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Datasheet for the decision of 17 September 2021

Case Number: T 1919/18 - 3.3.03

Application Number: 10155212.3

Publication Number: 2187243

IPC: G02B1/04, C09D11/10, C09D11/00, B29D11/00, G02C7/04

Language of the proceedings: EN

Title of invention:
Colored ink for pad transfer printing of silicone hydrogel lenses

Patent Proprietor:
Alcon Inc.

Opponent:
Johnson & Johnson Vision Care, Inc.

Relevant legal provisions:
EPC Art. 100(c), 123(2)

Keyword:
Main request - subject-matter extends beyond content of the application as filed (yes)
Auxiliary Request 1 - subject-matter extends beyond the content of the application as filed (no) - Auxiliary Request 1 allowable (yes) - absence of reaction of the respondent

Decisions cited:
G 0010/91, G 0009/92, G 0004/93, G 0001/99, G 0002/10, G 0001/16, T 0856/92, T 0149/02

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Case Number: T 1919/18 - 3.3.03

D E C I S I O N
of Technical Board of Appeal 3.3.03
of 17 September 2021

Appellant: (Patent Proprietor)	Alcon Inc. Rue Louis-d'Affry 6 1701 Fribourg (CH)
Representative:	Breuer, Markus Brienner Straße 1 80333 München (DE)
Respondent: (Opponent)	Johnson & Johnson Vision Care, Inc. 7500 Centurion Parkway, Suite 100 Jacksonville, Florida 32256 (US)
Representative:	Carpmaels & Ransford LLP One Southampton Row London WC1B 5HA (GB)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 5 June 2018 concerning maintenance of the European Patent No. 2187243 in amended form.**

Composition of the Board:

Chairman	O. Dury
Members:	F. Rousseau
	C. Brandt

Summary of Facts and Submissions

I. The appeal lies from the interlocutory decision of the opposition division posted on 5 June 2018 according to which European patent No. 2 187 243 as amended according to a set of claims labelled "Auxiliary Request 2" and a description adapted thereto, both filed during the oral proceedings on 18 April 2018, met the requirements of the EPC. The contested decision was also based on the patent as granted (rejection of the opposition) as the main request and a set of claims labelled "Auxiliary Request 1" also filed during the oral proceedings.

II. The independent claims of the claim requests underlying the contested decision read as follows (for ease of understanding the Board has indicated by comparison to the text of claims 1 and 13 as filed additions in underlined, and deletions in strikethrough):

Main Request (patent as granted)

"1. An ink comprising at least one colorant~~,~~; at least one first functionalizing vinylic monomer containing at least one functional group selected from the group consisting of hydroxyl group -OH, amino group -NHR (wherein R is hydrogen or C_1 to C_8 alkyl), carboxylic group -COOH, epoxy group, amide group -CONHR, and combinations thereof; a silicone-containing binder polymer~~,~~ ~~an adhesion promoter,~~; and optionally a diluent, wherein the silicone-containing binder polymer is a copolymerization product of a polymerizable mixture including

(i) at least one hydrophilic vinylic monomer;
(ii) at least one second functionalizing vinylic monomer containing at least one functional group selected from the group consisting of hydroxyl group -OH, amino group -NHR (wherein R is hydrogen or C_1 to C_8 alkyl), carboxylic group -COOH, epoxy group, amide group -CONHR, and combinations thereof;
(iii) at least one silicone-containing vinylic monomer or macromer, and
(iv) optionally one or more components selected from the group consisting of a polymerization initiator, a chain transfer agent, and a solvent.

1113. A method for making a colored silicone hydrogel contact lens, comprising the steps of:

(a) applying a color coat to at least a portion of at least one of the molding surfaces of a lens mold with an ink, wherein the ink comprises at least one colorant ; at least one first functionalizing vinylic monomer containing at least one functional group selected from the group consisting of hydroxyl group -OH, amino group -NHR (wherein R is hydrogen or C_1 to C_8 alkyl), carboxylic group -COOH, epoxy group, amide group -CONHR, and combinations thereof;, a silicone-containing binder polymer,; and optionally a diluent, wherein the silicone-containing binder polymer is a copolymerization product of a polymerizable mixture including

(i) at least one hydrophilic vinylic monomer;
(ii) at least one second functionalizing vinylic monomer containing at least one functional group selected from the group consisting of hydroxyl group -OH, amino group -NHR (wherein R is hydrogen or C_1 to

C_8 alkyl), carboxylic group -COOH, epoxy group, amide group -CONHR, and combinations thereof;
(iii) at least one silicone-containing vinylic monomer or macromer, and
(iv) optionally one or more components selected from the group consisting of a polymerization initiator, a chain transfer agent, and a solvent,

wherein the lens mold includes a first mold half having a first molding surface defining the anterior surface of a contact lens and a second mold half having a second molding surface defining the posterior surface of the contact lens, wherein the first and second mold halves are configured to receive each other such that a contact lens forming cavity is formed between the first and second molding surfaces, wherein the colored coat contains a first surface exposed to the interior of the lens-forming cavity and a second surface in contact with the molding surface;
(b) partially or completely curing the ink printed on the mold to convert the colored coat to a colored film;
(c) dispensing a silicone hydrogel lens-forming material into the lens-forming cavity of the mold; and
(d) curing the lens-forming material within the lens-forming cavity to form the contact lens, whereby the colored film detaches from the molding surface and becomes integral with the body of the contact lens."

Claims 2 to 10 as granted were dependent claims defining inks in accordance with claim 1.

Auxiliary Request 1 (filed during the oral proceedings on 18 April 2018)

The claims of Auxiliary Request 1 differed from those of the patent as granted solely in that claim 1

specified in the same manner as in claim 1 as filed that the claimed ink comprised an adhesion promoter, the wording of dependent claim 7 being consequently adapted by deleting the expression "comprising an adhesion promoter".

Auxiliary Request 2 (filed during the oral proceedings on 18 April 2018)

The claims of Auxiliary Request 2 differed from those of Auxiliary Request 1 in that method claim 11 also specified that the ink composition used in said method also comprised an adhesion promoter.

III. The decision was taken having regard to the following documentary evidence amongst others:

D1: US 2001/0002416 A1
D2: US 5,034,166
D5: US 2004/0001181 A1
D8: US 4,857,072
D9: US 4,668,240.

IV. According to the reasons for the contested decision which are pertinent in the appeal proceedings:

(a) Claim 1 as granted differed from claim 1 as originally filed in that (1) the requirement to use an adhesion promoter had been removed and (2) the use of a first functionalizing vinylic monomer had been made mandatory. Whereas a basis for the "deletion" of an adhesion promoter could be found in claim 13 as originally filed and possibly in Example 2, Ink 3, a disclosure for the addition of a functionalizing monomer could be found in claim 9 dependent on claim 1 in combination with the

disclosure on page 17, lines 2 to 6. However, the application as filed did not provide a basis for the combination of "the removal of the adhesion promoter" and the simultaneous addition of a first functionalizing vinylic monomer. Also none of the embodiments showed an ink without an adhesion promoter but comprising a functionalizing vinylic monomer. Accordingly, the subject-matter of claim 1 as granted extended beyond the content of the application as filed and the main request was therefore not allowable.

(b) Claim 1 of Auxiliary Request 1 which had been amended by re-introducing the mandatory use of "an adhesion promoter" did not extend beyond the content of the application as filed. However, the application as filed did not disclose using an ink with a functionalizing vinylic monomer and without an adhesion promoter. Also the passage on page 21, lines 12 to 26 only disclosed the combination of adhesion promoter and one or more vinylic monomers. It was therefore concluded that the subject-matter of claim 11 extended beyond the content of the application as filed. For that reason, Auxiliary Request 1 was not allowable.

(c) Claims 1 and 11 of Auxiliary Request 2 met the requirements of Rule 80 EPC, Article 123(2) EPC, and Article 84 EPC. The objection that the method in accordance with claim 11 was not sufficiently disclosed to be carried out by the skilled person failed to convince, as the patent in suit taught in paragraphs [0087] to [0089] the underlying principles for making coloured silicon hydrogel contact lenses using the ink of granted claim 1. In addition, as shown with Ink 1 of Example 2, Ink 17

of Example 3 and the inks of Examples 4 and 5, the patent in suit provided at least one way to successfully prepare such lenses.

(d) The objection that the ink of claim 1 lacked novelty over each of references D1 and D2 also did not persuade. That conclusion was not based on the use of an adhesion promoter made mandatory in Auxiliary Request 2. Regarding inventive step, both parties agreed that the closest prior art was represented by the disclosure of D5, from which the claimed subject-matter differed by the use of an ink comprising a silicone-containing binder polymer as defined in claim 1 and an adhesion promoter. Whereas the use of an adhesion promoter was found to be obvious in the light of D8 or D9, that of a silicon binder-containing binder would not be arrived at by the skilled person when following the teaching of D5 alone or the combined teaching of D5 and D8. The opponent's objection that the subject-matter defined in Auxiliary Request 2 lacked an inventive step was therefore not convincing.

(e) It was therefore concluded that the patent could be maintained in amended form on the basis of Auxiliary Request 2.

V. The patent proprietor (appellant) lodged an appeal against the above decision.

VI. In preparation of oral proceedings the Board issued a communication dated 30 March 2021 including a preliminary opinion on the allowability of the requests on file.

VII. With letter of 18 August 2021 the opponent (respondent) informed the Board that it would not be attending the oral proceedings.

VIII. Oral proceedings before the Board were held by videoconference on 17 September 2021.

IX. The appellant's submissions, in so far as they are pertinent, may be derived from the reasons for the decision below. They are essentially as follows:

The subject-matter of claim 1 of the patent as granted was based on the disclosure on page 17, lines 2-11 of the application as filed to use a functionalizing vinylic monomer, which had to be read in the light of the definition in the application as filed of the inks described in the paragraph starting at page 4, line 3, in clause A-29 at page 41 or in claim 13. Claim 11 as granted was based on the same passage of the application as filed describing the use of the functionalizing vinylic monomer which had to read in the light of claim 13 as filed. Accordingly, the claims of the patent as granted did not extend beyond the content of the application as filed.

The passage on page 17, lines 2-11 of the application as filed could be read in the context of method claim 13 as filed, which resulted in the disclosure of the subject-matter of claim 11 of Auxiliary Request 1. Therefore, said claim 11 met the requirements of Article 123(2) EPC, contrary to the findings of the opposition division.

X. The appellant requested that the decision of the opposition division be set aside and the patent be maintained as granted, i.e. the opposition be rejected

(main request), or alternatively, that the patent be maintained in amended form on the basis of Auxiliary Request 1 submitted during the oral proceedings on 18 April 2018.

XI. The respondent did not file any request, nor made any submission in the appeal proceedings.

Reasons for the Decision

Main request

Article 100(c) EPC - Claim 1

1. In accordance with the established Case Law of the Boards of Appeal of the EPO, the relevant question to be decided in assessing whether the subject-matter of an amended claim extends beyond the content of the application as filed, is whether after the amendment the skilled person is presented with new technical information (see G 2/10 (OJ 2012, 376), point 4.5.1 of the Reasons and Case Law of the boards of Appeal, 9th edition 2019, II.E.1). In other words, the above mentioned amendment is only allowable if the skilled person would derive the resulting claimed subject-matter directly and unambiguously, using common general knowledge from the application as filed. This test referred to as "gold standard" was confirmed in decision G 1/16 (OJ 2018, A70) (points 17 and 18 for the Reasons).

2. According to the appellant's submissions the ink defining the subject-matter of granted claim 1 is disclosed in the application as filed in view of the

teaching at page 17, lines 2-11 that a functionalizing vinylic monomer as defined in granted claim 1 can be comprised in any ink of the invention, including that described for step (a) of method claim 13.

3. The passage on page 17, lines 2-11 describes that "*The ink of the invention comprises preferably one or more vinylic monomers or macromers, more preferably at least one functionalizing vinylic monomer containing at least one functional group selected from the group consisting of hydroxyl group -OH, amino group -NHR (wherein R is hydrogen or C_1 to C_8 alkyl), carboxylic group -COOH, epoxy group, amide group -CONHR, and combinations thereof*". The Board agrees with the appellant's submission that the reference to the ink of the invention in said passage at page 17 of the application as filed is understood by the skilled person as a direct and unambiguous indication that a functionalizing vinylic monomer as defined in said passage can be part not only of the ink defined with claim 1 of the application as filed, but also of the ink whose use is described in step (a) of method claim 13 of the application as filed. As noted by the appellant the same method is also disclosed at page 4, lines 3-21 of the description or in clause "A-29", at page 41 of the description as filed.

4. However, it is also undisputed that claim 13 of the application as filed concerns a method whose definition comprises a functional limitation, namely that "*the colored film detaches from the molding surface and becomes integral with the body of the contact lens*", i.e. a result obtained by said method. The ink defined in the method of claim 13 of the application as filed with feature (a) is therefore one which allows to meet said functional feature when used in the context of

said method. This information is missing in granted claim 1 whose definition only relies on the ingredients of the inks explicitly defined in claim 13 as filed and the functionalizing vinylic monomer disclosed on page 17, lines 2-11.

5. The question to be answered is therefore not only whether the teaching to use at least one functionalizing vinylic monomer as defined on page 17, lines 2-11 is understood by the skilled person to be applicable to ink (a) which is used for method of claim 13 of the application as filed, which the Board answers in the affirmative as indicated in above point 3. It is also whether said combination of ingredients explicitly disclosed by a combination of claim 13 and the passage at page 17, lines 2-11 of the application as filed can be taken in isolation or dissociated from the whole information given in said claim 13, in particular without defining that the ink of claim 13 is one which allows to meet the functional feature provided in said claim. In other words, the question arises whether the application as filed provides a direct and unambiguous disclosure that the ink as generally defined in granted claim 1 can achieve said functional features, if necessary after adjustment of variables of the method which do not concern the ink, i.e. without having recourse to an adjustment of the ink composition.

6. The appellant argued in this respect during the oral proceedings before the Board that the functional feature present in claim 13 as filed did not impose any limitation on the ink composition, i.e. did not imply additional features for the ink used in step (a) since many other factors were defined in the application as filed to be relevant for achieving said function, reference being made to a corona treatment of the mould

surface, to an adjustment of the degree of curing and to the formation of interpenetrating networks.

7. The Board agrees with the appellant insofar some of those factors are relevant, or might need to be taken into account to achieve said technical result. This, however, does not mean that those are necessarily independent of the ink formulation.

7.1 The application as filed defines in the last sentence of page 18 that "*an ink of the invention should have a good transferability of the colored coat from a mold to a contact lens and a good adhesion to the molded lens*", which according to the first paragraph of page 19 as filed means that "*a color image printed on a molding surface of a mold with the ink can be transferred completely onto a contact lens cured in that mold*" and that "*the colored coat (with a color image) generated on the lens with the ink can pass at least a finger rubbing test*". This in the Board's opinion is for the skilled person a similar way to express the functional feature of claim 13 as filed.

7.2 As indicated on page 19, lines 17-20 of the application as filed, a good transferability and adhesion may be achieved by crosslinking of the binder polymer to the lens polymer and/or by interpenetrating network formation during curing of the lens-forming material in the mold. According to that passage, interpenetrating networks are also formed when the binder polymer is crosslinked to the lens polymer. This passage already provides an unambiguous indication that the crosslinking of the binder polymer to the lens polymer and/or the formation of interpenetrating networks which is described as a means to achieve the functional feature defined in claim 13 as filed is rather

prominently dependent on the nature of the binder polymer, i.e. of a component of the ink. This is also confirmed in the paragraph at the top of page 20.

7.3 Furthermore, the application as filed teaches in the last paragraph of page 21 that factors which might influence print quality and adhesion of ink to lenses include but are not limited to molecular weight, molecular weight distribution, composition of the binder polymer, lens composition, solvent type and content in both the lens and the ink. Solvents that swell the lens material are expected to enhance penetration of the binder polymer into the lens. Furthermore, the quantity and particle size characteristics of pigment in inks can also affect print quality and adhesion. This passage also rather highlights the key role of the ink composition in order to achieve the result defined in claim 13 as filed.

7.4 The usefulness of a further component of the ink composition in order to achieve good adhesion of the colored coat to the lens as well as a good transferability of the colored coat from the mold to the lens is emphasized in the experimental part of the application as filed (page 30, lines 5-13). That further component is designated throughout the whole description as an "adhesion promoter". This very designation already expresses the usefulness of that component to achieve the technical result defined in claim 13 as filed. According to page 16, lines 13-14 of the application as filed, this expression "*refers to a compound (or crosslinker) comprising two or more functional groups*". The indication of the usefulness of a crosslinker to achieve good adhesion of the colored coat to the lens as well as a good transferability of the colored coat from the mold to

the lens is consistent with the teaching mentioned in above point 7.2 according to which a good transferability and adhesion may be achieved by crosslinking of the binder polymer to the lens polymer and/or by interpenetrating network formation during curing of the lens-forming material in the mold.

8. Whereas, as shown above, the application as filed put the emphasis on various factors relating to the ink itself to achieve the functional feature of claim 13 as filed, which factors are not reflected in the definition of the ink of claim 1 as granted, it does not provide any indication, either explicitly, or implicitly that the latter could be achieved for the ink as broadly defined in claim 1 as granted by merely adjusting process features, i.e. features which can be varied independently of the ink composition.

A corona treatment as mentioned by the appellant during the oral proceedings before the Board does not constitute such means. It is a well known technique in the coating field which only relates to the pretreatment of the substrate to be coated in order to improve adhesion of the coating or ink to be applied. In the experimental part of the application as filed, a corona treatment is described to be performed on the polypropylene lens molds before the ink is printed (page 25, lines 16-17; page 26, Table 3). As could be expected that pretreatment increases the adhesion of the ink onto the mold. It decreases migration of the printed ink into the bulk material of the colored lens, but at the expense of the transferability of the colored coat from the mold to the contact lens (page 34, lines 9-18), i.e. contrary to the functional result to be obtained defined in claim 13 as filed. Therefore, a corona treatment (or the absence of such treatment)

is not disclosed in the application as filed as a process means to achieve the functional feature defined in claim 13 as filed for any ink as defined therein, in particular those that do not contain an adhesion promoter.

For the same reason, the application as filed was not shown to provide a direct and unambiguous basis showing that the functional feature according to claim 13 of the application as filed may be achieved for any ink as defined therein by adapting the curing conditions and/or controlling the formation of interpenetrating networks, as put forward by the appellant during the oral proceedings before the Board. As indicated in above points 7.2 to 7.4 the application as filed rather highlights the prominent role of the nature of the various components of the ink composition to achieve the functional result defined in claim 13 as filed, whereas the ink is more broadly defined in present claim 1. As to the degree of curing, it is certainly a factor to be adjusted for successfully crosslinking the binder polymer to the lens polymer and/or forming interpenetrating networks, which as argued by the appellant is a means to achieve the functional feature of claim 13 as filed. However, successfully crosslinking the binder polymer to the lens polymer and/or forming interpenetrating networks obviously depends on the number of sites available for the curing reaction, which characteristic is not defined, even implicitly in present claim 1.

In view of the above, the appellant's argument that it was derivable from the application as filed that a successful transfer as defined in the functional feature of claim 13 as originally filed may be obtained for any ink as defined in said claim 13 by adapting

various features of the preparation process is rejected.

9. On that basis, the passages of the application as filed indicated by the appellant have not been shown to provide a direct and unambiguous disclosure for the subject-matter of granted claim 1. Its subject-matter therefore extends beyond the content of the application as filed and the main request is as a consequence not allowable.

Auxiliary Request 1

10. Concerning claim 11 of Auxiliary Request 1, as already indicated in above point 3, the teaching provided on page 17, lines 2-11 of the application as filed can be read in the context of method claim 13 as filed, which results in the disclosure of the subject-matter of claim 11 of Auxiliary Request 1. Hence, contrary to the position of the opposition division, the Board in agreement with the appellant's submissions concludes that the subject-matter of claim 11 of the present Auxiliary Request 1 does not extend beyond the content of the application as filed. This was the sole objection on the basis of which the opposition division justified the refusal of Auxiliary Request 1.

11. Concerning the question whether additional objections were considered to prejudice maintenance of the patent in the form of Auxiliary Request 1, it is noted that the respondent did not made any submissions in the appeal proceedings, let alone any request. According to decision G 10/91 of the Enlarged Board of Appeal (OJ 1993, 420, point 18 of the Reasons), the appeal procedure inter partes is, in contrast to the merely administrative character of the opposition procedure,

considered as a judicial procedure, which by its very nature is less investigative than an administrative procedure and in which opposing parties should be given equally fair treatment (see G 10/91, loc. cit., point 2). In view of the judicial nature and purpose of inter partes appeal proceedings and in the interests of an efficient and fair procedure, it is therefore necessary that all parties to opposition proceedings complete their submissions at the beginning of the appeal stage in so far as this is possible. This is reflected in Article 12(3) RPBA 2020, whose wording is in essence identical to that of Article 12(2) RPBA 2007, which specifies that the statement of grounds of appeal and the reply shall contain a party's complete appeal case. Accordingly, they shall set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed, amended or upheld, and should specify expressly all the requests, facts, objections, arguments and evidence relied on.

12. Thus, in the present case, it would have been to the respondent to indicate its request, also setting out the reasons why such request would have been made. The opponent ceased to take an active part in the proceedings after having received the opposition division's decision. In view of the character of the inter partes appeal proceedings, it cannot be expected that the Board, in breach of the principle of equal treatment of the parties, investigates whether other objections would be likely to prejudice maintenance of the patent in the form of Auxiliary Request 1 filed during the oral proceedings on 18 April 2018, and if so provides on its own, an elaborate and full reasoning, substituting itself for that opponent which remained passive.

13. Furthermore, in decisions G 9/92 and G 4/93 (OJ EPO 1994, 875; confirmed in G 1/99, OJ EPO 2001, 381, point 4.1), the Enlarged Board of Appeal had decided that in cases where the patent proprietor is the sole appellant, neither the Board of Appeal, nor the non-appealing opponent as a party to the proceedings as of right under Article 107, second sentence, EPC, may challenge the maintenance of the patent as amended in accordance with the interlocutory decision (principle of prohibition of reformatio in peius). Hence, in application of that principle and considering that claims 1 to 10 of present Auxiliary Request 1 are identical to claims 1 to 10 of Auxiliary Request 2 underlying the contested decision, the Board has no reason to challenge the validity of claims 1 to 10 of Auxiliary Request 1, in line with decisions T 0856/92 (8 February 1995) and T 0149/02 (25 July 2003).

14. Regarding the subject-matter of claim 11 of Auxiliary Request 1 it differs from that of Auxiliary Request 2 underlying the contested decision in that it does not require the presence of an adhesion promoter. The opposition division gave reasons in the contested decision as to why the method of claim 11 of Auxiliary Request 2, i.e. corresponding to the method of claim 11 of present Auxiliary Request 1 supplemented by the feature defining the presence of an adhesion promoter in the ink, met the requirements of sufficiency of disclosure, novelty and inventive step. As indicated in above point 7.4 the patent in suit teaches in the specification the usefulness of an adhesion promoter in order to achieve the functional feature defined in present claim 11. Under these circumstances the absence of an explicit definition of the use of an adhesion promoter in present claim 11 has no impact on the assessment of sufficiency of disclosure made by the

opposition division. Moreover, it follows from the opposition division's reasoning in the contested decision that the acknowledgement that the subject-matter of claim 11 of Auxiliary Request 2 was novel and involved an inventive step was independent of the use of an adhesion promoter, i.e. novelty was not acknowledged based on the presence of such a feature in claim 11 and an inventive step was acknowledged having regard to the requirement that the ink of claim 11 should contain a silicone-containing binder polymer. Accordingly, the Board has no reason to consider that claim 11 of present Auxiliary Request 1 is not allowable.

15. Consequently, having regard to the reasons provided in the contested decision, the absence of any objection raised by the respondent against Auxiliary Request 1, let alone any request by that party, the Board decided that the claims in accordance with Auxiliary Request 1 are allowable.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the department of first instance with the order to maintain the patent in amended form on the basis of claims 1 to 11 according to the Auxiliary Request 1 submitted during the oral proceedings on 18 April 2018 and after any necessary consequential adaption of the description.

The Registrar: The Chairman:

B. ter Heijden O. Dury

Decision electronically authenticated