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**Datasheet for the decision  
of 15 May 2014**

**Case Number:** T 2353/09 - 3.3.07

**Application Number:** 03784006.3

**Publication Number:** 1531788

**IPC:** A61K8/26, A61K8/92, A61Q15/00

**Language of the proceedings:** EN

**Title of invention:**  
ANTIPERSPIRANT AEROSOL COMPOSITIONS

**Patent Proprietor:**  
Unilever PLC  
Unilever N.V.

**Opponents:**  
Beiersdorf AG  
Henkel AG & Co. KGaA

**Headword:**

**Relevant legal provisions:**  
EPC Art. 100(a)

**Keyword:**  
Novelty - (no)

**Decisions cited:**



**Beschwerdekammern  
Boards of Appeal  
Chambres de recours**

European Patent Office  
D-80298 MUNICH  
GERMANY  
Tel. +49 (0) 89 2399-0  
Fax +49 (0) 89 2399-4465

Case Number: T 2353/09 - 3.3.07

**D E C I S I O N  
of Technical Board of Appeal 3.3.07  
of 15 May 2014**

**Appellant:** Henkel AG & Co. KGaA  
(Opponent 2) Henkelstrasse 67  
40589 Düsseldorf (DE)

**Representative:** Augustin-Castro, Barbara  
Henkel AG & Co. KGaA  
VTP Patente  
40191 Düsseldorf (DE)

**Respondents:** Unilever PLC  
(Patent Proprietors) Unilever House  
Blackfriars  
London  
Greater London EC4P 4BQ (GB)

Unilever N.V.  
Weena 455  
3013 AL Rotterdam (NL)

**Representative:** Whaley, Christopher  
Unilever Patent Group  
Colworth House  
Sharnbrook  
Bedford MK44 1LQ (GB)

**Party as of right:** Beiersdorf AG  
(Opponent 1) Intellectual Property - Patente  
Unnastrasse 48  
20253 Hamburg (DE)

**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 29 October 2009  
rejecting the opposition filed against European  
patent No. 1531788 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairman:** J. Riolo  
**Members:** D. Semino  
P. Schmitz

## Summary of Facts and Submissions

I. The appeal of opponent 2 (appellant) lies against the decision of the opposition division announced at the oral proceedings on 23 September 2009 to reject the oppositions against European Patent 1 531 788. The granted patent comprised 14 claims, independent claim 1 reading as follows:

"1. A suspension antiperspirant aerosol composition comprising milled activated aluminium chlorohydrate (AACH) having non-hollow particles and a carrier fluid comprising a masking oil of kinematic viscosity at 25°C of  $10^3 \text{ mm}^2/\text{s}$  or greater."

II. Two notices of opposition were filed against the granted patent requesting revocation of the patent in its entirety on the grounds of lack of novelty and lack of inventive step in accordance with Article 100(a) EPC.

III. The oppositions were based *inter alia* on the following documents:

DH1: EP-A-0 792 634

DH1a: "Sicherheitsdatenblatt gemäß 91/155/EWG. Cosmacol PLG", Nordmann Rassmann (NRC) Hamburg, 5 December 1995

D4: US-A-5 840 289

IV. The decision of the opposition division, as far as relevant to the present decision, can be summarised as follows:

- a) The aerosol antiperspirant composition of granted claim 1 was new over the available prior art. In particular it was new over document DH1, as it was

not reasonable to consider Cosmacol PLG, which was a mixture containing silica as inorganic solid, as a masking oil and the liquid components of Cosmacol PLG had a kinematic viscosity lower than  $10^3 \text{ mm}^2/\text{s}$ .

- b) The composition of granted claim 1 was inventive over document D4, taken as the closest prior art, in view of the synergistic effect in the reduction of whitening shown by the use of a high viscosity masking oil and milled activated aluminium chlorohydrate. The problem was the provision of an improved aerosol antiperspirant which gave a much lower degree of whitening and the proposed solution was not made obvious by the available prior art.

- V. The appellant lodged an appeal against that decision and filed in due time a statement of grounds, to which the patent proprietors (respondents) did not reply.
- VI. In a communication sent in preparation to oral proceedings the Board summarised the objections of the appellant and expressed *inter alia* the preliminary view that "document DH1 appears to disclose all the features of granted claim 1 in combination" (paragraph 1.1).
- VII. With letter of 22 April 2014 the respondents informed the Board that they would not be represented at the convened oral proceedings. Opponent 1 (party as of right) also informed the Board with letter of 9 April 2014 that it would not participate.
- VIII. Oral proceedings were held on 15 May 2014 in the announced absence of the respondents and of the party as of right.

- IX. The arguments of the appellant, as far as relevant to the present decision, can be summarised as follows:

*Novelty of granted claim 1 over document DH1*

Document DH1 disclosed a suspension antiperspirant aerosol composition comprising milled activated aluminium chlorohydrate having non-hollow particles, a carrier fluid and Cosmacol PLG as masking oil. Document DH1a showed that the kinematic viscosity of Cosmacol PLG was 1176,5 mm<sup>2</sup>/s, thus more than 10<sup>3</sup> mm<sup>2</sup>/s. Therefore the composition of granted claim 1 was anticipated by document DH1. It was wrong to disregard the viscosity of Cosmacol PLG as a whole and consider only the one of its individual components, as done in the appealed decision, as Cosmacol PLG was a single commercial product, and its kinematic viscosity, which was obtained by the addition of silica, was one of its essential properties. In this respect it was clear from DH1 itself that Cosmacol PLG in its totality, namely including some oils and silica as thickener, was a masking oil.

- X. The appellant requested that the decision under appeal be set aside and the patent be revoked.
- XI. The respondents did not make any submissions, nor file any request in the appeal procedure. The same holds true for the party as of right.

## Reasons for the Decision

### *Novelty*

1. Document DH1 discloses a suspension antiperspirant aerosol composition for topical application to the human skin comprising 1-30% by weight of solid activated aluminium chlorohydrate, 1-30% by weight of a liquid masking agent, 30-90% of a propellant for expelling the composition from a container and a carrier (claim 1). Preferably, the activated aluminium chlorohydrate comprises non-hollow particles (claim 2; page 2, line 32). A preferred method of obtaining such activated aluminium chlorohydrate with no or very small cores or voids is to obtain activated aluminium chlorohydrate with very large particle sizes (e.g. 100 microns or more), and reduce these particles in size by grinding or milling them (page 2, lines 38 and 39).
  - 1.1 In particular in the examples suspension antiperspirant aerosol compositions comprising milled activated aluminium chlorohydrate mixed with four masking oils are disclosed and tested (page 4, lines 11 to 14, section "Examples", subsection "1. Comparative"). The milled activated aluminium chlorohydrate particles are explicitly said not to contain a hollow core and not to be hollow spheroid particles (page 4, lines 28 and 29). One of the four masking oils is Cosmacol PLG (page 4, table in lines 21 to 24).
  - 1.2 The composition and properties of the commercial product Cosmacol PLG are disclosed in document DH1a. Cosmacol PLG is composed of a mixture of di-C<sub>12</sub>-C<sub>13</sub> alkyl tartrate, tri-C<sub>12</sub>-C<sub>13</sub> alkyl citrate and silica (section 2: "Zusammensetzung/Angabe zu den Bestandteilen" on page 1); it has a density of

0,850 g/cm<sup>3</sup> and a dynamic viscosity of 1000 mPa.s at 20°C (section 9: "Physikalische und chemische Eigenschaften" on page 3), which result in a kinematic viscosity of 1176,5 mm<sup>2</sup>/s at 20°C.

- 1.3 On that basis Cosmacol PLG is a masking oil having a kinematic viscosity greater than 10<sup>3</sup> mm<sup>2</sup>/s at 20°C, so that it falls under the definition of the masking oil comprised in the composition of granted claim 1 (no evidence of a possible significant variation of the viscosity between 20°C and 25°C is available).
- 1.4 The Board cannot follow the argument of the opposition division that one should consider the kinematic viscosity of the individual components of Cosmacol PLG (which may well be below 10<sup>3</sup> mm<sup>2</sup>/s) and compare them to the value given in granted claim 1, as the product Cosmacol PLG is a masking oil as such, namely it is a combination of two oils and silica which results in an oily mixture with masking properties. Indeed this is confirmed in DH1 where the product Cosmacol PLG is indicated as a masking oil and not its individual ingredients, which are not even mentioned (DH1, page 3, lines 11 to 14 and table on lines 21 to 24).
- 1.5 On that basis document DH1 discloses a suspension antiperspirant aerosol composition having all the features of granted claim 1 in combination, so that the subject-matter of claim 1 is not new.

### *Conclusion*

2. As the subject-matter of granted claim 1 is not new over the disclosure of document DH1 and there are no further requests of the respondents, there is no need



for the Board to decide on any other issue and the patent is to be revoked.

## 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:



K. Boelicke

J. Riolo

Decision electronically authenticated