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**Datasheet for the decision  
of 10 January 2012**

**Case Number:** T 1254/08 - 3.3.07

**Application Number:** 00936188.2

**Publication Number:** 1183005

**IPC:** A61Q 19/00, A61K 8/34,  
A61Q 15/00, A61K 8/26

**Language of the proceedings:** EN

**Title of invention:**  
After shave composition containing aluminum chlorohydrate

**Patent Proprietor:**  
The Gillette Company

**Opponents:**  
Unilever PLC

**Headword:**  
-

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

**Relevant legal provisions (EPC 1973):**  
-

**Keyword:**  
"Inventive step - (no) - obvious alternative"

**Decisions cited:**  
-

**Catchword:**  
-



Case Number: T 1254/08 - 3.3.07

**DECISION**  
of the Technical Board of Appeal 3.3.07  
of 10 January 2012

**Appellants:**  
(Opponents)

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**Respondents:**  
(Patent Proprietors)

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**Representative:**

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**Decision under appeal:** Decision of the Opposition Division of the European Patent Office posted 13 May 2008 rejecting the opposition filed against European patent No. 1183005 pursuant to Article 101(2) EPC.

**Composition of the Board:**

**Chairman:** J. Riolo  
**Members:** F. Rousseau  
D. T. Keeling

## Summary of Facts and Submissions

- I. The Appellants (Opponents) lodged an appeal on 4 July 2008 against the decision of the opposition division posted on 13 May 2008 rejecting the opposition against European patent No. 1 183 005 which was granted on the basis of thirteen claims, claims 1, 2, 7, and 8 of which read as follows:
- "1. An after shave composition comprising, by weight, at least 30% water, 5 to 65% ethanol, 0.25 to 6% fragrance, 0.25 to 5% surfactant to solubilize or emulsify the fragrance, and 0.5 to 1.5% (U.S.P.) aluminum chlorohydrate.
  2. The composition of claim 1, comprising at least 65% water and 5 to 25% ethanol.
  7. A cosmetic method of reducing irritation and redness of human skin caused by shaving, comprising topically applying to shaved human skin an after shave composition comprising, by weight, at least 30% water, 5 to 65% ethanol, 0.25 to 6% fragrance, 0.25 to 5% surfactant to solubilize or emulsify the fragrance, and 0.5 to 1.5% (U.S.P.) aluminum chlorohydrate.
  8. The method of claim 7, wherein said composition comprises at least 65% water and 5 to 25% ethanol."
- II. An opposition had been filed in which revocation of the patent in its entirety was requested on the grounds of lack of inventive step and lack of sufficiency of the disclosure pursuant to Articles 100(a) and 100(b) EPC.

III. According to the decision under appeal, the claimed subject-matter was sufficiently disclosed and novel. As regards inventive step, the after-shave product "Kiehl's For The Ladies (Unscented) Moisturizing And Conditioning After-Shave Lotion" as referred to in paragraph [0003] of the specification represented the starting point for analyzing inventive step. The objective problem solved by the claimed subject-matter over that prior art was the provision of a mere alternative. No hint could be found in the cited documents to modify the after-shave compositions described in paragraph [0003] of the patent in suit in order to arrive at the subject-matter of claims 1 and 12 as granted. The same was valid for independent claims 7 and 13. An inventive step was therefore acknowledged.

IV. With the statement setting out the grounds for appeal, dated 23 September 2008, the Appellants submitted *inter alia* the following documents :

- D7: Extract from Kiehl's web-site on 26 June 2008 showing the label of the "Blue Astringent Herbal Lotion",
- D8: Extract from Kiehl's web-site on 16 September 2008 concerning the "Blue Astringent Herbal Lotion",
- D9: Extract from Harry's Cosmeticology, seventh edition, edited by J.B. Wilkinson and R.J. Moore, George Godwin London, 1982, pages 181-183,
- D10: Extract from Cosmetics Science and Technology, second edition, edited by M.S. Balsam and E. Sagarin, Wiley-Interscience, Volume 2, 1972, pages 18-31 and

D12: "Men's Products Formulary", Cosmetics & Toiletries,  
Vol. 100, November 1985, pages 79-100.

- V. In response to the statement setting out the grounds of appeal, the Respondents submitted with letter of 16 March 2009 two sets of amended claims as Main and Auxiliary Requests, respectively. The claims of the Main Request corresponded to the granted claims in which claims 12 and 13 had been deleted and the range relating to the amount of ethanol had been limited to 5 to 25% in claims 1 and 7. The subject-matter defined in claims 1 to 5 of the Auxiliary Request corresponded to that of claims 7 to 11 of the Main Request. In support of the presence of an inventive step, reference was merely made to the reasons for the contested decision.
- VI. A summons to attend oral proceedings before the Board was dispatched on 25 July 2011. In preparation of the oral proceedings, the Board issued a communication on 28 October 2011, in which the Board expressed the preliminary opinion that the amended claims according to the Main and Auxiliary Requests did not comply with the requirements of Article 123(2) EPC, as the original disclosure did not appear to disclose an amount of water of at least 30% by weight in combination with an aqueous-alcoholic after shave composition comprising by weight, 5 to 25% ethanol, 0,25 to 6% fragrance, 0,25 to 5% surfactant and 0,5 to 1,5% aluminium chlorohydrate. As regards inventive step, the claimed subject-matter was considered according to the Board's preliminary opinion to lack an inventive step over the closest prior art defined in the impugned decision, when taken in combination with the general knowledge of the skilled person represented by documents D9 and D10.

VII. The Appellants submitted with letter of 9 December 2011 two additional sets of claims as Second and Third Auxiliary Requests in order to overcome the objection under Article 123(2) EPC raised in the Board's communication. No arguments were made in respect of inventive step.

VIII. Oral proceedings before the Board took place on 10 January 2012, at the beginning of which all requests were replaced by a new Main and Auxiliary Request, independent claims 1 of those requests reading as follows:

*Main Request*

"1. An after shave composition comprising, by weight, at least 65% water, 5 to 25% ethanol, 0.25 to 6% fragrance, 0.25 to 5% surfactant to solubilize or emulsify the fragrance, and 0.5 to 1.5% (U.S.P.) aluminum chlorohydrate."

*Auxiliary Request*

"1. A cosmetic method of reducing irritation and redness of human skin caused by shaving, comprising topically applying to shaved human skin an after shave composition comprising, by weight, at least 65% water, 5 to 25% ethanol, 0.25 to 6% fragrance, 0.25 to 5% surfactant to solubilize or emulsify the fragrance, and 0.5 to 1.5% (U.S.P.) aluminum chlorohydrate."

IX. The arguments of the Respondents which are pertinent for the decision can be summarized as follows :

- (a) It was submitted for the first time at the oral proceedings that there was no evidence that the products sold under the names "Kiehl's Blue Astringent Herbal Lotion" and "Kiehl's For The Ladies (Unscented) Moisturizing And Conditioning After-Shave Lotion" described in paragraph [0003] of the patent in suit had been made available to the public before the date of filing of the patent in suit. Their exact composition was not known and doubts on the accuracy of the partial information provided in paragraph [0003] of the patent in suit were also raised. Concerning the "Kiehl's Blue Astringent Herbal Lotion", it could not be relied on the information provided by documents D7 and D8, as it could not be ascertained that the composition indicated on the label shown by those documents was that used before the date of filing of the patent in suit.
  
- (b) D12 was a general publication demonstrating the skilled person's knowledge in the field of after-shave products. The commercial after-shave product named "Silky Skin Aftershave (Croda)" contained a surfactant, namely PPG 12 PEG 50 lanolin, and differed from the compositions according to the Main Request only in that it did not contain aluminium chlorohydrate. The problem solved by the subject-matter of claim 1 according to the Main Request was to provide after-shave compositions providing satisfactory astringency. Neither D9, nor D10 taught specific after-shave compositions

comprising aluminium chlorohydrate. The specific after-shave compositions disclosed in those documents, as well as those disclosed in D12, directed the skilled person to the use of witch hazel extract. Furthermore, the skilled person wishing to solve this problem would not find any hint in the cited documents to add aluminium chlorohydrate in the claimed specific concentration, as it belonged to the general common knowledge, shown by D10 (page 22, second paragraph) and D9 (page 182, fourth paragraph) that ethyl alcohol impacted the overall astringency of after-shave compositions. Hence, the skilled person starting from the after-shave product named "Silky Skin Aftershave" of Croda would not have arrived at the presently claimed subject-matter in an obvious manner. No further argument was presented in respect of the Auxiliary Request.

X. The Appellants' arguments which are pertinent for the decision can be summarized as follows :

(a) Starting from D12, and in particular the aftershave product named "Silky Skin Aftershave" of Croda as closest prior art, the objective problem solved by the presently claimed subject-matter was the mere provision of further after-shave compositions. From his common general knowledge described in paragraph [0003] of the patent in suit and in documents D9 and D10, and in view of the Kiehl's products also described in paragraph [0003] of the patent in suit, the skilled person would be aware that is was



generally known that an aluminium salt could be added to an after shave-composition. The claimed compositions were simple workshop variations of the product "Silky Skin Aftershave" of Croda described in D12 that could not involve any inventive step. The Main Request was therefore not allowable.

- (b) As the composition of the closest prior art disclosed in D12 already solved the problem of reducing irritation and redness of the human skin caused by shaving, no inventive step could be acknowledged for the subject-matter of the Auxiliary Request either.

- XI. The Appellants requested that the decision under appeal be set aside and that the patent be revoked.
- XII. The Respondents requested that the decision under appeal be set aside and that the patent be maintained on the basis of the Main or Auxiliary Request submitted at the oral proceedings.
- XIII. At the end of the oral proceedings, the decision of the Board was announced.

### **Reasons for the Decision**

1. The appeal is admissible
2. The only issue in dispute in these appeal proceedings is inventive step.

*Main Request*

*Closest prior art*

3. The patent in suit is directed to after-shave compositions. As submitted by the Respondents, the Board agrees to analyse inventive step starting from document D12, which is a general publication demonstrating the skilled person's knowledge in the field of after-shave products. D12 provides from page 91 to page 98 various examples of commercial after-shave products, in particular the product named "Silky Skin Aftershave (Croda)" described on page 97, which comprises 2 wt.-% of a surfactant, namely PPG 12 PEG 50 lanolin, 13 wt.-% ethanol, 79,75 wt.-% water and 2 wt.-% perfume. It is obtained by mixing in a first step perfume and surfactant, stirring and combining in a second step the remaining components, and when all components have dissolved, adding the surfactant / perfume mixture and stirring so as to obtain a clear product. The parties agreed that the after-shave compositions as defined in amended claim 1 of the Main Request are distinguished from that product solely by the use of aluminium chlorohydrate. Thus, the Board in agreement with the parties is satisfied that the product "Silky Skin Aftershave (Croda)" described on page 97 of document D12 represents a suitable starting point for analysing inventive step of the subject-matter according to the present Main Request.

*Problem solved*

4. Having regard to the disclosure of the after-shave composition "Silky Skin" from Croda, the Appellants

submitted that the technical problem solved by the subject-matter of claim 1 according to the Main Request was merely to provide an alternative after-shave composition, while the Respondents argued that it was to provide after-shave compositions which present satisfactory astringency.

5. It can be expected in view of the effect of aluminium salts in after-shave compositions reported in paragraph [0003] of the patent in suit, as well as in D9 (page 182, 4th paragraph) and D10 (page 23, last paragraph), that the addition of aluminium chlorohydrate to the "Silky Skin Aftershave (Croda)" composition of D12 will contribute towards an increase of the after-shave's astringent effect. It should be borne in mind, however, that astringency of the claimed composition does not only depend on the presence of aluminium chlorohydrate, but also on that of ethanol which as indicated by the Respondents and confirmed by documents D9 (page 182, fourth paragraph) and D10 (page 22, second paragraph) also brings about that effect. Considering that the claimed after-shave compositions allow lower amounts of ethanol than those employed in the closest prior art, it must therefore be established whether the addition of aluminium chlorohydrate in any amount defined in present claim 1 makes it possible to counter-balance the reduction of astringency that would result from the use of reduced amounts of ethanol, and thus still obtain satisfactory astringency. In the absence of any experimental evidence supporting the Respondents' contention, let alone any indication in the patent in suit, that the claimed compositions provide over the whole breadth of the claim satisfactory astringency, the Respondents'

argument is mere speculation and cannot be taken into consideration in determining the problem solved over the closest prior art by the claimed invention (see Case Law of the Boards of Appeal of the European Patent Office, 6<sup>th</sup> edition, 2010, I.D.4.2). Therefore, the technical problem as defined by the Respondents needs to be redefined. Thus, the technical problem solved over the composition "Silky Skin Aftershave" from Croda described in D12 can only be seen in the mere provision of further after-shave compositions.

*Obviousness*

6. It remains to be decided whether or not the skilled person starting from the after-shave composition "Silky Skin" from Croda and wishing to solve the above defined problem would have been guided by the available prior art to the claimed solution, namely to after-shave compositions comprising by weight at least 65% water, 5 to 25% ethanol, 0,25 to 6% fragrance, 0,25 to 5% surfactant to solubilise or emulsify the fragrance, and 0,5 to 1,5% aluminium chlorohydrate.
  
7. It is common knowledge in the art, as shown by D10 that after-shave lotions can contain various amounts of ethanol. Beside after-shave lotions comprising between 40 and 60% by volume of ethanol, i.e. between 31,6 and 47,4% by weight, D10 also teaches, as in the case of the after-shave composition representing the closest prior art, the use of no or little alcohol, i.e. compositions which are water-based. It is furthermore implicit from the preparation of the after-shave composition according to the closest prior art, and in line with the teaching provided on page 23, first

- paragraph of D10, that the 2 wt.-% of PPG 12 PEG 50 lanolin surfactant are used in the context of the closest prior art to solubilise in a system which contains little alcohol the 2 wt.-% of perfume, as to obtain a clear solution. It is also implicitly taught in the first paragraph on page 23 of D10, that the amount of perfume and the amount of surfactant for solubilisation of said perfume can be varied.
8. As regards the use of aluminium chlorohydrate, paragraph [0003] of the patent in suit, in line with D9 (page 182, 4th paragraph) and D10 (page 23, last paragraph) indicates, that the practice of adding an aluminium salt to an after-shave composition for the purpose of providing astringency was known in the art, D9 and D10 disclosing in particular the use of aluminium chlorohydrate.
  9. Concerning the concentration ranges for aluminium chlorohydrate, ethanol, water, fragrance and surfactant defined in the Main Request, these are not critical for solving the problem of providing further after-shave compositions and choosing at random a lower and an upper limit for the amount of those compounds is within the routine activity of the skilled person faced with the mere problem of providing further after-shave compositions.
  10. Consequently, starting from the "Silky Skin Aftershave (Croda)" composition of D12 and in view of the teaching of D10, the addition of aluminium chlorohydrate and the arbitrary choice of the concentration ranges for ethanol, water, aluminium chlorohydrate, fragrance and surfactant as defined in claim 1 of the Main Request

are obvious measures for the skilled person who wish to provide further after-shave compositions. These measures therefore cannot endow the claimed after-shave compositions with any inventive character. Thus, the Main Request is not allowable.

*Auxiliary Request*

11. Claim 1 of the Auxiliary Request is directed to a cosmetic method of reducing irritation and redness of human skin caused by shaving, comprising topically applying to shaved human skin the after-shave composition according to claim 1 of the Main Request. As the very purpose of using an after-shave composition is to reduce irritation and redness of human skin caused by shaving, that purpose is already suggested in the closest prior art, if not implicit. Consequently, the additional measure defined in claim 1 of the Auxiliary Request also arises in an obvious manner from the state of the art and claim 1 of the Auxiliary Request also lacks an inventive step. The Auxiliary Request is therefore not allowable.

**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

S. Fabiani

J. Riolo