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**Datasheet for the decision  
of 12 September 2019**

**Case Number:** T 1720/17 - 3.3.07

**Application Number:** 02773955.6

**Publication Number:** 1443885

**IPC:** A61Q5/02, A61Q5/12, A61Q19/10,  
A61K8/25, A61K8/46, A61Q5/00,  
A61K8/81, A61K8/02, A61K8/04,  
C11D1/52, C11D3/04, C11D3/20,  
C11D3/37, C11D17/00

**Language of the proceedings:** EN

**Title of invention:**  
COMPOSITION CONTAINING A CATIONIC POLYMER AND WATER INSOLUBLE  
SOLID MATERIAL

**Patent Proprietor:**  
THE PROCTER & GAMBLE COMPANY

**Opponent:**  
Beiersdorf AG

**Headword:**  
Cationic polymer/P&G

**Relevant legal provisions:**  
EPC Art. 123(2), 123(3)

**Keyword:**

Amendments main request and auxiliary requests 1,3,6,7,9 -  
added subject-matter (yes) auxiliary requests 2,4,5,8,10,11 -  
broadening of claim (yes)



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Case Number: T 1720/17 - 3.3.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.07**  
**of 12 September 2019**

**Appellant:** Beiersdorf AG  
(Opponent) Unnastrasse 48  
20253 Hamburg (DE)

**Respondent:** THE PROCTER & GAMBLE COMPANY  
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Cincinnati, OH 45202 (US)

**Representative:** Simpson, Tobias Rutger  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
12 June 2017 concerning maintenance of the  
European Patent No. 1443885 in amended form.**

**Composition of the Board:**

**Chairman** J. Riolo  
**Members:** A. Usuelli  
C. Schmidt

## Summary of Facts and Submissions

- I. European patent 1 443 885 was opposed on the grounds that its subject-matter lacked novelty and inventive step and extended beyond the content of the application as filed.

The first part of claim 1 of the patent read as follows:

"1. A shampoo composition comprising:

- a) from 5 to 50% by weight of the composition of an anionic surfactant;
  - b) from 0.05% to 10% by weight of a dispersed, water insoluble, solid, temperature stable particle that is not a liquid or gas at any temperature below 95°C;
  - c) from 0.025% to 5% by weight of an organic, non crosslinked, cationic homopolymer or copolymer having a cationic charge density of from 3 meq/gm to 8 meq/gm and an average molecular weight of from 1,000 to 2,000,000;
  - d) from 0.1% to 5%, by weight, of a phase separation initiator selected from the group consisting of electrolytes, amphiphiles and mixtures thereof; and
  - e) from 50% to 95%, by weight, of water,
- and wherein said cationic homopolymer or copolymer promotes the formation of a microscopic-phase separation of lyotropic liquid crystals in said composition, and further wherein said cationic homopolymer or copolymer has the following structure:..."

The second part of the claim disclosed the chemical structure of component c).

- II. The appeal of the opponent ("the appellant") lies against the decision of the opposition division according to which the claims of auxiliary request 1 filed during the oral proceedings held on 4 May 2017 met the requirements of the Convention.

The first part of claim 1 of the request maintained by the opposition division was identical to the first part of claim 1 as granted (see point I above). Claim 1 of the request maintained by the opposition division differed from claim 1 of the patent only in the definition of the chemical structure of component c) (second part of the claim).

- III. With regard to the assessment of the requirement of Article 123(2) EPC, the opposition division maintained that the feature "... *said cationic homopolymer or copolymer promotes the formation of a microscopic-phase separation of lyotropic liquid crystals...*" of claim 1 of auxiliary request 1, was based on a passage on page 3 of the original application, stating that certain cationic polymers form microscopically-phase separate lyotropic liquid crystals.

- IV. In its statement setting out the grounds of appeal filed on 10 October 2017 the appellant maintained *inter alia* that the amendments introduced into claim 1 of the request maintained by the opposition division did not comply with Article 123(2) EPC. With the same letter, it submitted the following document.

D17: The new Oxford dictionary of English - 1998

- V. In its reply to the appeal of the opponent filed on 27 February 2018 the patent proprietor ("the respondent") requested that the patent be maintained on

the basis of the request allowed by the opposition division or alternatively on the basis of one of 11 auxiliary requests.

As claim 1 of the main request, claim 1 of auxiliary requests 1, 3, 6, 7 and 9 recited the following feature:

*"...wherein said cationic homopolymer or copolymer **promotes the formation** of a microscopic-phase separation of lyotropic liquid crystals in said composition..."*, (bold type added by the Board).

This feature was modified as follows in claim 1 of auxiliary requests 2, 4, 5, 8, 10 and 11:

*"...wherein said cationic homopolymer or copolymer **forms** a microscopic-phase separation of lyotropic liquid crystals in said composition..."*, (bold type added by the Board).

- VI. Oral proceedings were held on 12 September 2019.
- VII. The appellant's arguments, as far as they are relevant to the present decision, can be summarised as follows:

The term "promotes" used in claim 1 of the main request and of auxiliary requests 1, 3, 6, 7 and 9 indicated that the cationic polymer stimulated the formation of a microscopic-phase separation of lyotropic liquid crystal. This term did not require the polymer to be part of the lyotropic liquid crystal. In contrast, the term "forms", used in the original application, did require the polymer to be part of the lyotropic liquid crystal. Hence, the introduction into claim 1 of the

feature "promotes" did not comply with the requirements of Article 123(2) EPC.

The cationic polymers included in the compositions of claim 1 of auxiliary request 2 were not the same cationic polymers defined in claim 1 of the patent in view of the use of the term "forms" instead of "promotes". Thus, this request did not comply with Article 123(3) EPC. The same conclusion applied to auxiliary requests 4, 5, 8, 10 and 11.

VIII. The respondent's arguments, as far as they are relevant to the present decision, can be summarised as follows:

The skilled person would have understood from the original description that the cationic polymer formed the lyotropic liquid crystal. The feature "promotes the formation" used in claim 1 of the main request was entirely consistent with the content of the application as filed and therefore it did not add any new subject-matter.

The term "forms" used in claim 1 of auxiliary requests 2, 4, 5, 8, 10 and 11 had the effect of narrowing the scope of protection of the patent. Thus, these requests did not contravene the requirements of Article 123(3) EPC.

IX. The appellant requested that the decision under appeal be set aside and that European patent No.1 443 885 be revoked.

X. The respondent requested that the appeal be dismissed, i.e. that the patent be maintained on the basis of the request allowed by the opposition division (main request), or alternatively, that the patent be

maintained on the basis of one of the auxiliary requests 1 to 11 filed with a letter dated 27 February 2018.

## **Reasons for the Decision**

### Main request (request allowed by the opposition division)

1. Article 123(2) EPC

1.1 According to claim 1 the cationic polymer (component c) of the composition) "promotes the formation of a microscopic-phase separation of lyotropic liquid crystals...". As remarked by the appellant, the expression "promotes the formation" is not used anywhere in the original application.

In the respondent's view, the skilled person reading claim 1 in light of the teaching of the patent would understand that the contested expression means that the cationic polymer is part of the lyotropic liquid crystal. This interpretation would be in line with several passages of the original description. Hence, the introduction of the contested feature would not result in the addition of new subject-matter.

1.2 As also explained by the appellant with reference to D17, the verb "promote" indicates the capacity to support or actively encourage something to occur. Thus, a polymer that promotes the formation of a microscopic-phase separation is a polymer that actively encourages said separation. In other words the polymer facilitates or induces the separation.



1.3 The original application does not disclose the technical information that the cationic polymer acts as an agent that promotes the formation of a microscopic-phase separation of lyotropic liquid crystals. Several passages of the original description indicate that the cationic polymer forms the lyotropic liquid crystals, i.e. it is a constituent thereof (see for instance, page 3, lines 28 to 31 and page 18, lines 20 to 22).

However, the indication that a substance promotes the formation of lyotropic liquid crystals does not necessarily imply that this substance is a constituent of the liquid crystal. Conversely, the indication that a substance forms a lyotropic liquid crystal does not necessarily imply that this substance promotes the formation of the lyotropic liquid crystal structure.

In this regard, the Board also notes that the original description recognises that a substance may act as a promoter of a microscopic-phase separation of lyotropic liquid crystals. This role is however attributed to component d) of the shampoo composition, namely to the phase separator initiators which are electrolytes or amphiphilic substances capable of inducing the phase separation (page 27, lines 23 to 26). There is no indication in the original application that the cationic polymers (components c) of the shampoo) may have the same function.

1.4 The respondent does not dispute that the original application does not disclose the concept of a cationic polymer capable of promoting the microscopic-phase separation of lyotropic liquid crystals. In its opinion however, the skilled person would simply disregard the

meaning of the term "promotes" and interpret claim 1 on the basis of the description.

- 1.4.1 However, several decisions of the Boards of Appeal have affirmed that a discrepancy between the claims and the description is not a valid reason to ignore the clear linguistic structure of a claim and interpret it differently or give a different meaning to a feature which is in itself clear (see Case Law of the Boards of Appeal of the EPO, 9th edition 2019, II.A.6.3.1).

The fact that in claim 1 as granted the cationic polymer is qualified by a functional requirement (i.e. the ability to promote the microscopic-phase separation of lyotropic liquid crystals), which is not disclosed in the description, does not imply that the claim lacks clarity.

Hence, the respondent's argument is not persuasive.

- 1.5 In summary, the original application does not disclose the information that component c) is a cationic polymer capable of promoting the microscopic-phase separation of lyotropic liquid crystals. It follows that claim 1 does not comply with the requirements of Article 123(2) EPC.

Auxiliary requests 1, 3, 6, 7 and 9

2. Claim 1 of auxiliary requests 1, 3, 6, 7 and 9 indicates that the cationic polymer "promotes the formation of a microscopic-phase separation of lyotropic liquid crystals". Thus, these requests fail to comply with the requirements of Article 123(2) EPC for the reasons provided above in respect of the main request.

Auxiliary requests 2, 4, 5, 8, 10 and 11

3. In the shampoo compositions defined in claim 1 of auxiliary requests 2, 4, 5, 8, 10 and 11 component c) is a cationic polymer that "forms a microscopic-phase separation of lyotropic liquid crystals in said composition"

3.1 Thus, component c) no longer needs to be a cationic polymer that has the property of promoting the formation of a microscopic-phase separation of lyotropic liquid crystals as required by claim 1 of the patent. In other words, the amendment introduced into auxiliary requests 2, 4, 5, 8, 10 and 11 has the effect of extending the definition of component c) to a larger class of cationic polymers that also includes polymers that do not promote the formation of a microscopic-phase separation of lyotropic liquid crystals and therefore are not included in claim 1 as granted.

It follows from the above considerations that claim 1 of auxiliary requests 2, 4, 5, 8, 10 and 11 covers shampoo compositions which are not included in claim 1 of the patent. Hence, these requests do not comply with the requirements of Article 123(3) EPC.

**Order**

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

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



B. Atienza Vivancos

J. Riolo

Decision electronically authenticated