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**Datasheet for the decision
of 23 January 2020**

Case Number: T 2664/17 - 3.3.07

Application Number: 10779423.2

Publication Number: 2637630

IPC: A61K8/03, A61K8/34, A61K8/36,
A61K8/368, A61K8/49, A61Q11/00

Language of the proceedings: EN

Title of invention:

ORAL CARE PRODUCT AND METHODS OF USE AND MANUFACTURE THEREOF

Applicant:

Colgate-Palmolive Company

Headword:

Oral Care Product / COLGATE-PALMOLIVE

Relevant legal provisions:

EPC Art. 53(c), 123(2)

Keyword:

Exceptions to patentability - method for treatment by therapy
Amendments - allowable (no)



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Case Number: T 2664/17 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 23 January 2020

Appellant: Colgate-Palmolive Company
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 12 July 2017
refusing European patent application No.
10779423.2 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman A. Uselli
Members: E. Duval
C. Schmidt

Summary of Facts and Submissions

- I. The appeal was filed by the appellant (applicant) against the decision of the examining division to refuse the European patent application No 10779423.2 (hereinafter "the application").
- II. The decision was based on a main request and on auxiliary requests 1 and 2, all filed by letter dated 19 May 2017.

Claim 1 of each request related to a dual phase mouthwash comprising a hydrophilic phase, a hydrophobic phase, a hydrotrope and preservatives as defined therein.

- III. The examining division decided that neither the main request nor auxiliary requests 1 and 2 fulfilled the requirements of Article 56 EPC. Claim 1 of auxiliary request 2 was additionally found unclear.
- IV. With the statement setting out the grounds of appeal, the appellant filed a main request and auxiliary requests 1-4.

Claim 1 of each of the main request and auxiliary requests 1-4 related to a dual phase mouthwash comprising a hydrophilic phase, a hydrophobic phase, a hydrotrope and preservatives as defined therein.

In particular, claim 1 of auxiliary request 2 read as follows:

" A dual phase mouthwash comprising
- a hydrophilic phase,
- a hydrophobic phase,

- a hydrotrope, and
- at least two preservatives selected from
 - (i) 0.1 to 0.5% by weight sodium benzoate,
 - (ii) 0.05 to 0.5% by weight potassium sorbate, and
 - (iii) 0.0005 to 0.15% by weight methylisothiazolinone, whereinthe hydrotrope component comprises glycerin and/or propylene glycol which are the humectants of the dual phase mouthwash."

Furthermore, each of the main request and auxiliary requests 1-4 contained the same claim 11 reading as follows:

"A method to improve oral health comprising applying an effective amount of a mouthwash of any of the preceding claims further comprising a whitening agent to the oral cavity of a subject in need thereof to whiten teeth."

V. The Board summoned the appellant to oral proceedings.

In a communication pursuant to Article 15(1) RPBA, the Board expressed the view that claim 1 of the main request and of auxiliary requests 1, 3 and 4 did not comply with Article 56 EPC. Concerning auxiliary request 2, the Board considered that it was questionable whether the amendments overcame the lack of inventive step noted for the main request. Additionally, the Board expressed the preliminary opinion that claim 11 of the main request contravened the requirements of Article 53(c) EPC. None of the auxiliary requests appeared to meet the requirements of Article 53(c) EPC or, in the case of auxiliary request 2, of Article 123(2) EPC.

VI. By letter dated 19 December 2019, the appellant filed auxiliary requests 5 and 6, both of which comprised a claim 9 identical to claim 11 of the main request. The appellant's letter was silent about the objections pursuant to Articles 53(c) and 123(2) EPC raised in the Board's communication (see V. above).

VII. By letter dated 14 January 2019, the appellant announced that it would not attend the scheduled oral proceedings, but instead requested a decision according to the state of the file.

The oral proceedings were cancelled.

VIII. The appellant requests that the decision under appeal be set aside and that a patent be granted on the basis of the main request filed with the statement of grounds of appeal or, in the alternative, on the basis of one of auxiliary requests 1-4, each filed with the statement of grounds of appeal, or auxiliary requests 5 or 6, both filed by letter dated 19 December 2019.

Reasons for the Decision

Cancellation of the oral proceedings

1. In the present appeal proceedings, the appellant requested oral proceedings as an auxiliary measure. Oral proceedings were initially appointed as a result of the appellant's request.

By letter dated 14 January 2019, the appellant subsequently stated that it would not attend the oral proceedings. Such a statement is normally treated as equivalent to a withdrawal of the request for oral proceedings (see Case Law of the Boards of Appeal of

the European Patent Office, 9th edition 2019, III.C.4.3.2).

The present decision can accordingly be issued without oral proceedings taking place.

Main request

2. Article 53(c) EPC

As noted in the communication pursuant to Article 15(1) RPBA (see point 2 of the communication), claim 11 of the main request pertains to a "method to improve oral health" and therefore relates to a method for treatment of the human or animal body by therapy, which is excluded from patentability by Article 53(c) EPC. The appellant did not submit any argument in response to this objection. The Board notes that the therapeutic nature of the claimed method of improving oral health is confirmed by the description (see paragraph [0032]).

For this reason at least, the main request must be rejected.

Auxiliary requests

3. Article 53(c) EPC, auxiliary requests 1-6

Claim 11 of each of the auxiliary requests 1-4, and claim 9 of each of the auxiliary requests 5 and 6, is identical to claim 11 of the main request. As a result, none of these requests meets the requirements of Article 53(c) EPC.

4. Article 123(2) EPC, claim 1 of auxiliary request 2

Claim 1 of auxiliary request 2 specifies that the hydrotrope component comprises glycerin and/or propylene glycol "which are the humectants of the dual phase mouthwash". According to the appellant's proposed interpretation, this expression excludes the use of further humectants.

As noted in the communication pursuant to Article 15(1) RPBA (see point 3.2 of the communication), the application as filed provides no basis for the exclusive use of glycerin and/or propylene glycol as humectants. Paragraph [0029] mentions a mixture of glycerine and sorbitol, rather than propylene glycol, as the humectants. A mixture of glycerin and propylene glycol would result from two simultaneous selections from the list disclosed in item 1.0.34 of paragraph [0010]. The appellant did not submit any argument in response to this objection. Accordingly, auxiliary request 2 does not meet the requirements of Article 123(2) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



B. Atienza Vivancos

A. Usuelli

Decision electronically authenticated