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**Datasheet for the decision  
of 9 December 2019**

**Case Number:** T 1118/17 - 3.3.07

**Application Number:** 10769131.3

**Publication Number:** 2490652

**IPC:** A61K8/26, A61K8/28, A61K8/34,  
A61K8/37, A61K8/49, A61K8/97,  
A61Q15/00

**Language of the proceedings:** EN

**Title of invention:**  
ANTIPERSPIRANT THAT REDUCES/ELIMINATES YELLOWING ON CLOTHING

**Applicant:**  
Colgate-Palmolive Company

**Headword:**  
Antiperspirant/ COLGATE

**Relevant legal provisions:**  
EPC Art. 123(2)

**Keyword:**  
Amendments - allowable (no)

**Decisions cited:**  
T 0201/83



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

Boards of Appeal of the  
European Patent Office  
Richard-Reitzner-Allee 8  
85540 Haar  
GERMANY  
Tel. +49 (0)89 2399-0  
Fax +49 (0)89 2399-4465

Case Number: T 1118/17 - 3.3.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.07**  
**of 9 December 2019**

**Appellant:** Colgate-Palmolive Company  
(Applicant) 300 Park Avenue  
New York, NY 10022 (US)

**Representative:** Wichmann, Hendrik  
Wuesthoff & Wuesthoff  
Patentanwälte PartG mbB  
Schweigerstraße 2  
81541 München (DE)

**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 23 December  
2016 refusing European patent application No.  
10769131.3 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** J. Riolo  
**Members:** A. Usuelli  
P. Schmitz

## Summary of Facts and Submissions

I. The appeal of the applicant (hereinafter: the appellant) lies from the decision of the examining division to refuse European patent application No. 10 769 131.3. The decision was based on a main request and three auxiliary requests wherein the main request and auxiliary request 1 were filed on 8 November 2016 and auxiliary requests 2 and 3 were filed on 6 December 2016.

Claim 1 of the main request read as follows:

"1. An antiperspirant composition comprising:  
a) a base,  
b) an antiperspirant active, and  
c) an antioxidant wherein the antioxidant is a combination of butylated hydroxytoluene and pentaerythrityl tetra-di-t-butyl hydroxyhydrocinnamate, wherein the amount of butylated hydroxytoluene is 0,05 to 0,5 weight%, and wherein the amount of pentaerythrityl tetra-di-t-butyl hydroxyhydrocinnamate is 0.001 to 0.5 weight%".

II. In its decision the examining division considered that the amount of hydroxyhydrocinnamate derivative recited in claim 1 of the main request was disclosed in paragraph [0056] of the original application in the context of a specific composition. Its inclusion in claim 1 of the main request was based upon a generalisation of the disclosure of paragraph [0056]. Hence, this amendment did not comply with Article 123(2) EPC.

Claim 1 of auxiliary requests 1 to 3 also contravened Article 123(2) EPC on account of the feature defining the amount of hydroxyhydrocinnamate derivative.

III. With the statement setting out the grounds of appeal filed on 20 April 2017, the appellant submitted a main request and five auxiliary requests. Claim 1 of each request related to an antiperspirant composition comprising as antioxidant a mixture of butylated hydroxytoluene (BHT) and pentaerythrityl tetra-di-t-butyl hydroxyhydrocinnamate (Tinogard TT™)

Apart from a minor editorial amendment, claim 1 of the main request was identical to claim 1 of the main request underlying the decision of the examining division.

Claim 1 of auxiliary request 1 differed from claim 1 of the main request in that the amount of Tinogard TT™ was 0.02 to 0.5 weight%.

Claim 1 of auxiliary request 2 indicated that the antioxidant was a combination of BHT and Tinogard TT™ and that the total amount of antioxidant was at least 0.11 wt% of the composition.

Claim 1 of auxiliary request 3 differed from claim 1 of auxiliary request 2 in specifying that the composition comprised also citric acid.

Claim 1 of auxiliary request 4 read as follows:

"1. An antiperspirant composition comprising:  
a) a base;  
b) an aluminum containing antiperspirant active in an amount of 1-25 wt% of the composition; and

c) an antioxidant, wherein the antioxidant is a combination of butylated hydroxytoluene and pentaerythrityl tetra-di-t-butyl hydroxyhydrocinnamate, wherein the amount of butylated hydroxytoluene is 0,05 to 0,5 wt% of the composition, and wherein the amount of pentaerythrityl tetra-di-t-butyl hydroxyhydrocinnamate is 0.001 to 0,5 wt% of the composition."

Claim 1 of auxiliary request 5 read as follows:

"1. An antiperspirant composition comprising:

- a) a base;
- b) aluminum zirconium tetrachlorohydrate glycine in an amount of 1-24 wt% of the composition; and
- c) an antioxidant, wherein the antioxidant is a combination of butylated hydroxytoluene and pentaerythrityl tetra-di-t-butyl hydroxyhydrocinnamate, wherein the amount of butylated hydroxytoluene is 0.1 to 0.5 wt% of the composition, wherein the amount of pentaerythrityl tetra-di-t-butyl hydroxyhydrocinnamate is 0.001 to 0.5 wt% of the composition, and wherein the composition further comprises 50% citric acid in an amount of 0.001 to 0.5 wt% of the composition."

IV. In a communication pursuant to Article 15(1) RPBA, issued on 19 September 2019 the Board observed that claim 1 of the main request and of auxiliary requests 1, 4 and 5 contained features extracted from the specific formulations disclosed in paragraph [0056] of the original description. It noted that each of these formulations contained several other ingredients not recited in claim 1. Concerning claim 1 of auxiliary requests 2 and 3, the Board observed that the feature

"at least 0.11 wt%" appeared to be based on a generalisation of the disclosure of paragraph [0010] of the description. It concluded that none of the requests appeared to comply with Article 123(2) EPC.

V. Oral proceedings were held on 9 December 2019.

VI. The appellant's arguments can be summarised as follows:

Antiperspirant compositions containing a combination of BHT and Tinogard TT™ were disclosed in original claim 2. The specific amounts of the two antioxidants were based on the disclosure of the general embodiments of paragraph [0010] and on the disclosure of the specific formulations of paragraph [0056]. Concerning these formulations, the skilled person would have considered that the amounts of the antioxidants were not inextricably linked with the amounts of the other ingredients. Indeed, only BHT and Tinogard TT™ were important for the stabilisation and the reduced yellowing of the composition. Thus, the skilled person would have seriously contemplated combining the amount of Tinogard TT™ disclosed in the formulations of paragraph [0056] with the amount of BHT disclosed in paragraph [0010]. This approach was in line with decision T 201/83. This argument essentially applied to all the requests.

VII. The appellant requested that the decision under appeal be set aside and that the case be remitted to the examining division for further prosecution on the basis of the main request or on the basis of one of auxiliary requests 1 to 5, all filed with the grounds of appeal.

## Reasons for the Decision

### Main Request

1. Article 123(2) EPC
  - 1.1 Claim 1 relates to an antiperspirant composition containing an amount of 0.001 to 0.5 weight% of the antioxidant Tinogard TT™ (a hydroxyhydrocinnamate derivative) and an amount of 0.05 to 0.5 weight% of the antioxidant BHT (butylated hydroxytoluene).

According to paragraph [0010] of the original description, BHT is generally present in an amount of 0.05 to 0.5 weight%. Concerning Tinogard TT™, the amount 0.001 to 0.5 weight% corresponds to the amount present in the antiperspirant formulation disclosed in the first table of paragraph [0056] of the original application (page 15). This formulation contains, in addition to Tinogard TT™, 0.2 weight% of BHT and several other components in given amounts which are not recited in claim 1.

It needs therefore to be assessed whether the ranges disclosed in paragraphs [0010] and [0056] can be combined without adding any new subject-matter.

- 1.2 In this regard the Board notes that the main role of the antioxidant is to reduce or eliminate the yellowing effect on clothing caused by the antiperspirant [0012]. The intensity of this effect, and therefore the amount of antioxidant required to reduce or eliminate it, is linked to the amount and possibly the type of antiperspirant used. Indeed, in paragraph [0025] it is stated that "*[b]y reducing the level of the*

*antiperspirant...the amount of material that contributes to yellowing is reduced".*

The antioxidant is also used to stabilise the antiperspirant compositions themselves and to prevent their yellowing [0013]. Also with regard to this function, the amount of antioxidant is closely related to the type and amount of the other components of the composition. This is explicitly acknowledged in paragraph [0013] where it is affirmed that "*[t]he actual amount of antioxidant is dependent on the specific composition depending on the materials in the composition*".

For these reasons the skilled person considering the whole teaching of the application would assume that the amount of Tinogard TT™ contained in the first formulation of paragraph [0056] is specific for this particular formulation. In other words, this amount is linked with the type and amounts of the other ingredients contained in the formulation.

Thus, introducing the amount of Tinogard TT™ disclosed in the first formulation of paragraph [0056] in the context of a composition in which the most part of the ingredients present in this formulation is not mentioned and BHT is present in a different amount, results in the addition of new subject-matter.

- 1.3 The appellant refers to decision T 201/83 in which an amendment of a concentration range based on a particular value disclosed in a specific example was considered to comply with the requirements of Article 123(2) EPC. The competent Board held that "*the skilled man could have readily recognised this value as not so closely associated with the other features of the*



*example as to determine the effect of that embodiment...*" (point 12 of the Reasons).

However, for the reasons discussed above, in the Board's view in the present case the skilled person would consider the amount of Tinogard TT<sup>TM</sup> disclosed for the formulation of paragraph [0056] as closely associated with the other features characterising the formulation.

The assessment as to whether a value disclosed in an example is closely associated or not with the other features of the example is rather case-specific. This is acknowledged also in decision T 201/83 (see point 6 of the Reasons).

- 1.4 Therefore claim 1 of the main request does not comply with the requirements of Article 123(2) EPC.

#### Auxiliary request 1

2. In the formulation of claim 1 of auxiliary request 1, the amount of Tinogard TT<sup>TM</sup> is 0.02 to 0.5 weight%. This range is based on the combinations of the values 0.02 and 0.5 disclosed respectively in the third and in the first formulation of paragraph [0056]. The amount of BHT is the same as in claim 1 of the main request and is based on the disclosure of paragraph [0010] of the original description.

- 2.1 Thus, also claim 1 of auxiliary request 1 is based on a combination of features disclosed in the context of specific formulations with features disclosed in the description in relation to general embodiments. Accordingly, the considerations set out above in relation to the main request apply also to the

subject-matter of auxiliary request 1. Furthermore, as discussed above, the skilled person would assume that the amount of Tinogard TT™ disclosed in the context of a specific formulation, is specific for that formulation. Hence, the combination of the values 0.02 and 0.5 disclosed in relation of two different formulations results in the addition of new subject-matter.

Therefore, auxiliary request 1 does not comply with the requirements of Article 123(2) EPC.

### Auxiliary requests 2 and 3

3. In claim 1 of auxiliary requests 2 and 3 the total amount of the two antioxidants (Tinogard TT™ and BHT) is at least 0.11 wt% of the composition.
- 3.1 In paragraph [0010] of the original application it is explained that the amount of antioxidant is at least 10% greater than the amount needed to stabilise the composition. It is further stated that, "*[f]or example, if 0.1 weight% based on the total weight of the composition is needed to stabilize, then at least 0.11 weight% would be used*". Thus, according to this paragraph of the description, the amount of antioxidant is at least 0.11 weight% only when the compositions require an amount of antioxidant of 0.1 weight% in order to be stabilised. Since this condition has not been incorporated in claim 1 of auxiliary requests 2 and 3, the subject-matter of claim 1 is the result of an intermediate generalisation.
- 3.2 Thus, auxiliary requests 2 and 3 do not comply with Article 123(2) EPC.

Auxiliary request 4

4. The formulation of claim 1 of auxiliary request 4 contains the same amounts of Tinogard TT™ and BHT as the formulation of claim 1 of the main request. Moreover, this request indicates that the antiperspirant active is present in an amount of 1 to 25 weight %, as disclosed in paragraph [0018] of the original application.
- 4.1 Thus, claim 1 combines features disclosed in paragraph [0056] in relation with a specific formulation (i.e. the amount of Tinogard TT™) with features disclosed in the description in the context of general embodiments (i.e. the amounts of BHT and antiperspirant active). For the reasons already set out in respect of the main request this combination does not comply with the requirements of Article 123(2) EPC.

Auxiliary request 5

5. In claim 1 of auxiliary request 5 the amounts of aluminum zirconium tetrachlorohydrate glycine, Tinogard TT™ and citric acid are the same as in the first formulation of paragraph [0056]. BHT is present in an amount of 0.1 to 0.5 weight %. The value 0.1 is disclosed in the second formulation of paragraph [0056] whereas 0.5 is disclosed in the first formulation of paragraph [0056].
- 5.1 As explained in paragraph 1.2 above, in the present case the concentrations disclosed in the context of a specific formulation are specific for that formulation. Thus, combining concentrations disclosed in two different formulations does not comply with Article 123(2) EPC.

5.2 Moreover, each formulation of paragraph [0056] contains several substances (e.g. C12-C15 alkyl benzoate, hydrogenated soybean oil (with a specific iodine value), DC 345) which are not recited in claim 1 of auxiliary request 5. This represents in the present case an inadmissible intermediate generalisation.

5.3 It follows that auxiliary request 5 does not comply with the requirements of Article 123(2) EPC.

### **Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:



B. Atienza Vivancos

J. Riolo

Decision electronically authenticated