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**Datasheet for the decision  
of 10 May 2017**

**Case Number:** T 0440/14 - 3.3.07

**Application Number:** 08728140.8

**Publication Number:** 2114532

**IPC:** A61Q15/00, A61K8/28, A61K8/92

**Language of the proceedings:** EN

**Title of invention:**  
ANTIPERSPIRANT/DEODORANT COMPOSITION

**Patent Proprietor:**  
Colgate-Palmolive Company

**Opponent:**  
Beiersdorf AG

**Relevant legal provisions:**  
EPC Art. 54, 56

**Keyword:**  
Novelty - (yes)  
Inventive step - (yes)



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Case Number: T 0440/14 - 3.3.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.07**  
**of 10 May 2017**

**Appellant:** Colgate-Palmolive Company  
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**Appellant:** Beiersdorf AG  
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**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
7 January 2014 concerning maintenance of the  
European Patent No. 2114532 in amended form.

**Composition of the Board:**

**Chairman** J. Riolo  
**Members:** A. Uselli  
I. Beckedorf

## Summary of Facts and Submissions

- I. European patent No. 2 114 532, based on European patent application No. 08728140.8, was granted on the basis of 14 claims.

Claim 1 of the patent read as follows:

"1. A composition comprising:

- a) a structuring agent for the composition comprising at least one plant derived oil having a melting point of 26 to 38°C, the at least one plant derived oil comprising a partially hydrogenated soybean oil, in an amount of 5% or less by weight;
- b) at least one active chosen from antiperspirant actives and deodorant actives in an amount of 0.5 to 16% by weight of the composition on an active weight basis;
- c) water in an amount that is at least 20% by weight of the composition to form a roll-on composition."

Claims 2 to 14 were dependent on claim 1.

- II. An opposition was filed against the patent on the grounds that its subject-matter lacked novelty and inventive step (Article 100(a) EPC) and it extended beyond the content of the application as filed (Article 100(c) EPC).

The following documents were among those cited during the first-instance proceedings:

D1: WO 98/17238

D2: US 2005/0281851

Annex 1: Experiments filed on 21 November 2011 during the prosecution of 09172875.8.

III. By an interlocutory decision posted on 7 January 2014 , the opposition division maintained the patent in amended form on the basis of the patent proprietor's auxiliary request 3 filed during the oral proceedings held on 13 December 2013.

IV. In the appealed decision the opposition division came to the conclusion that claim 1 of the patent and claim 1 of auxiliary requests 1 and 2 were not novel over the composition disclosed in example 11 of D2.

The composition of auxiliary request 3 was novel over D2 on account of the requirement that it contained an antiperspirant. Document D1 was the closest prior art for the assessment of inventive step. The table on page 9 of the patent showed that the addition of partially hydrogenated soybean oil increased the viscosity of the composition. According to the description, this had a beneficial effect on the wet feeling. The technical problem was therefore defined as the provision of a roll-on composition which improved the wet feeling. Neither D1 nor D2 taught that the addition of a partially hydrogenated soybean oil increased the viscosity and improved the wet feeling of a roll-on composition. The subject-matter of auxiliary request 3 was therefore inventive.

V. Against the decision of the opposition division an appeal was filed by the patent proprietor (hereinafter: appellant patent proprietor) and by the opponent (hereinafter: appellant opponent).

The appellant opponent submitted the following document with the reply to the appeal of the patent proprietor:

D9: Grasas y Aceites, 50(1), 1999, 16-22.

- VI. In a communication pursuant to Article 15(1) RPBA issued on 22 March 2017, the Board *inter alia* commented on the requirements of inventive step, arguing that it agreed with the opposition division and with the appellant patent proprietor in considering D1 as the closest prior art.
- VII. Oral proceedings were held on 10 May 2017. Regarding the course of the proceedings, reference is made to the minutes.
- VIII. With regard to the patent as granted, the appellant opponent essentially argued as follows:
- (a) The subject-matter of claim 1 was anticipated by the composition disclosed in example 11 of D2. Although this product was described as a soft face cream it was also suitable to form roll-on compositions as required by claim 1 of the patent. The composition of example 11 contained a partially hydrogenated soybean oil. It was evident from the melting curves disclosed in D9 that partially hydrogenated soybean oils contained various substances and that some of them had a melting point in the range of 26 to 38°C. This was enough to fulfil the requirement of claim 1 of the patent in suit concerning the melting point of the plant derived oil. Moreover, the information in paragraph [0035] of D2, according to which the partially hydrogenated soybean oil used in example 11 had a iodine value of 50, was an indication that its

melting point was in the range defined in claim 1 of the patent in suit.

Claim 1 of the patent was also anticipated by example 10 of D2 relating to a skin lotion containing the same partially hydrogenated soybean oil product as example 11.

- (b) Document D2 was the closest prior art for the assessment of inventive step. The roll-on composition of the patent in suit differed from the product of example 11 of D2 mainly on account of the melting point of the plant derived oil. The experimental data disclosed in the patent did not constitute evidence of any particular effect associated with the selection of a plant derived oil as defined in claim 1. The technical problem was the provision of an alternative composition. As reported in the patent, partially hydrogenated soybean oils with a melting point as defined in claim 1 were available on the market at the priority date. The mere fact of using one of these oils for a roll-on composition did not involve any inventive activity.

IX. The appellant patent proprietor argued that claim 1 of the patent was novel for the simple reason that D2 did not disclose any product containing a plant derived oil having a melting point of 26°C to 38°C.

Document D1 was the closest prior art for the assessment of inventive step. The technical problem was to be seen in the provision of roll-on compositions which ameliorated the wet feeling after application. This effect was supported by the experiments submitted during the first instance proceedings (Annex 1 of

5 November 2013) and by the data disclosed in the patent. None of the cited documents suggested solving that technical problem by providing a roll-on composition containing a plant derived oil having a melting point of 26°C to 38°C. Hence, the patent met the requirements of Article 56 EPC.

- X. The appellant patent proprietor requested that the decision under appeal be set aside and that the opposition be rejected (i.e. that the patent be maintained as granted - main request), or, alternatively, that the patent be maintained in amended form on the basis of one of the three auxiliary requests filed with letter of 8 May 2014, or on the basis of auxiliary request 4, which consists of the set of claims and amended description which were allowed by the opposition division.
- XI. The appellant opponent requested that the decision under appeal be set aside and the patent be revoked.

## **Reasons for the Decision**

### MAIN REQUEST - GRANTED PATENT

1. Novelty
  - 1.1 The novelty objections of the appellant opponent are based on the disclosures of examples 11 and 10 of document D2.
  - 1.2 Example 11 concerns a soft face cream comprising the vegetable oil blend SOYA SOFT SKIN® the composition of which is disclosed in paragraph [0035]. The parties dispute, *inter alia*, whether the composition of example

11 meets the requirement of claim 1, namely that it should comprise at least one plant derived oil having a melting point of 26 to 38°C.

- 1.3 Neither example 1 nor paragraph [0035] provides information as to the melting point of the oil blend SOYA SOFT SKIN®. Paragraph [0035] indicates that the major component of this product is partially hydrogenated soybean oil. However, this information is not on its own sufficient for a realistic estimation of the melting point of the whole blend. Indeed, various other components are included in the blend. Furthermore, there are different types of partially hydrogenated soybean oils which may have different melting points. For instance, D9 discloses in Table II two different varieties of partially hydrogenated soybean oil (SON and SOB): in one case the melting point is within the range of claim 1 (SON, 36.8°C); in the other it is outside it (SOB, 42.7°C).
- 1.4 In the appellant opponent's opinion, the requirement of claim 1 concerning the melting point of the plant derived oil is met if a single component of the face cream has a melting point comprised between 26 and 38°C. It argues that according to paragraph [0035] of D2 the vegetable oil SOYA SOFT SKIN® contains a partially hydrogenated soybean oil. In its opinion, it follows from D9 that partially hydrogenated soybean oils contain various substances, some of which melt in the range of 26 to 38°C. Thus, the face cream of example 11 would also contain some substances melting within this range of temperatures.
- 1.5 The Board does not agree with the construction of claim 1 adopted by the appellant opponent. The wording of feature a) of claim 1:



*"a)...at least one plant derived oil having a melting point of 26 to 38°C, the at least one plant derived oil comprising a partially hydrogenated soybean oil,..."*

makes it clear that it is the whole plant derived oil that must have a melting point of 26 to 38°C. If this plant derived oil consists of partially hydrogenated soybean oil, then the partially hydrogenated soybean oil must have this melting point. The interpretation of the appellant opponent, according to which the condition expressed by feature a) is fulfilled even when the plant derived oil contains a single substance melting in the range of 26 to 38°C, is inconsistent with the plain meaning of the words of this feature. Nor can this interpretation find support in the description. To the contrary, various passages of the description confirm that the whole plant derived oil must have a melting point of 26 to 38°C (see paragraphs [0007] and [0010]).

Thus, the argument that the composition of example 11 of D2 meets the requirement expressed by feature a) of claim 1 because it could contain some substances melting between 26 and 38°C must fail for the simple reason that it is based on a wrong reading of claim 1.

1.6 Following a different line of argument, the appellant opponent argues that D2 indicates that the product SOYA SOFT SKIN® has an iodine value of about 50, which is comparable with the iodine values reported in the patent in suit for the partially hydrogenated soybean oil used in the composition of claim 1. This would be a clue that the oil blend SOYA SOFT SKIN® has the same melting point as the plant derived oil of the patent in suit.

1.7 This argument of the appellant opponent is not persuasive either. According to established case law, it is a prerequisite for the acceptance of lack of novelty that the claimed subject-matter is "directly and unambiguously derivable from the prior art" (Case Law of the Boards of Appeal of the EPO, 8th edition 2016, I.C.4.1). Thus, a successful attack on novelty cannot be based on the probability that a feature in respect of which no information is given in the prior art may be the same as in the claim objected to. In other words, a conclusion of lack of novelty cannot be based on the argument that a prior art document provides some clues that its subject-matter may be comprised in the claim against which the novelty attack is addressed.

Independently of the above, the Board does not agree with the position of the appellant opponent that the iodine value disclosed in D2 is an indication that the SOYA SOFT SKIN® has a melting point of 26 to 38°C.

In paragraph [0011] of the patent in suit, it is explained that the iodine number of the partially hydrogenated soybean oil used for the composition of the invention should be comprised preferably in the range 75 to 80. According to D2 (see paragraph [0035]), the oil blend SOYA SOFT SKIN® has an iodine value of about 50.

As explained in [0021] of D2, the iodine value is a number that reflects the degree of hydrogenation of an oil, i.e. its degree of unsaturation. The degree of unsaturation, and therefore the iodine number, are linked to the melting point of the oil.

Thus, the fact that the iodine value reported in D2 for the SOYA SOFT SKIN® is well outside the preferred range of 75 to 80 does not support the appellant opponent's position that the melting point of the vegetable oil used for the composition of example 11 is included in the range of claim 1.

1.8 It follows from the above that there is no evidence that the face cream described in example 11 of D2 comprises a plant derived oil having a melting point of 26 to 38°C. Hence, the subject-matter of claim 1 is novel over the disclosure of example 11 of D2.

1.9 The novelty objection in view of example 10 of D2 is based on the argument that this composition also contains the oil blend SOYA SOFT SKIN®. However, for the reasons explained above, there is no evidence that this oil has a melting point in the range of 26 to 38°C. Thus, claim 1 is novel over this example too.

In the light of the above, the Board concludes that the subject-matter of claim 1 meets the requirements of Article 54 EPC.

2. Inventive step

2.1 The invention underlying the patent in suit concerns antiperspirant and/or deodorant roll-on compositions used to reduce sweat in an axillary region. A specific problem addressed in the patent is to reduce the tackiness and wet feeling common to these kinds of composition (see paragraph [0002]).

## 2.2 Closest prior art

2.2.1 The Board agrees with the opposition division and the appellant patent proprietor that D1 represents the closest prior art. This document relates to deodorant or antiperspirant sticks and mentions the problem of providing compositions which can be applied without frictional resistance ("*Reibungswiderstand*") and do not provide a fatty effect ("*fettigen Eindruck*") (page 1, lines 1 to 14).

2.2.2 The sticks described in D1 contain a fatty phase which includes at least one oil component (page 4, 2nd paragraph). A long list of suitable oil components is disclosed in pages 11 and 12 of D1. The list includes *inter alia* non hydrogenated soybean oil (page 11, 2nd paragraph). The composition of claim 1 of the patent in suit differs from the compositions of D1 mainly in that it contains a plant derived oil comprising a partially hydrogenated soybean oil.

## 2.3 Technical problem

The description of the patent and Annex I disclose some experiments which are relevant for the definition of the technical problem. In both cases compositions according to the patent in suit are compared with compositions containing non hydrogenated soybean oil, which can be regarded as the oil component structurally closer to the partially hydrogenated soybean oil, among the oil components mentioned in D1.

2.3.1 The patent discloses in the table on page 9 some experimental data concerning the viscosity of roll-on compositions. A comparison among compositions differing only in the type of soybean oil (partially hydrogenated

versus non hydrogenated) demonstrates an increase of viscosity linked to the presence of partially hydrogenated soybean oil. An increase in viscosity provides more structure to the composition and ameliorates the feeling of wetness (see paragraph [0009] and [0012] of the patent).

2.3.2 The experiment disclosed in Annex I relates to a comparison of the tactile properties of two antiperspirant compositions named A and B. The only difference between the two compositions is that composition A contains partially hydrogenated soybean oil, whereas composition B contains non hydrogenated soybean oil. The results of the experiments disclosed in page 2 of Annex I indicate that composition A provides a statistically significant reduction in grease residue and slight reduction in stickiness.

2.3.3 In the light of these results, the technical problem underlying the invention can be defined as the provision of a composition that ameliorates the feeling of wetness and has reduced grease residue and stickiness.

2.4 Obviousness

2.4.1 There is no suggestion in D1 to solve this problem by the inclusion in the compositions disclosed therein of a plant derived oil comprising a partially hydrogenated soybean oil. Nor is this suggestion to be drawn from the other cited documents.

Thus, the subject-matter of the patent meets the requirements of Article 56 EPC.

2.5 In the appellant opponent's opinion, the composition of example 11 of D2 was the most suitable starting point for the assessment of inventive step.

However, as discussed above, the composition of example 11 of D2 is a soft face cream. In the Board's view, the skilled person seeking to formulate a new antiperspirant and/or deodorant roll-on composition would not realistically consider achieving this goal by modifying a face cream. In any case, he would find no teaching in D2 or any other document on how to modify the composition of example 11 in a roll-on composition with good tactile properties. In particular, there would be no suggestion to include in the composition a plant derived oil as defined in the patent in suit.

2.6 Therefore, the Board concludes that the patent meets the requirements of Article 56 EPC.

**Order**

**For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The opposition is rejected.

The Registrar:

The Chairman:



S. Fabiani

J. Riolo

Decision electronically authenticated