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**Datasheet for the decision
of 29 January 2024**

Case Number: T 1551/22 - 3.3.07

Application Number: 15817784.0

Publication Number: 3256101

IPC: A61K8/44, A61K8/46, A61Q5/02,
A61Q5/12, A61K8/02

Language of the proceedings: EN

Title of invention:

SOLID ANHYDROUS COSMETIC COMPOSITION, PREPARATION PROCESS,
COSMETIC TREATMENT PROCESSES AND ASSOCIATED KIT

Patent Proprietor:

L'OREAL

Opponent:

Henkel AG & Co. KGaA

Headword:

Solid anhydrous cosmetic compositions ANHYDROUS/ L'OREAL

Relevant legal provisions:

RPBA 2020 Art. 12(4), 12(6)
EPC Art. 56

Keyword:

Admission of a new document (No)
Main request - Inventive step (Yes)
Application of G 2/21

Decisions cited:

G 0002/21



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 1551/22 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 29 January 2024

Appellant: Henkel AG & Co. KGaA
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Representative: Henkel AG & Co. KGaA
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Respondent: L'OREAL
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Representative: Casalonga
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 2 June 2022
rejecting the opposition filed against European
patent No. 3256101 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman A. Uselli
Members: D. Boulois
Y. Podbielski

Summary of Facts and Submissions

- I. European patent No. 3 256 101 was granted on the basis of a set of 18 claims.

Independent claim 1 as granted read as follows:

"1. Solid anhydrous cosmetic composition in particle form wherein the size of the particles is, in the largest dimension thereof, between 0.01 and 5 mm, comprising:

- at least 30% by weight, relative to the total weight of the composition, of one or more anionic surfactants,
- at least 5% by weight, relative to the total weight of the composition, of one or more amphoteric surfactants chosen from (C₈-C₂₀)alkylbetaines, (C₈-C₂₀)alkylamido(C₁-C₆)alkylbetaines, (C₈-C₂₀)alkylamphoacetates and (C₈-C₂₀)alkylamphodiacetates, and mixtures thereof,
- at least 10% by weight, relative to the total weight of the composition, of one or more fillers chosen from sodium or calcium halides and polymeric organic fillers."

- II. An opposition was filed under Article 100 (a) EPC on the ground that its subject-matter lacked an inventive step.
- III. The appeal lies from the decision of the opposition division to reject the opposition.
- IV. The documents cited during the opposition proceedings included the following:

D1: US 4330438 A published 18.05.1982
D2: DE 102006056249 A1 published 29.05.2008
D3: WO 2003/70211 A1 published 28.08.2003
D4: DE 4324358 A1 published 27.01.1994
D5: WO 2009/153311 published 23.12.2009
D6: DE 102010030555 A1 published 07.04.2011
D7: WO 2010/060600 A1 published 03.06.2010
D8: Mintel, "Silk Peeling Powder" (Kanebo) No. Record ID 661899, available in France in February 2007
D9: Mintel, "Micro-Peel Cleansing Powder" (Skeen+), No. Record-ID 1587902, available in France in July 2011
D10: Letter from the proprietor of the patent of 30.01.2019 with comparative experiments; submitted during the examination procedure
D11: Comparative test report.

V. According to the decision under appeal, the composition of claim 1 of the contested patent differed from the composition of example 1 of D1, representing the closest prior art, in that it comprised at least 5 wt% of one or more amphoteric surfactants. The technical problem to be solved over D1, taking into account of D11, was defined as the provision of a solid granulated cleansing composition having improved foaming properties. The claimed solution was not obvious in view of D5 or D8, while the skilled person would not have consulted D2-D4, D6, D7 or D9, since these documents concerned compositions having a different physical form or dealing with a different technical problem.

VI. The opponent (hereinafter the appellant) filed an appeal against said decision. With the statement of grounds of appeal dated 14 September 2022, the appellant submitted a new item of evidence:

D12: Charles Fox, "An Introduction to the Formulation of Shampoos", Cosmetics & Toiletries, Vol.103, 25-58, March 1988

- VII. With a letter dated 18 January 2023 the patent proprietor (hereinafter the respondent) replied to the statement of grounds of appeal.
- VIII. A communication from the Board, dated 29 November 2023, was sent to the parties. In it the Board expressed its preliminary opinion that the subject-matter of the claims of the main request was inventive.
- IX. With its letter dated 18 December 2023, the appellant withdrew its request for oral proceedings.
- X. The arguments of the appellant may be summarised as follows:

D1 was considered to represent the closest prior art. The subject-matter of claim 1 of the patent differed from the composition according to example 1 of D1 by the presence of at least 5% by weight of at least one amphoteric surfactant selected from C₈- C₂₀ alkyl(amido(C₁-C₆)alkyl)betaines and/or C₈-C₂₀ alkylampho(di)acetates).

If the comparative test D11 were not taken in account, the problem was the provision of alternative solid compositions with at least equivalent foam properties. The claimed solution was obvious in view of D5 or common general knowledge as evidenced by D12.

If the comparative tests D11 were taken in account, the problem was the provision of solid granular cleaning

compositions with improved foaming properties. The claimed solution was obvious in view of D5, common general knowledge as evidenced by D12 or D8.

XI. The arguments of the respondent may be summarised as follows:

D12 should not be admitted into the appeal proceedings, since no reasons were given for the late-filing of this document, and since it could have been filed during the opposition proceeding. The preliminary opinion of the opposition division was positive with regard to inventive step, and the opponent could and should have filed any new document at this stage. Additionally, document D12 did not concern at all the formulation of solid shampoo compositions.

D1 was the closest prior art. In view of the comparative tests D11, the technical problem could be formulated as the provision of a composition with increased foaming performances. The claimed solution was not obvious in view of D1 or D5.

XII. Requests

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

The respondent requests that the appeal be dismissed, and that document D12 filed with the letter of 14 September 2022 not be admitted into the appeal proceedings.

Reasons for the Decision

1. Admission of D12 into the appeal proceedings

- 1.1 This document was filed by the appellant with its statement of grounds of appeal. D12 is a document evidencing common general knowledge relating to shampoo compositions and is mentioned by the appellant in the framework of the discussion on inventive step, in particular with regard to the obviousness of the claimed solution.

According to the appellant, it mentions on pages 25 and 26 the importance of the presence of a surfactant, in particular in a concentration of 12-20% for the lather provided by the shampoo.

- 1.2 In the Board' s view this document could and should have been filed during the opposition proceedings, after the opposition division issued a positive opinion on inventive step in its preliminary opinion. At that stage, the appellant was aware that its objection on invenitve step was not considered convincing and should have realised that without further evidence the opposition would likely be rejected; it had also sufficient time to file any new evidence at that stage.

Additionally, document D12 does not concern at all formulations of solid shampoo compositions in the form of granules as claimed in the contested patent. D12 is a general document regarding formulations of shampoos and identifies on page 25 three forms of compositions which are liquids, gels and creams. In view of the limited relevance of this document, the Board sees an additional reason for not admitting it into the appeal proceedings.

Consequently, D12 is not admitted into the appeal proceedings (Article 12(4) and (6) RPBA 2020).

2. Main request - Inventive step

2.1 The claimed invention relates to cosmetic compositions useful in particular for cleaning or washing keratin materials such as the hair, which are in solid anhydrous form.

2.2 D1 was considered as the closest prior art in the decision of the opposition division and by the appellant in its statement of grounds of appeal.

D1 relates to powdered shampoo concentrates which, on addition of water, rapidly form a rich, viscous, ready to use shampoo with desired viscosity, foaming, cleansing, rinseability and conditioning characteristics (see D1, col. 1, l. 10-17). The powder shampoo comprises from 50 to 75 parts of alkali metal or ammonium salt of an alpha olefin sulfonate containing from 12 to 18 carbon atoms and 18 to 30 parts of a non-ionic hydroxypropyl derivative of a polygalactomannann gum (see col 1, l. 36-45).

Example 1 of D1 discloses a shampoo in powder form comprising 74 wt% of an anionic surfactant (sodium olefin sulfonate C14-C16) and 22.80 wt% of an organic filler (Hydroxypropyl guar gum non-ionic). Said mixture is passed through a 30 mesh screen (col. 3, l. 26-28). Examples 2 and 3 disclose the same type of composition.

D1 does not disclose the presence of at least 5 wt% of one or more amphoteric surfactants.

2.3 The opposition division defined the problem as the provision of a solid granulated cleansing composition having improved foaming properties, which is also the problem as defined by the respondent.

The appellant defines the problem as the provision of an alternative solid composition with equal foaming properties or as the provision of a solid granulated cleansing composition having improved foaming properties, respectively, depending on whether or not the tests provided in D11 are to be taken in account.

2.4 The claimed solution to any of these problems is the provision of solid anhydrous cosmetic compositions in particle form with at least 5% by weight of at least one amphoteric surfactant selected from (C₈-C₂₀)alkylbetaines, (C₈-C₂₀)alkylamido(C₁-C₆)alkylbetaines, (C₈-C₂₀)alkylamphoacetates) and (C₈-C₂₀)alkylamphodiacetates).

2.5 D11 provides a comparison between a composition A comprising 74% of an anionic surfactant and 22.8% of a polymeric filler with a composition B comprising respectively 64% and 22.8% of the same anionic surfactant and the same polymeric filler in combination with 10% by weight of an amphoteric surfactant, namely cocoamidopropyl betaine; both compositions comprise also NaCl and composition A corresponds to the disclosure of D1, in particular its example 1. The compositions are applied to the hair, and the comparison shows through photographs that the composition B according to the invention provides a better start of the foaming and a foam with better general properties.

In view of D11, the Board is of the opinion that the problem is as defined by the opposition division in its decision and by the respondent.

2.6 In this regard, the Board notes that the application as filed mentioned as an objective that the composition as claimed must allow rapid initiation of foaming and the rapid obtaining of an appropriate and sufficient abundant foam (see page 2, lines 15-16). Moreover, examples 2 and 3 of the patent indicate that several compositions according to the invention form a firm and very creamy foam. According to the decision G 2/21, a patent proprietor may rely upon a technical effect for inventive step if, based on the application as originally filed, the skilled person would derive said effect as being encompassed by the technical teaching and embodied by the same originally disclosed invention. In the present case, in view of the above the Board considers that the criteria set forth in G2/21 are met. Therefore, and the post-published experiments D11 must be taken in consideration.

2.7 With regard to obviousness, D5 and D8 have been cited.

D5 discloses a granulated personal care shampoo which dissolves readily in water and has a pleasant feel (par. [0010]). Most of the compositions of the examples of D5 comprise an anionic surfactant, an amphoteric surfactant and a filler (ex. 1-18, 25, 27, 28-30). However, the surfactants are present in the examples in lower amounts than required by claim 1 of the contested patent, while the compositions of the examples comprise a very high amount of filler, i.e more than 80% by weight. The amphoteric surfactant might be the same as claimed in claim 1 of the main request (see D5, par. [020]), but is always comprised in an amount less than

5 wt%. There is furthermore no teaching in D5 that the use of an amphoteric surfactant would have any impact on the foaming properties of the composition as demonstrated in D11, even if foaming efficiency is mentioned in paragraph [043] of D5. Hence, there is no incentive in D5 to increase the amount of the amphoteric surfactant for improving the foaming properties.

D8 is a skin silk peeling powder comprising inter alia sodium myristoyl glutamate, sodium lauroyl glutamate, zea mays (corn) starch, talc, hydroxypropyl starch, kaolin, aluminum silicate, disodium lauryl sulfosuccinate, and microcrystalline cellulose in undisclosed amounts. Consequently, this document is irrelevant with regard to the obviousness of the solution.

Thus, the Board does not see any reason to overrule the decision of the opposition division, since none of D5 or D8 gives any useful technical guidance to the skilled person to add an amphoteric surfactant in at least 5 wt% in order to improve the foaming properties of the composition of D1. Hence, the claimed solution is not obvious and the main request meets the requirements of Article 56 EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



B. Atienza Vivancos

A. Uselli

Decision electronically authenticated