examining division to refuse European patent application No. 06780122.5, published as WO 2007/031884.
- II. The decision was based on a main request and four auxiliary requests wherein the main request and auxiliary requests 1 to 3 were filed on 21 October 2014 whereas auxiliary request 4 was filed during the oral proceedings held on 21 November 2014.

Claim 1 of each request related to shampoo compositions comprising a dispersed gel network phase wherein said dispersed gel network phase had a melt transition temperature from 40°C to 60°C.

Claim 1 of auxiliary request 4 read as follows:

"1. A shampoo composition comprising:

- a) from 5 % to 50 % of one or more deterative surfactants, by weight of said shampoo composition;
- b) a dispersed gel network phase comprising:
- i) at least 0.05 % of one or more fatty alcohols, by weight of said shampoo composition;
 - ii) at least 0.01 % of one or more secondary surfactants, by weight of said shampoo composition;
 - and
 - iii) water; and
- c) at least 20 % of an aqueous carrier, by weight of said shampoo composition;

wherein said dispersed gel network phase has a melt transition temperature of from 40°C to 60°C, as measured according to differential scanning calorimetry, wherein said fatty alcohol is selected from fatty alcohols having from 18 to 70 carbon atoms, wherein said secondary surfactant is selected from cationic surfactants".

III. In the decision under appeal the examining division observed that for the shampoos of examples 11 and 18, the requirement of claim 1 concerning the melt transition temperature of the gel network dispersed in the shampoo was not met, despite the fact that these shampoos contained a fatty alcohol and a secondary surfactant as defined in claim 1. It concluded that not only the nature of the fatty alcohol and of the surfactant influenced the melt transition temperature of the gel dispersed in the shampoo, but also other factors. In the absence of sufficient information in this respect, the examining division considered that an unreasonable amount of experimentation was required to prepare compositions according to claim 1. Accordingly, it concluded that the main request did not comply with the requirements of sufficiency of disclosure. Substantially for the same reasons, auxiliary requests 1 to 3 were also considered to offend against the requirement of Article 83 EPC.

As to claim 1 of auxiliary request 4, the examining division concluded that it related to shampoo compositions comprising a specific combination of fatty alcohols and surfactants that was not disclosed in the original application. Accordingly, this request did not comply with Article 123(2) EPC.

IV. With the statement setting out the grounds of appeal, the appellant requested that the decision under appeal be set aside and a patent be granted on the basis of a main request or on the basis of one of eleven auxiliary requests.

Claim 1 of auxiliary request 4 was nearly identical to claim 1 of auxiliary request 4 forming part of the basis of the decision of the examining division, the difference being the addition of the word "and" before the words "wherein said secondary surfactant is selected from cationic surfactants" (see point II above).

V. In a communication pursuant to Article 15(1) RPBA issued on 6 March 2018, the Board expressed the opinion that the subject-matter of the main request and of auxiliary requests 1 to 3 and 6 to 9 was not sufficiently disclosed whereas auxiliary requests 4, 5, 10 and 11 were considered to comply with Articles 83 and 123(2) EPC. It furthermore stated that it intended to remit the case to the examining division for further prosecution on the basis of a request complying with the requirements of Article 83 EPC.

VI. By letter of 20 March 2018, the appellant withdrew its previous main request and auxiliary requests 1 to 3 and submitted a new main request and 7 auxiliary requests. The claims of the main request were identical to the claims of the request filed with the statement setting out the grounds of appeal as auxiliary request 4.

VII. In a phone conversation held on 22 March 2018, the appellant was informed of the Board's opinion that the main request met the requirements of Articles 123(2) and 83 EPC and that the Board intended to remit the

case to the examining division for further prosecution. The appellant was furthermore informed that the oral proceedings scheduled for 17 April 2018 were maintained in order to bring the case to a final decision.

VIII. The appellant's arguments in relation to the main request, as far as relevant for the present decision can be summarised as follows:

The limitation to fatty alcohols having from 18 to 70 carbon atoms had a basis in original claim 2 which depended on claim 1. The indication that the secondary surfactant was selected from cationic surfactants was based on the disclosure on page 12, lines 3 to 5 of the original application. The requirements of Article 123(2) EPC were therefore met.

The application as filed comprised several examples of shampoo compositions comprising a dispersed gel network phase having a melt transition temperature of 40°C to 60°C. The compositions of examples 11 and 18, presenting a melt transition temperature below 40°C were excluded from the scope of claim 1 of the main request in view of the limitation concerning the secondary surfactant. The subject-matter of the main request was therefore sufficiently disclosed.

IX. The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the main request or one of auxiliary requests 1 to 7 all submitted on 20 March 2018.

Reasons for the Decision

Main Request

1. Article 123(2) EPC
 - 1.1 The subject-matter of claim 1 is based on the introduction in original claim 1 of the feature restricting the fatty alcohols to those having from 18 to 70 carbon atoms and of the feature restricting the secondary surfactant to the cationic surfactant.
 - 1.1.1 The feature concerning the chain's length of the fatty alcohol is disclosed in original claim 2 which depends on claim 1. Hence original claim 2 defines shampoo compositions containing a gel network comprising a fatty alcohol having from 18 to 70 carbon atoms.
 - 1.1.2 The indication that the secondary surfactant can be a cationic surfactant is disclosed on page 12 of the original application, line 5. This passage refers in general to all the shampoo compositions of the invention and therefore also to the compositions defined in original claim 2 comprising a fatty alcohol having from 18 to 70 carbon atoms. Therefore, the original application provides a basis for a shampoo comprising in the gel network phase a cationic surfactant and a fatty alcohol having from 18 to 70 carbon atoms.
 - 1.1.3 Claims 2 and 3 of the main request have a basis in original claims 2 and 3 whereas claims 4 and 5 correspond to original claims 9 and 10.
 - 1.2 Thus, the main request meets the requirements of Article 123(2) EPC.

2. Article 83 EPC

2.1 The description of the application provides information as to the substances which are suitable as components of the shampoos defined in claim 1 and as to the amounts in which these substances are to be used (see sections A to D). The experimental part of the description discloses several examples of shampoo compositions included in claim 1 (e.g. examples 1-3, 6 and 7). Finally, a general procedure for preparing the shampoo compositions is disclosed from the last paragraph of page 20 to the first paragraph of page 23.

2.2 The examining division came to the conclusion that the then pending main request and auxiliary requests 1 to 3 did not comply with the requirements of Article 83 EPC. A key point in the reasoning of the examining division was the observation that the melt transition temperatures of the gel networks contained in the shampoos of examples 11 and 18 were outside the range 40°C to 60°C defined in claim 1.

2.3 The shampoo compositions of examples 11 and 18 contain as a dispersed gel network phase respectively "Gel Network 4" and "Gel Network 11" (see page 24). Both these gel network phases contain as a secondary surfactant sodium laureth-3 sulfate, i.e. an anionic surfactant (see page 21). Hence, the shampoo compositions of examples 11 and 18 are not covered by claim 1 of the current main request since the secondary surfactant is not a cationic surfactant.

The Board notes that in all the shampoos exemplified in the description in which the secondary surfactant is a cationic surfactant, the gel network phase fulfils the

requirement of having a melt transition temperature between 40° to 60°.

- 2.4 In view of the above the Board sees no reasons to maintain the examining division's objection. Nor sees the Board any other reason for considering that the skilled person would not be able to carry out the invention defined in claim 1.

It follows that the main request complies with the requirements of Article 83 EPC.

3. Remittal

- 3.1 The primary function of an appeal is to consider whether the decision issued by the first-instance department is correct. Hence, a case is normally remitted if essential questions regarding the patentability of the claimed subject-matter have not yet been examined and decided by the department of first instance.

- 3.2 These observations fully apply to the present case since important issues such as novelty and inventive step have not been considered in the decision under appeal.

Hence the Board exercises its discretion pursuant to Article 111(1) EPC to remit the case to the first instance for further prosecution.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Examining Division for further prosecution.

The Registrar:

The Chairman:



S. Fabiani

J. Riolo

Decision electronically authenticated