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**Datasheet for the decision
of 22 June 2017**

Case Number: T 0991/16 - 3.3.07
Application Number: 12177206.5
Publication Number: 2581077
IPC: A61K8/33, A61K8/34, A61K8/35,
A61K8/37, A61K8/49, A61Q15/00
Language of the proceedings: EN

Title of invention:

Olfactory adaption and cross-adapting agents to reduce the perception of body odors

Applicants:

Symrise AG
MONELL CHEMICAL SENSES CENTER

Relevant legal provisions:

EPC Art. 84, 76(1), 123(2)

Keyword:

Claims - clarity (no)
Divisional application - added subject-matter (yes)
Amendments - added subject-matter (yes)



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Case Number: T 0991/16 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 22 June 2017

Appellant: Symrise AG
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37603 Holzminden (DE)

Appellant: MONELL CHEMICAL SENSES CENTER
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Decision under appeal: **Decision of the Examining Division of the European Patent Office posted on 10 February 2016 refusing European patent application No. 12177206.5 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman J. Riolo
Members: R. Hauss
P. Schmitz

Summary of Facts and Submissions

I. The appeal lies from the decision of the examining division, announced on 15 January 2016 and posted on 10 February 2016, refusing European patent application No. 12 177 206, a divisional of European patent application No. 03 710 691 (the parent application).

II. The decision under appeal was based on a sole request consisting of three claims.

Independent claim 1 of that request reads as follows:

"1. A deodorant composition comprising an amount of a cross-adapting agent effective to reduce perception of male and female malodour

wherein the cross-adapting agent is selected from the group consisting of a combination of hexyl salicylate and methyl acetate rf, and

wherein the cross-adapting agent comprises from about 0.1% to about 10% b.w. of the deodorant composition."

Claims 2 and 3 are dependent claims defining narrower concentration ranges for the cross-adapting agent.

III. In the decision under appeal, the examining division observed that claim 1 erroneously referred to "methyl acetate" instead of "menthyl acetate", and found that the subject-matter defined in that claim extended beyond the content of both the parent application and the divisional application as filed, *inter alia* due to the amendment introducing the specific combination of hexyl salicylate with menthyl acetate (Articles 123(2) and 76(1) EPC).

IV. The appellants (applicants) lodged an appeal against that decision, stating that they were still pursuing

the claims considered in the decision under appeal. Claim 1 as set out in the statement of grounds of appeal has however been amended by correcting the typing error so that "methyl acetate" now reads "menthyl acetate".

The appellants presented arguments to substantiate their view that claim 1 found support in both the parent application and the divisional application as filed.

They requested that the decision under appeal be set aside and that a patent be granted on the basis of the claims of the sole pending request as set out in their statement of grounds of appeal.

- V. In a communication issued in preparation for oral proceedings and advising the appellants of its preliminary opinion, the board mentioned *inter alia* the following points:
- Neither the parent nor the divisional application as filed contained a direct and unambiguous specific disclosure of a combination of hexyl salicylate and menthyl acetate rf, nor of a composition which contained this combination as the effective cross-adapting agent; hence it appeared that the requirements of Articles 76(1) and 123(2) EPC were not met.
 - The scope of the claims could not be determined, in the absence of any defined criterion for establishing the presence of an "effective amount" of the cross-adapting agent, and because the meaning of the addition "rf" was not known (Article 84 EPC).
- VI. With letter of 14 June 2017, the appellants informed the board that they would not be attending the oral proceedings scheduled for 22 June 2017, and requested

a decision according to the state of the file. They did not provide any further arguments in reply to the board's communication.

- VII. Oral proceedings were held on 22 June 2017 in the absence of the appellants.

Reasons for the Decision

1. Clarity (Article 84 EPC)
 - 1.1 After due deliberation, the board confirms its conclusions on the issue of clarity as previously expressed in section 3 of its communication (see point V above):
 - 1.2 Present claim 1 does not define any criterion or test for ascertaining that the combination of hexyl salicylate and menthyl acetate is present in the deodorant composition at an amount effective to reduce perception of male and female malodour. Thus the scope claimed cannot be determined.

The additional requirement that the cross-adapting agent be present at a concentration of "about 0.1 to about 10 % b.w." of the deodorant composition cannot change that assessment. The application as filed envisages many different cross-adapting agents and uses. Nothing in the application indicates the concentration range regarded as "effective", within the meaning of claim 1, in the case of the specific combination of hexyl salicylate and menthyl acetate. The effect produced by these agents would also depend, to some degree, on the other components and on the type and intended use of the deodorant composition. Thus the

concentration range of "about 0.1% to about 10% b.w." does not necessarily cover only effective amounts. The term "about" gives rise to a further lack of clarity.

1.3 It is moreover uncertain whether the addition "rf" is intended to confer a limitation on the menthyl acetate and whether "rf" is a term universally understood to have a specific technical meaning.

1.4 For these reasons, the requirements of Article 84 EPC are not met.

2. Amendments (Articles 76(1) and 123(2) EPC)

2.1 Moreover, the requirements of Articles 76(1) and 123(2) EPC are not met, as indicated in particular in section 2.1 of the board's communication (see point V above), and therefore the request cannot be allowed for that reason either.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



L. Malécot-Grob

J. Riolo

Decision electronically authenticated