

Internal distribution code:

- (A) [-] Publication in OJ
(B) [-] To Chairmen and Members
(C) [-] To Chairmen
(D) [X] No distribution

**Datasheet for the decision
of 8 June 2017**

Case Number: T 1454/16 - 3.3.07

Application Number: 11175483.4

Publication Number: 2497459

IPC: A61K9/00, A61K31/00, A61K31/42,
A61K45/06, A61P31/02

Language of the proceedings: EN

Title of invention:
Methods of reducing microbial contamination

Applicant:
3M Innovative Properties Co.

Relevant legal provisions:
RPBA Art. 13
EPC Art. 76(1), 111(1)

Keyword:
Amended request - accepted (yes)
Divisional application - subject-matter extends beyond content
of earlier application (no, after amendment)
Appeal decision - remittal to the department of first instance
(yes)



Beschwerdekammern
Boards of Appeal
Chambres de recours

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 1454/16 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 8 June 2017

Appellant: 3M Innovative Properties Co.
(Applicant) P.O. Box 33427
St. Paul, MN 55133-3427 (US)

Representative: Vossius & Partner
Patentanwälte Rechtsanwälte mbB
Siebertstrasse 3
81675 München (DE)

Decision under appeal: **Decision of the Examining Division of the European Patent Office posted on 21 December 2015 refusing European patent application No. 11175483.4 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman D. Boulois
Members: R. Hauss
Y. Podbielski

Summary of Facts and Submissions

- I. The present appeal lies from the decision of the examining division, announced on 26 November 2015 and posted on 21 December 2015, refusing European patent application No. 11 175 483.4, which is a divisional of European patent application No. 06 738 111.1 (the parent application).
- II. The decision under appeal was based on a main request and three auxiliary requests. Independent claims 1 and 2 of the **main request** read as follows:
- "1. An antimicrobial composition for use in delaying the onset of an infection or preventing an infection caused by a microbial organism in an internal cavity of a subject, wherein the antimicrobial composition comprises:*
- an effective amount of an antimicrobial component comprising one or more antimicrobial lipid antiseptics comprising one or more fatty acid esters of a polyhydric alcohol, one or more fatty ethers of a polyhydric alcohol, or alkoxyated derivatives of either or both of the ester and ether, or combinations thereof;*
- wherein the antimicrobial composition includes the one or more antimicrobial lipids in a total amount of at least 0.25 wt-%, based on the total weight of the antimicrobial composition;*
- a hydrophilic component; and*
- a surfactant component distinct from the antimicrobial component;*
- wherein the antimicrobial composition is to be administered in a method comprising the steps of:*

contacting at least a portion of the interior surface of an opening leading to the internal cavity with the antimicrobial composition; and subsequently at least partially inserting an instrument into the opening.

2. Use of an antimicrobial component for the preparation of an antimicrobial composition for delaying the onset of an infection or preventing an infection caused by a microbial organism in an internal cavity of a subject, wherein the antimicrobial composition comprises:

an effective amount of an antimicrobial component comprising one or more antimicrobial lipid antiseptics comprising one or more fatty acid esters of a polyhydric alcohol, one or more fatty ethers of a polyhydric alcohol, or alkoxyated derivatives of either or both of the ester and ether, or combinations thereof; wherein the antimicrobial composition includes the one or more antimicrobial lipids in a total amount of at least 0.25 wt-%, based on the total weight of the antimicrobial composition;

a hydrophilic component; and

a surfactant component distinct from the antimicrobial component;

wherein the antimicrobial composition is to be administered in a method comprising the steps of: contacting at least a portion of the interior surface of an opening leading to the internal cavity with the antimicrobial composition; and subsequently at least partially inserting an instrument into the opening."

III. In the decision under appeal, the examining division found that the subject-matter of independent claims 1 and 2 of the main request and of all auxiliary requests went beyond the content of the parent application as originally filed (Article 76(1) EPC).

IV. The applicant (appellant) lodged an appeal against that decision. With the statement setting out the grounds of appeal, the appellant filed a main request and three auxiliary requests which were identical to the requests considered in the decision under appeal.

V. In a communication issued in preparation for oral proceedings, the board expressed its preliminary opinion that claims 1 and 2 of the main request did not comply with Article 76(1) EPC:

- In particular, the board explained that the subject-matter described in independent claim 6 or on page 7, lines 25 to 28 of the parent application could not provide support for the entire scope of claims 1 and 2 of the main request, since it covered only embodiments according to which the antimicrobial composition contained a hydrophilic vehicle. The term "vehicle", as understood by a person skilled in the art and also as explicitly defined in the parent application, referred to a component which was present in a large proportion. Claims 1 and 2 of the main request no longer contained the requirement that the hydrophilic component be the vehicle (i.e. present in a large proportion).

- Nor could a specific disclosure of the required combination of technical features be found elsewhere in the parent application.

VI. Oral proceedings took place on 8 June 2017. The appellant submitted an amended main request and three amended auxiliary requests.

Claims 1 and 2 of the **amended main request** are identical to claims 1 and 2 of the previous main request, except that the term "*hydrophilic component*" is replaced by "*hydrophilic vehicle*".

VII. The appellant's arguments may be summarised as follows:

The amended main request had been filed in reaction to a new point raised by the board, whose reasoning was not identical to that previously given by the examining division, inasmuch as the examining division had not commented on the features "vehicle" vs. "component". The amended request, which re-introduced the quantitative feature of a hydrophilic "vehicle", should therefore be admitted into the proceedings.

The support required pursuant to Article 76(1) EPC for claims 1 and 2 of the main request could be found on page 17, lines 17 to 21 and page 7, lines 25 to 28 of the parent application as filed, as far as the general composition and method of administration were concerned. The limitations with regard to a specific antimicrobial lipid antiseptic and a lower concentration limit for such components was based on page 32, lines 17 to 20 and page 38, lines 1 to 6 of the parent application as filed. The introduction of these further limitations was allowable, as they concerned a preferred embodiment of the antimicrobial component.

VIII. The appellant requested that the decision under appeal be set aside and that the case be remitted to the examining division for further prosecution on the basis of the main request or one of the first to third auxiliary requests filed during the oral proceedings before the board.

Reasons for the Decision

1. Admission of the amended main request (Article 13 RPBA)

The amended main request was drafted to overcome the board's objections under Article 76(1) EPC to the independent claims, and does not raise any new issues. Hence the board had no objection to admitting it into the proceedings.

2. Amendments (Article 76(1) EPC)

- 2.1 The purpose (or use) and method of administration as defined in claims 1 and 2 of the present main request are based on the general disclosure on page 6, lines 3 to 7 and page 17, lines 17 to 21 of the parent application as filed, which applies to all embodiments envisaged in that application.

- 2.2 The general combination of mandatory components of the antimicrobial composition as required in claims 1 and 2 of the present main request (viz. an effective amount of an antimicrobial component, a hydrophilic vehicle and a surfactant component distinct from the antimicrobial component) finds support in the embodiment described on page 7, lines 25 to 28 of the parent application as filed, where it is specified that in certain embodiments "the antimicrobial composition includes: an effective amount of an antimicrobial component comprising an antiseptic, an antibiotic, or combinations thereof; a hydrophilic vehicle (preferably other than water); and a surfactant component distinct from the antimicrobial component".

- 2.3 The antimicrobial component according to independent claims 1 and 2 of the present main request has been further restricted to a preferred embodiment which

includes certain antimicrobial lipid antiseptics at a specified total minimum concentration. These preferred aspects of the antimicrobial component find support in the following passages of the parent application:

According to the general disclosure of the parent application as filed, the antimicrobial component preferably includes antiseptics. The antiseptics may be antimicrobial lipids preferably including one or more fatty acid esters of a polyhydric alcohol, fatty ethers of a polyhydric alcohol, or alkoxyated derivatives thereof (of either or both of the ester and ether), or combinations thereof (see page 19, lines 29 to 30; page 20, line 6 and page 32, lines 17 to 20). Such compositions containing antimicrobial lipids preferably include a total amount of such material of at least 0.01 wt-%, more preferably at least 0.1 wt-%, even more preferably at least 0.25 wt-% based on the "ready to use" or "as used" composition (page 38, lines 1 to 6). Thus these preferred minimum concentrations apply to any embodiment including antimicrobial lipids.

2.4 As a consequence, the subject-matter of independent claims 1 and 2 of the main request does not extend beyond the content of the parent application as filed (Article 76(1) EPC).

3. Remittal (Article 111(1) EPC)

The decision under appeal concerns only objections raised under Article 76(1) EPC against claims 1 and 2. This issue is also the subject of the present appeal. Since the examining division has not yet decided on any other issue, the board considers it appropriate to remit the case, in accordance with the appellant's request, in order to enable the full case to be considered by two instances.

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

D. Boulois

Decision electronically authenticated