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**Datasheet for the decision  
of 17 October 2017**

**Case Number:** T 1129/14 - 3.3.07  
**Application Number:** 09172875.8  
**Publication Number:** 2149366  
**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

**Headword:**  
Antiperspirant composition/COLGATE

**Relevant legal provisions:**  
EPC Art. 114(2), 54

**Keyword:**  
Late submitted material - correct exercise of discretion (yes)  
Novelty - (yes)



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Case Number: T 1129/14 - 3.3.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.07**  
**of 17 October 2017**

**Appellant:** Beiersdorf AG  
(Opponent) Unnastrasse 48  
20253 Hamburg (DE)

**Respondent:** Colgate-Palmolive Company  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 15 May 2014  
rejecting the opposition filed against European  
patent No. 2149366 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairman** J. Riolo  
**Members:** A. Usuelli  
L. Bühler

## Summary of Facts and Submissions

- I. European patent No. 2 149 366, based on European patent application No. 09172875.8, was granted on the basis of 14 claims.

Independent claim 1 read as follows:

"1. A liquid 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, and  
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".

- II. An opposition was filed against the patent, on the grounds that its subject-matter lacked novelty and inventive step. The documents cited during the opposition proceedings included the following:

D1: US 2005/0281851

D3: US 2004/0204601

D4: DE 10140586

D6: Acta Med Scan 1988, Suppl. 726

D8: Annex 1, experiments of 21 November 2011

- III. By decision posted on 15 May 2014 the opposition division rejected the opposition.

In the decision, the opposition division came *inter alia* to the following conclusions:

- (a) Late-filed document D6 was not admissible since it was not relevant.
- (b) The composition defined in claim 1 of the patent in suit differed from the compositions of examples 10 and 11 of D1 as regards the melting point of the plant-derived oil. Document D3 did not anticipate the subject-matter of the patent because the compositions it disclosed did not contain a partially hydrogenated soybean oil.
- (c) Document D4 was the closest prior art for the assessment of inventive step. The composition of the patent in suit differed from the composition of D4 in the requirement of comprising a plant-derived oil that had a melting point of 26 to 38°C and comprised a partially hydrogenated soybean oil. In the light of the experimental data disclosed in the patent and in document D8, the technical problem was the provision of compositions with reduced greasy and tacky feel. The available prior art did not suggest to solve this problem by providing compositions comprising a plant-derived oil having a melting point of 26 to 38°C. The requirement of inventive step was therefore met.

IV. The opponent (hereinafter the appellant) lodged an appeal against that decision. With the statement setting out the grounds of appeal filed on 12 September 2014, it submitted the following document:

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

The arguments presented by the appellant in the statement setting out the grounds of appeal can be summarised as follows:

Examples 10 and 11 of D1 disclosed respectively a skin lotion and a soft face cream containing SOYA SOFT SKIN™, a commercial product containing partially hydrogenated soybean oil. In both compositions, the amount of partially hydrogenated soybean oil was less than 5%. Document D9 showed that the hydrogenated soybean oils melted over a broad range of temperatures. For instance, the melting curve for hydrogenated soybean oil type N covered the range -10°C to 36.8°C. This indicated that the oils contained various substances, some of them melting within the range of claim 1, namely 26 to 38°C. Hence, the compositions of examples 10 and 11 of D1 anticipated claim 1 of the patent in suit since they contained less than 5% of partially hydrogenated soybean oil and substances of vegetable origin having a melting point within the range defined in claim 1.

- V. By letter dated 26 January 2015 the patent proprietor (hereinafter the respondent) requested that the appeal be dismissed, or alternatively that the patent be maintained on the basis of one of the three auxiliary requests submitted with the same letter.

Concerning the requirement of novelty over D1, the respondent argued there was no unambiguous disclosure in examples 10 and 11 of D1 of a composition comprising a structuring agent based on a plant-derived oil having a melting point of 26 to 38°C and comprising a partially hydrogenated soybean oil.

- VI. In a communication pursuant to Article 15(1) RPBA issued on 11 September 2017, the Board expressed the view that the subject-matter of the patent was novel over examples 10 and 11 of D1.

- VII. Oral proceedings were held on 17 October 2017. They were not attended by the appellant, who had informed the Board accordingly by letter of 26 July 2017.
- VIII. The appellant requested in writing that the decision under appeal be set aside and that European patent No.2149366 be revoked.
- IX. The respondent requested that the appeal be dismissed (main request) or, alternatively, that the patent be maintained in accordance with one of the first to third auxiliary requests submitted with the statement setting out the grounds of appeal.

### **Reasons for the Decision**

1. Admissibility of document D6
  - 1.1 In its discretionary decision not to admit document D6, the opposition division found that the document lacked relevance. In its statement setting out the grounds of appeal, the appellant briefly mentions document D6 (see page 5), without commenting on the decision of the opposition division not to admit it.
  - 1.2 The Board observes that the opposition division has exercised its discretion under Article 114(2) EPC by applying a correct criterion (i.e. relevance) and there is no indication that it did so in an unreasonable way.

D6 was cited by the appellant since it discloses the melting point of a particular type of partially hydrogenated soybean oil. There is however no indication that this is the same partially hydrogenated soybean oil present in the compositions of D1, as argued by the appellant. Thus, it was reasonable for

the opposition division to conclude that D6 is not a *prima facie* relevant document.

Under these circumstances, the Board sees no reason to overrule the decision of the opposition division not to admit it.

Main request (patent as granted)

2. Novelty

2.1 The appellant contended that the subject-matter of the patent lacks novelty in view of examples 10 and 11 of D1. Both examples relate to compositions comprising the vegetable oil blend SOYA SOFT SKIN™, the composition of which is disclosed in paragraph [0035]. It was, *inter alia*, disputed between the parties whether the compositions of examples 10 and 11 meet the requirement of comprising at least one plant-derived oil having a melting point of 26 to 38°C and comprising a partially hydrogenated soybean oil.

2.2 The Board notes that neither paragraph [0035] nor any other part of D1 provides information as to the melting point of the vegetable oil blend SOYA SOFT SKIN™. Paragraph [0035] indicates that the major component of this product is partially hydrogenated soybean oil. However, there are different types of partially hydrogenated soybean oils, and they 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 (SOB, 42.7°C).

Furthermore, various other components are included in the SOYA SOFT SKIN™ blend; taken together, they constitute about 60% of the whole blend. Hence, even if the melting point of the partially hydrogenated soybean oil present in the blend were known, it would be difficult to make any realistic estimation of the melting point of the blend as a whole.

- 2.3 In the appellant's opinion, the requirement of claim 1 concerning the melting point of the plant-derived oil is met if a single component of the compositions of examples 10 and 11 D1 has a melting point between 26 and 38°C.

In the Board's view, the appellant's position is not consistent with the plain meaning of the wording of claim 1 of the patent under appeal stating that the structuring agent comprises "*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*" (see point I above). The indication that the plant-derived oil comprises a partially hydrogenated soybean oil means that it either consists entirely of partially hydrogenated soybean oil or contains other substances in addition. In the first case, the partially hydrogenated soybean oil as a whole must have a melting point of 26 to 38°C. In the second case, it is the plant-derived oil with all its constituents that must have a melting point of 26 to 38°C. The appellant's interpretation, namely that the condition expressed by feature a) is fulfilled if e.g. a single substance contained in the partially hydrogenated soybean oil melts in the range of 26 to 38°C, is also not supported by the description of the patent under appeal, various passages of which confirm that, on the



contrary, the plant-derived oil with all its constituents must have a melting point of 26 to 38°C (see paragraphs [0005] and [0010]).

- 2.4 In view of the above, the Board concludes that document D1 fails to provide a direct and unambiguous disclosure of a composition comprising a plant-derived oil as defined in claim 1 of the patent in suit. Thus, the patent is novel over document D1.
3. The appellant has not contested the opposition division's conclusions that the subject-matter of claim 1 is novel over D3 and fulfils the requirements of inventive step; the Board sees no reason to depart from the opposition division's finding.

## Order

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

The appeal is dismissed.

The Registrar:

The Chairman:



S. Fabiani

J. Riolo

Decision electronically authenticated