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**Datasheet for the decision
of 17 July 2019**

Case Number: T 0910/16 - 3.3.06

Application Number: 07753553.2

Publication Number: 1996692

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Language of the proceedings: EN

Title of invention:

LIQUID TREATMENT UNITIZED DOSE COMPOSITION

Patent Proprietor:

The Procter & Gamble Company

Opponents:

Colgate-Palmolive Company
Henkel AG & Co. KGaA

Headword:

UNITIZED DOSE COMPOSITION / Procter & Gamble

Relevant legal provisions:

EPC Art. 56

Keyword:

Inventive step - non-obvious alternative

Decisions cited:

Catchword:



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Case Number: T 0910/16 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 17 July 2019

Appellant: Henkel AG & Co. KGaA
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Respondent: The Procter & Gamble Company
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
15 February 2016 maintaining European Patent
No. 1996692 in amended form.**

Composition of the Board:

Chairman J.-M. Schwaller
Members: P. Ammendola
 R. Cramer

Summary of Facts and Submissions

I. The appeal was filed by opponent 2 (hereinafter "the appellant") against the interlocutory decision of the opposition division to maintain European patent Nr. 1 996 692 in amended form according to the Auxiliary Request 2 of 15 January 2016 (hereinafter "Main request"), claim 1 of which defines the following **pearlescent unitary dose composition** (hereinafter "PUD composition"):

"1. A pearlescent unitary dose composition comprising a water-soluble film encapsulating a liquid treatment composition suitable for use as a laundry or hard surface cleaning composition having turbidity of greater than 5 and less than 3000 NTU, said composition comprising from 0.01% to 2.0% by weight of the composition of a pearlescent agent, and wherein the pearlescent agent comprises from 0.01% to 2.0% by weight of the composition of an inorganic pearlescent agent, from 2% to 15% by weight of the composition of water and a rheology modifier, wherein the inorganic pearlescent agent is selected from the group consisting of mica, metal oxide coated mica, bismuth oxychloride coated mica, bismuth oxychloride, glass, metal oxide coated glass and mixtures thereof and wherein the D0.99 volume particle size of the pearlescent agent is less than 50 μm ."

II. In its statement of grounds of appeal the appellant only disputed the finding of the opposition division that the subject-matter of maintained claim 1 represented a non-obvious alternative to the prior art disclosed in D1 (US 2004/992438 A1).

III. With its reply the patent proprietor (hereinafter "the respondent") filed, *inter alia*, a set of amended claims labelled "First Auxiliary Request".

IV. At the oral proceedings the question whether claim 1 of the main request met the requirements of Article 56 EPC starting from document D1 as closest prior art was discussed with the parties. The appellant also referred to document D3 (US 5,089,148 A).

At the closure of the debate, the final requests of the parties were as follows:

The appellant requested that the decision under appeal be set aside and that the patent be revoked.

The respondent requested that the appeal be dismissed and the patent be upheld in the version maintained by the opposition division (Main Request), or alternatively that the decision under appeal be set aside and the patent be maintained on the basis of the claims of the First Auxiliary Request filed with the reply to the statement of grounds of appeal.

No requests were filed by Opponent 1.

V. The appellant argued in essence that the opposition division correctly identified the turbidity range, the quantity and the particle size of the pearlescent agent as the three features distinguishing the PUD composition of maintained claim 1 from those disclosed in particular by the combination of claims 24 and 29 and of paragraph [0158] of D1, which are defined as comprising "pearlisers such as mica". However, these distinguishing features were independent from each other and produced no particular technical effect, and

so the appellant concluded that each of these features was the result of an arbitrary selection among normal alternatives. Thus, the composition of maintained claim 1 was just an obvious alternative to the prior art disclosed in D1.

- VI. The respondent argued that the skilled person would have no motivation for specifically carrying out those modifications of the prior art disclosed in D1 that were necessary for arriving at the subject-matter of the maintained claims. Moreover, there was no evidence on file demonstrating that the features distinguishing the claimed subject-matter from D1 were normal for PUD compositions.
- VII. No submissions as to the substance of the case were filed by Opponent 1.

Reasons for the Decision

Main Request - Inventive step

1. Closest prior art - technical problem solved

It is common ground among the parties that:

- (a) the closest prior art is represented by the PUD compositions disclosed in D1 (in particular the combination of claims 29 and 24 with paragraph [0158]) that are made of a water-soluble film packing a substantially non-aqueous suspension and which comprise a structured surfactant composition and, possibly, also "pearlisers such as mica".

(b) the PUD composition of maintained claim 1 differs from this prior art in three features, namely:

- the turbidity range ("*of greater than 5 and less than 3000 NTU*");
- the pearlescent agent's quantity range ("*from 0.01% to 2.0% by weight of the composition*");
- the pearlescent agent's particle size ("*the D0.99 volume particle size of the pearlescent agent is less than 50 μ m*").

(a) the sole technical problem plausibly solved by the subject-matter of maintained claim 1 vis-à-vis the prior art of departure was the provision of an alternative to this latter, i.e. the provision of further PUD compositions comprising a water-soluble film (and thus with a low water content).

The board sees no reason to take a different stance on any of these points.

2. Obviousness of the solution

2.1 In appellant's view a skilled person searching for further PUD compositions would have arrived at the subject-matter of maintained claim 1 by simply making three (independent and) arbitrary selections among normal alternatives for PUD compositions.

2.2 The board notes however that, as also stressed by the respondent, the appellant has provided no evidence demonstrating that any of the three distinguishing features would be a normal alternative for PUD compositions.

In particular D1 contains no general teaching or specific example of PUD compositions with a turbidity as required in maintained claim 1, nor does it disclose the possibility to use in such PUD compositions:

- pearlescent agents with a D_{0,99} of less than 50µm, or
- amounts of pearlescent agents in the 0.01 to 2.0 % by weight range.

Paragraph [0199] of D1, referred to by the appellant, which discloses certain particle size ranges for the "suspended material" undisputedly relates to "Agrochemical Suspensions" (see also [0188] and [0197]) and not to PUD compositions.

2.3 The board also stresses the undisputed fact that document D3, i.e. the only other document cited by the appellant as possibly relevant in respect of the particle size of certain pearlescent agents, is a patent document that does not refer to PUD compositions, but only to liquid fabric conditioners (mostly made of water).

2.4 Hence, the appellant failed to provide any evidence demonstrating that the skilled formulator of a PUD composition would have considered normal for such composition:

- to display a turbidity as that required in maintained claim 1 and/or
- to comprise pearlescent agents with a D_{0,99} of less than 50µm and/or
- to comprise 0.01 to 2.0 % by weight of pearlescent agent.

2.5 If only for this reason the board finds it unconvincing the appellant's allegation that each of these features

only resulted from an arbitrary selection among the normal alternatives for PUD composition.

2.6 Thus, the subject-matter of claim 1 of this request (and by the same token that of claims 2 and 3 which depend thereon) is found to provide a non-obvious alternative to the prior art of departure.

3. It follows that said claims are found not objectionable under Article 56 EPC, and the board thus does not see any reason to reverse the findings of the opposition division.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



M. Patin

J.-M. Schwaller

Decision electronically authenticated