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**Datasheet for the decision
of 10 June 2011**

Case Number: T 1168/08 - 3.3.07

Application Number: 97952928.6

Publication Number: 0957897

IPC: A61K 7/32

Language of the proceedings: EN

Title of invention:

Antiperspirant or deodorant compositions

Patent Proprietors:

Unilever PLC, et al

Opponents:

BEIERSDORF AG
L'OREAL

Headword:

-

Relevant legal provisions:

RPBA Art. 13(1)
EPC Art. 113(2), 114(2)

Relevant legal provisions (EPC 1973):

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Keyword:

"Main request and auxiliary requests 1 to 4 - late filed - not admitted into the proceedings - prima facie not allowable"

Decisions cited:

G 0004/95, G 0002/88, G 0006/88

Catchword:

-



Case Number: T 1168/08 - 3.3.07

D E C I S I O N
of the Technical Board of Appeal 3.3.07
of 10 June 2011

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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 29 April 2008
revoking European patent No. 0957897 pursuant
to Article 101(3)(b) EPC.

Composition of the Board:

Chairman: J. Riolo
Members: F. Rousseau
P. Schmitz

Summary of Facts and Submissions

I. The appeal by the Patent Proprietors (Appellants) lies from the decision of the opposition division posted on 29 April 2008 revoking European patent No. EP-B-0 957 897. Claims 1, 5, 7 and 14 of the patent read as follows:

- "1. An antiperspirant or deodorant cosmetic aerosol composition suitable for topical application to the human skin, comprising:
 - i. an antiperspirant or deodorant active;
 - ii. a moisturising cream providing occlusion or humectancy;
 - iii. a non-polar hydrocarbon propellant and;
 - iv. a carrier for the antiperspirant or deodorant active.
5. An antiperspirant composition according to any one of the preceding claims, wherein the moisturising cream comprises a humectant.
7. An antiperspirant composition according to claim 5 or claim 6, wherein the humectant is sorbitol, glycerol, ethylene glycol, propylene glycol, or mixtures thereof.
14. A cosmetic method for providing an antiperspirant or deodorising effect while moisturising the skin, employing a cosmetic antiperspirant or deodorant composition according to any preceding claim."

II. Two notices of opposition were filed in which the Opponents (Respondents) requested revocation of the

patent in its entirety on the grounds *inter alia* of lack of novelty and inventive step (Article 100(a) EPC). The oppositions were supported *inter alia* by the following documents:

- D1: Extracts from of "Die kosmetischen Präparate, Band II, Wäßrige und tensidhaltige Formulierungen", 4th edition, 1992, page 275
- D2: GB-A-1 285 073
- D4: WO 95/05799
- D5: WO 94/05253
- D6: Extracts from "A Formulary of Cosmetic Preparations", compiled by Michael and Irene Ash, Chemical Publishing Co. New York, 1977, pages 1 and 20-22,
- D10: Extracts from the CTFA, Cosmetic Ingredient Handbook, first edition, publishing date not indicated, pages 79-84
- D11: Extracts from Cosmetic & Toiletries, Vol. 105, 1990, page 80
- D13: Extracts from Cosmetic & Toiletries, Vol. 95, 1980, pages 27-34
- D14: CA-A-1 000 613
- D18: GB-A-2 291 805.

III. The impugned decision was based on the patent as granted (Main Request) and on 8 sets of amended claims as Auxiliary Requests 1 to 8. According to the decision under appeal, the Main Request was not allowable as its claim 1 lacked novelty in view of documents D1, D2, D4 to D6 and D14. Amended claim 1 according to any of Auxiliary Requests 1 to 7 was considered to lack a basis in the application as originally filed

(Article 123(2) EPC) and claim 1 of Auxiliary Request 8 was anticipated by D18.

IV. With the statement setting out the grounds of appeal dated 28 August 2008, the Appellants submitted 32 sets of claims forming basis for their new Main and 1st to 31st Auxiliary Requests. Claim 1 of all those requests, compared to claim 1 as granted, was restricted by the use of an additional ingredient (v) defined to be a single non-volatile emollient or a mixture of emollients selected from fatty acids, fatty alcohol esters, slightly water-soluble ethers and alcohols, hydrocarbons, water-insoluble ethers, mineral oils and polyorganosiloxanes. The nature of the composition according to claim 1 was furthermore restricted in all requests by defining it as anhydrous and/or free from ethanol. Claim 1 of the 1st, 5th-7th, 12th-15th, 17th, 21st-23rd and 28th-31st Auxiliary Requests contained in addition the proviso that the claimed composition "does not contain from 0.01% to 5% by weight of a trihydroxy stearin suspending agent". The Appellants also submitted with the statement setting out the grounds of appeal document D23 that provided technical information on Finsolv® TN dated 2007.

V. With their letter dated 13 March 2009, Respondents II submitted objections under Article 123(2) EPC against all requests then on file. The features that the compositions were anhydrous and contained "a single non-volatile emollient or mixture of emollients" were held to have no basis in the application as originally filed. Moreover, the disclaimer defining the absence of a trihydroxy stearin suspending agent was considered to be unallowable, as it was intended to overcome a

novelty objection vis-à-vis the non-accidental disclosure D18. As to novelty, the antiperspirant compositions described in examples 6 and 7 of D18 comprised aluminiumchloro-hydrate as antiperspirant active, a non-polar hydrocarbon propellant (Propellant CAP 30), Cyclomethicone DC 245 which was a volatile emollient as evidenced by D10 and a dimethiconol/dimethicone mixture. As shown by D10, dimethiconol was a non-volatile emollient and dimethicone an agent providing occlusion, and therefore a moisturising cream providing occlusion or humectancy within the meaning of claim 1 as granted. The feature "while moisturizing the skin" did not provide any limitation as it did not define any purpose. The compositions described in examples 6 and 7 of D18 anticipated therefore the subject-matter of the Main and the 2nd-4th, 8th-11th, 16th, 18th-20th and 24th to 27th Auxiliary Requests.

- VI. The Appellants submitted with letter dated 2 December 2009 revised 1st, 5th-7th, 12th-15th, 17th, 21st-23rd and 28th-31st Auxiliary Requests in order to correct a typing error concerning the place of the decimal in the amount of 0.01% defined in the proviso, which amount should read instead "0.1%".
- VII. With a letter dated 15 February 2011, the parties were summoned to oral proceedings on 10 June 2011. In preparation for the oral proceedings, the Board issued a communication dated 5 April 2011 containing a preliminary and non-binding opinion concerning the arguments and the allowability of the requests presented. Based on the objections and arguments of Respondents II the Board's preliminary opinion was that none of the requests appeared to meet the requirements

of Article 123(2) EPC. Concerning the issue of novelty of claim 1 over the disclosure of Examples 6 and 7 of D18 raised by Appellants II, the Board indicated that it did not appear to be disputed that the compositions disclosed in Examples 6 and 7 of D18 were free from ethanol and contained (i) an antiperspirant active comprising an aluminium salt or complex (Aluminiumchlorohydrate), (iii) a non-polar hydrocarbon propellant (Propellant CAP 30) and (iv) a volatile carrier fluid for the antiperspirant active (Cyclomethicone DC 245). They furthermore contained Finsolv® TN, which as confirmed by D23 and D10 was an emollient ester of a fatty alcohol, *i.e.* a compound according to feature (v) of claim 1. As far as dimethiconol was concerned, it was disclosed in D10 to be an emollient. It appeared to be non-volatile as argued by Respondents II, which had not been disputed by the Appellants. Dimethiconol would therefore appear also to fall within the category of compounds (v) as defined in amended claim 1. The question of whether the compositions 6 and 7 of D18 comprised "a moisturising cream providing occlusion or humectancy" had to be examined in view of the meaning to be attributed to this expression. Attention was drawn in this respect to the specification, for example to paragraphs [0014], [0015] and [0018] to [0021] and to the second composition exemplified page 4, lines 25-45. It appeared in view of those passages that the expression "a moisturising cream providing occlusion or humectancy" was meant to define any cream which would either reduce "the rate of transepidermal water loss through old or damaged skin" or protect "otherwise healthy skin from the effect of a drying environment". As the patent in suit did not quantify the degree of

reduction or protection qualifying a cream as being occlusive, it appeared that any cream providing any degree of reduction of the rate of transepidermal water loss or any protection from the effect of a drying environment should be considered as a cream providing occlusion. The compositions according to Examples 6 and 7 were prepared by homogenising Cyclomethicone DC 245, Finsolv® TN and Thixcin R, the latter being according to D18 a trade name for trihydroxystearin, that was described in D10 as providing occlusive properties. Hence, there was a prima facie argument that the compositions according to Examples 6 and 7 of D18 should be considered to provide at least to some extent a reduced rate of transepidermal water loss, as they contained a homogenised mixture comprising a known occlusive agent. The Board was therefore of the preliminary view that claim 1 according to the Main, the 2nd-4th, 16th and 18th-20th Auxiliary Requests was anticipated by the disclosure of D18. It also followed from the above that the expression "*while moisturising the skin*" in claim 1 of the 8th to 11th and 24th to 27th Auxiliary Requests did not appear to provide any distinguishing feature over the prior art D18. Thus, the subject-matter according to the 8th to 11th and 24th to 27th Auxiliary Requests had not been shown to be novel over the disclosure of D18.

VIII. The Appellants with a written submission dated 25 May 2011 no longer maintained the former requests, but submitted five sets of claims as their Main and 1st to 4th Auxiliary Requests. Independent claims of those requests read as follows:

Main Request

- "1. Use of an antiperspirant composition for providing an antiperspirant effect while moisturising the skin, which composition comprises:
 - i. an antiperspirant active;
 - ii. a moisturising cream providing occlusion or humectancy;
 - iii. a non-polar hydrocarbon propellant and
 - iv. a carrier for the antiperspirant active.

9. An antiperspirant or deodorant cosmetic aerosol composition suitable for topical application to the human skin, comprising:
 - i. an antiperspirant active comprising an aluminium salt or complex;
 - ii. a moisturising cream providing occlusion or humectancy comprising a humectant that is sorbitol, glycerol, ethylene glycol, propylene glycol, or mixtures thereof;
 - iii. a non-polar hydrocarbon propellant and
 - iv. a volatile carrier fluid for the antiperspirant active."

1st Auxiliary Request

- "1. Use of an antiperspirant composition for providing an antiperspirant effect while moisturising the skin, which composition comprises:
 - i. an antiperspirant active comprising an aluminium salt or complex;
 - ii. a moisturising cream providing occlusion or humectancy;
 - iii. a non-polar hydrocarbon propellant and

iv. a volatile carrier fluid for the antiperspirant active and
v. additionally a single non-volatile emollient or mixture of non-volatile emollients selected from fatty acids, fatty alcohol esters, slightly water-soluble ethers and alcohols, hydrocarbons, water-insoluble ethers, mineral oils and polyorganosiloxanes."

Claim 9 of the 1st Auxiliary Request was identical to claim 9 of the Main Request.

2nd Auxiliary Request

Claim 1 of the 2nd Auxiliary Request corresponded to claim 1 of the 1st auxiliary request with the additional restriction that the composition was free from ethanol. Claim 9 of the 2nd Auxiliary Request was identical to claim 9 of the Main Request.

3rd Auxiliary Request

Claim 1 of the 3rd Auxiliary Request was identical to claim 1 of the 1st Auxiliary Request.

Claim 9 of the 3rd Auxiliary Request corresponded to claim 9 of the Main Request with the additional restriction that the antiperspirant or deodorant cosmetic aerosol composition additionally contained a single non-volatile emollient or mixture of non-volatile emollients selected from fatty acids, fatty alcohol esters, slightly water-soluble ethers and alcohols, hydrocarbons, water-insoluble ethers, mineral oils and polyorganosiloxanes.

4th Auxiliary Request

Claim 1 of the 4th Auxiliary Request corresponded to claim 9 of the Main Request.

IX. In the letter dated 25 May 2011 accompanying the new sets of claims, claims 1 to 8 of the new Main Request were held to be based upon claim 14 as granted with the restriction that only an antiperspirant effect was now claimed and that only an antiperspirant active was required. Claims 1 to 8 of the new 1st and 3rd Auxiliary Requests were held to be based upon the 8th Auxiliary Request of 28 August 2008 with the feature "which composition is anhydrous or free from ethanol" removed. In addition the expression "mixture of emollients" had been replaced by mixture of non-volatile emollients" in order to address the objection under Article 123(2) EPC mentioned in the Board's communication dated 5 April 2011. Claims 1 to 8 of the new 2nd Auxiliary Request were considered to be based upon the previous 9th Auxiliary Request with the expression "mixture of emollients" replaced by "mixture of non-volatile emollients". Claim 9 of the Main, 1st and 2nd Auxiliary Requests was explained to have a basis in claim 7 as granted, wherein features (i) and (iv) had been limited to an antiperspirant active comprising an aluminium salt or complex and a volatile carrier fluid for the antiperspirant active, respectively. A basis for said restrictions was to be found in the published application on page 5, lines 12 to 13 and in claim 9. Claim 9 of the 3rd Auxiliary Request was similar to claim 9 of the Main Request, with the additional feature "*additionally a single non-*

volatile emollient or mixture of non-volatile emollients selected from fatty acids and polyorganosiloxanes" that had a basis in claim 11 of the published application. The new 4th Auxiliary Request comprised composition claims and had the same basis as claim 9 of the Main Request. The letter accompanying the new sets of claims did not address the issue of novelty, so that no reason was given as to why the claimed subject-matter should be considered to be novel over D18.

X. Oral proceedings before the Board took place on 10 June 2011, in the course of which the admissibility of the new requests was debated.

XI. The Appellants' arguments that are relevant for the present decision can be summarised as follows:

(a) The new requests had been submitted in the light of the Board's preliminary opinion, that showed that amendments to the case were necessary.

(b) The Appellants had cut back greatly on the number of requests, simplifying the issues and there was no undue burden on the Respondents to deal with those requests. The new claims had a basis in the application as originally filed.

(c) Feature (ii) as defined in claim 9 of the Main and 1st to 3rd Auxiliary Requests, as well as in claim 1 of the 4th Auxiliary Request meant a moisturising cream that provided either occlusion or humectancy, wherein in the latter case use was made of a humectant that was selected from

sorbitol, glycerol, ethylene glycol, propylene glycol, or mixtures thereof.

- (d) The issue of novelty of the claims according to the new requests was addressed by the Appellants for the first time at the oral proceedings. D18 was held to be silent on the moisturising effect. The invention of D18 concerned only the provision of a masking effect that in the compositions of Examples 6 and 7 of D18 was brought about by Finsolv® TN. The combination of the antiperspirant and moisturising effects conferred novelty on the use according to the Main and 1st to 3rd Auxiliary Requests. D18, however, was not concerned with the provision of these two effects. Thus, the objection for lack of novelty over D18 had been overcome. Novelty of the product-claims over D18 was given, as D18 did not disclose the use of a humectant selected from sorbitol, glycerol, ethylene glycol, propylene glycol, or mixtures thereof.
- (e) The new requests met the objections raised by the Respondents and were therefore admissible.

XII. The arguments of the Respondents can be summarised as follows:

- (a) The new requests had been filed at a very late stage of the appeal proceedings, more than two years after the submissions of the Respondents in reply to the statement setting out the grounds of appeal.

- (b) The subject-matter of claim 1, according to the Main and 1st to 3rd Auxiliary Requests, was *prima facie* not allowable, as it appeared to lack novelty over the disclosure of Examples 6 and 7 of D18. The compositions described with Examples 6 and 7 contained all the compounds defined in the present use-claims. They were implicitly disclosed to provide a moisturising effect as they contained two compounds, namely dimethicone and Thixcin R that were occlusive. Claim 1 of those requests was also considered to be anticipated by the disclosure of D11.
- (c) A series of formal objections under Articles 84 and 123(2) and (3) EPC was also raised, as in particular the terms "aluminium complex" and "volatile" were unclear and the term "aerosol" was missing in the use-claims.
- (d) As far as the 4th Auxiliary Request was concerned, it lacked inventive step over D18, as no effect had been shown to be associated with the humectant, the use of which was well-known from D10 and D13.
- (e) Thus, the Main and 1st to 4th Auxiliary Requests were *prima facie* not allowable. Accordingly, they should not be admitted into the proceedings.

XIII. The Appellants requested that the decision under appeal be set aside and that the patent be maintained according to the Main Request or 1st to 4th Auxiliary Requests filed with letter dated 25 May 2011.

XIV. The Respondents requested that the appeal be dismissed.

- XV. At the end of the oral proceedings, the decision of the Board was announced.

Reasons for the Decision

1. The appeal is admissible.

Admissibility of the Requests

2. The Appellants' Main and 1st to 4th Auxiliary Requests were submitted about two weeks before the oral proceedings and more than two years after having received the reply of the Respondents to the statement setting out the grounds of appeal. Explanations as to the relevance of the amendments with respect to the grounds of opposition were provided only at the oral proceedings. These requests therefore represent an amendment to the Appellants' case that may be admitted and considered at the Board's discretion, as stipulated by Article 13(1) Rules of Procedure of the Boards of Appeal (RPBA). Some of the criteria that a board applies in exercising its discretion to admit and consider amendments to a party's case are defined in Article 13(1) RPBA, namely the complexity of the subject-matter submitted, the current state of the proceedings and the need for procedural economy.
3. The Appellants' justification for the late filing of the new requests, namely that they had been filed in reaction to the Board's communication, is not acceptable here, because the argumentation in support of the Board's preliminary opinion that the claimed

subject-matter had no basis in the application as originally filed and lacked novelty over D18 corresponded in substance to the reasoning of Respondent II in reply to the grounds of appeal. A Board communication under Article 15(1) RPBA is intended as guidance for the oral proceedings. It helps the parties to focus their argumentation on issues that the Board considers crucial for reaching its decision. Where the Board's communication contains a preliminary opinion based solely on the issues raised by the parties and their arguments, that communication cannot be taken as a justification for submitting new requests that the parties could have filed earlier. In decision G 4/95 of the Enlarged Board of Appeal (OJ EPO 1996, 412), it is pointed out that both opposition and opposition appeal procedures are primarily written procedures. In principle, oral proceedings are scheduled at a point in time within an opposition or opposition appeal procedure when the written submissions of all parties, including the written presentation of facts and evidence by all parties, are complete. In the present case, the Appellants, at the latest after having received the submissions of Respondents II that the claims proposed had no basis in the application as filed and that their subject-matter was in part anticipated by D18, should have submitted one or more additional set(s) of claims in order to overcome those objections if they considered it necessary. They chose, however, not to file any such request, the revised 1st, 5th-7th, 12th-15th, 17th, 21st-23rd and 28th-31st Auxiliary Requests filed with letter dated 2 December 2009 being submitted only in order to correct a typing error in the disclaimer contained in the previous requests, not to overcome the

Respondents' objection, who had clearly objected to the introduction of that disclaimer, as it was made to overcome a novelty objection in view of prior art D18 that could not be considered as an accidental disclosure.

4. The question also arises whether the new requests would overcome the existing objections.

Claim 1 of the Main and 1st to 3rd Auxiliary Requests

- 4.1 The Respondents' arguments had led the Board to the preliminary view, as indicated in the communication dated 5 April 2011, that D18 disclosed with its Examples 6 and 7 compositions that contained (i) an antiperspirant active comprising an aluminium salt (Aluminiumchlorohydrate), (iii) a non-polar hydrocarbon propellant (Propellant CAP 30), (iv) a volatile carrier fluid for the antiperspirant active (Cyclomethicone DC 245) and (v) an emollient ester of a fatty alcohol (Finsolv® TN). It was indicated in the Board's communication that the homogenised mixture of Cyclomethicone DC 245, Finsolv® TN and Thixcin R that was contained in the compositions of Examples 6 and 7 of D18 was implicitly a moisturising cream providing occlusive properties within the meaning of the patent in suit, since Thixcin R was a known occlusive agent. Thus, the composition the use of which is now claimed in claim 1 of any of the present Main and 1st to 3rd Auxiliary Requests was indicated in the Board's communication to be disclosed in D18.

- 4.2 The Appellants argued at the oral proceedings before the Board that the use according to claim 1 of any of

the new Main and 1st to 3rd Auxiliary Requests was novel over the disclosure of Examples 6 and 7 of D18, by virtue of the fact that the compositions described in Examples 6 and 7 of D18 were not described in that document to be used for the purpose of providing, in addition to the antiperspirant effect, also a moisturising effect for the skin. In other words, the sole definition in the present use claims of the purpose "while moisturising the skin" provided a distinguishing feature over the disclosure of D18, thereby overcoming in the Appellants' opinion the Respondents' objection for lack of novelty. No other arguments were presented by the Appellants as to why the claimed use was novel over D18. It was in particular not argued that the composition the use of which is now defined in claim 1 of any of the present Main and 1st to 3rd Auxiliary Requests structurally differed from those disclosed in D18. The Respondents also did not rebut the view that the homogenised mixture of Cyclomethicone DC 245, Finsolv® TN and Thixcin R provides occlusion.

- 4.3 According to decisions of the Enlarged Board of Appeal G 2/88 (OJ EPO 1990, 93) and G 6/88 (OJ EPO 1990, 114) a claim to the use of a known compound for a particular purpose, which is based on a technical effect which is described in the patent, should be interpreted as including that technical effect as a functional technical feature, and is accordingly not open to objection under Article 54(1) EPC provided that such technical feature has not previously been made available to the public. The question to be answered in the case under consideration is therefore whether or not in D18 a moisturising effect is disclosed. As shown

above, the existence of an occlusive effect brought about by the creamy mixture obtained in Examples 6 and 7 of D18 has been implicitly made available to the public, as outlined in the Board's communication dated 5 April 2011. Hence, the condition defined in decisions G 2/88 (supra) and G 6/88 (supra) to recognise novelty of the use of a known compound for a particular purpose is therefore here not fulfilled. Thus, claim 1 as defined in any of the Main and 1st to 3rd Auxiliary Requests does not *prima facie* overcome the existing objection of lack of novelty over D18.

Claim 1 of the 4th auxiliary request

- 4.4 According to the Appellants' declaration at the oral proceedings, feature (ii) as defined in claim 1 of the 4th Auxiliary Request was intended to mean a moisturising cream that provides either occlusion or humectancy, wherein in the latter case use is made of a humectant that is selected from sorbitol, glycerol, ethylene glycol, propylene glycol, or mixtures thereof. The Appellants' view on the meaning to be attributed to that feature is in line with the structure of the claims as granted, claim 1 defining a moisturising cream that provides occlusion or humectancy and claim 7, that refers to claim 5, defining that the moisturising cream contains a humectant which is specified to be selected from sorbitol, glycerol, ethylene glycol, propylene glycol, or mixtures thereof. Furthermore, there is no room for another interpretation of present feature (ii), as neither the patent nor the application as originally filed teaches the use of a humectant that is selected from sorbitol, glycerol, ethylene glycol, propylene glycol, or mixtures thereof, in a cream that

provides occlusion. Accordingly, the subject-matter of claim 1 of the 4th Auxiliary Request also encompasses antiperspirant or deodorant cosmetic aerosol compositions suitable for topical application to the human skin wherein the presence of a humectant is not mandatory, i.e. compositions that comprise (i) an antiperspirant active comprising an aluminium salt or complex, (ii) a moisturising cream providing occlusion, (iii) a non-polar hydrocarbon propellant and (iv) a volatile carrier fluid for the antiperspirant active. Such a composition is however disclosed in Examples 6 and 7 of D18 (see point 4.1. above). Thus, claim 1 of the 4th Auxiliary Request also does not *prima facie* overcome the existing objection of lack of novelty over D18.

5. Accordingly, in view of the circumstances of the present case the late-filed Main and 1st to 4th Auxiliary Requests that have been submitted in the absence of a proper justification and which are *prima facie* not allowable are in the interest of procedural economy not admitted into the appeal proceedings under Article 114(2) EPC in conjunction with Article 13(1) RPBA.

6. Article 113(2) EPC stipulates that the instances of the EPO shall examine and decide upon a European patent only in the text submitted to it, or agreed, by the proprietor of the patent. In the present case, the Proprietors agreed only to the text of the patent in suit submitted with letter dated 25 May 2011 as Main and 1st to 4th Auxiliary Requests. However, those requests were not admitted into the proceedings for the reasons given above.

7. In the absence of any valid request in the proceedings,
the patent in suit must be revoked.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar

The Chairman

S. Fabiani

J. Riolo