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**Datasheet for the decision
of 1 March 2021**

Case Number: T 0212/16 - 3.3.07

Application Number: 09763975.1

Publication Number: 2367521

IPC: A61K8/26, A61K8/34, A61K8/92,
A61Q15/00

Language of the proceedings: EN

Title of invention:

ANTIPERSPIRANT COMPOSITION COMPRISING MICA AND FATTY ALCOHOL
WAX

Patent Proprietor:

Unilever PLC, Unilever N.V.

Opponent:

Beiersdorf AG

Headword:

Antiperspirant composition comprising mica and fatty alcohol
wax/ UNILEVER

Relevant legal provisions:

EPC Art. 56

Keyword:

Main request - Inventive step (Yes)



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Case Number: T 0212/16 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 1 March 2021

Appellant: Beiersdorf AG
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Respondent: Unilever PLC, A Company Registered in England and
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
30 November 2015 concerning maintenance of the
European Patent No. 2367521 in amended form.**

Composition of the Board:

Chairman A. Usuelli
Members: D. Boulois
 Y. Podbielski

Summary of Facts and Submissions

- I. European patent No. 2 367 521 was granted on the basis of a set of 32 claims.
- II. An opposition was filed under Article 100 (a) EPC against the granted patent on the grounds that the subject-matter of the granted patent lacked novelty and inventive step.
- III. The appeal lies from the decision of the opposition division finding that the patent in amended form met the requirements of the EPC. The decision was based on the main request filed on 4 September 2014.

Independent claim 1 of the main request read:

"1. A cosmetic antiperspirant composition comprising from 5 to 30% by weight of an astringent antiperspirant salt, from 40 to 80% by weight of a continuous liquid phase comprising at least one water-immiscible oil and from 5 to 30% by weight of a gellant for the carrier liquid selected from fatty alcohol waxes, and containing at least 0.1 % by weight of at least one aliphatic dihydric or trihydric moisturiser having a molecular weight of not greater than 620 and/or at least 0.1 % by weight of a triglyceride oil, which composition further containing at least 0.25% by weight of a mica pigment dispersed within the continuous liquid phase."

- IV. The documents cited during the opposition proceedings included the following:

D1: EP 2090284 A1
D4: US 2008/0152608 A1
D5: US 2004/0091439 A1
D6: US 2006/0051304 A1
D7: DE 10 2005 026034 A1

V. According to the decision under appeal:

(a) Claim 1 of the main request was novel over D1.

(b) As regards inventive step, D7 was preferred over D4 as closest prior art, and disclosed a stearyl alcohol structured antiperspirant comprising 20 wt% antiperspirant salt, 18 wt% of stearyl alcohol and 56.9 wt% of oils (see example 1). The differences between the subject-matter of claim 1 of the main request and the disclosure of D7 were the presence of at least 0.1 % of an aliphatic dihydric or trihydric moisturizer with a molecular weight of less than 620 and/or at least 0.1 % of a triglyceride oil, and the presence of at least 0.25 wt% of a mica pigment. With regard to the latter difference, the experimental data of the description of the specification showed an improvement in perceived skin appearance in terms of skin tone, radiance or smoothness of axillary skin. Thus, the technical problem was the improvement of the visual appearance of the treated skin. The solution was not obvious, in particular in view of the teaching of D5 and D6.

VI. The opponent (hereinafter the appellant) filed an appeal against said decision.

VII. In their reply to the statement of grounds of appeal dated 17 August 2016, the patent proprietors

(hereinafter the respondents) requested that the appeal be dismissed.

- VIII. With a letter dated 12 June 2020, the respondents filed auxiliary requests 1-6.
- IX. A communication from the Board, dated 2 July 2020, was sent to the parties. In this it was indicated in particular that the Board concurred with the conclusions of the opposition division with regard to inventive step.
- X. With a letter dated 24 February 2021, the appellant informed the Board and the parties that it will not take part in the oral proceedings scheduled for 4 March 2021 via videoconference.
- XI. With a letter in reply thereto and also dated 24 February 2021, the respondent requested that the oral proceedings be cancelled and the appeal be continued in writing. The Board cancelled the oral proceedings.
- XII. The arguments of the appellant may be summarised as follows:

Main request - Inventive step

D7 was the closest prior art, and disclosed in example 1 a water-free deodorant antiperspirant stick comprising

- a) 5 to 30% by weight of an astringent antiperspirant salt, namely 20% by weight of aluminum chlorohydrate,
- b) 40 to 80% by weight of a continuous liquid phase,
- c) which comprises at least one water-immiscible oil, namely 36% cyclomethicone, 3% octyldodecanol, 2% C₁₂₋₁₅

alkyl benzoate and 16% PPG₁₄ butyl ether, i.e. a total of at least 57% oil phase,
d) 5 to 30% by weight of a gelling agent for the carrier liquid,
e) which is selected from fatty alcohol waxes, namely 18% stearyl alcohol.

In contrast to claim 1 of the patent in suit, the stick preparation according to D7 did not contain at least 0.25% by weight of mica pigment that was dispersed in the continuous liquid phase. Another difference to claim 1 of the patent in suit was that the stick preparation according to D7 did not contain 0.1% by weight of at least one aliphatic bivalent or trivalent humectant with a molecular weight of not more than 620 and/or at least 0.1% by weight of a triglyceride.

The objective problem was to provide an alternative antiperspirant that enabled an improved appearance.

D7 suggested in paragraph [0066] to add pigments to the preparations. The person skilled in the art also knew mica pigments from D6, which were to be used in antiperspirant preparations (claim 7) in order to improve the appearance.

No effect was linked with the presence of the aliphatic bivalent or trivalent humectant. The only substances that showed an acceptable range of variation in the comparative tests of paragraph [0089] were the interference pigments used. Interference pigments, however, were pigments whose task in cosmetic preparations was known to be to conceal irregularities on the skin surface. This effect was based on the fact that light incident on the skin was reflected back diffusely, whereby color effects could also be used.

The interference pigments only did what was expected of them. An inventive effect could not be recognized.

The preparation according to claim 1 was therefore not inventive.

XIII. The arguments of the respondents may be summarised as follows

Main request - Inventive step

D7 was considered to constitute the most promising starting point in assessing inventive step as it taught antiperspirant compositions that included fatty alcohol as a gellant. Claim 1 of the patent maintained as amended differed from D7 in that it required the presence of at least 0.25% by weight of a mica pigment. This had the effect of improving skin appearance, especially in relation to skin tone, radiance and smoothness. This effect could be seen from the table on pages 12-13 of the patent, where an example according to the invention (Ex. 4, including mica pigments) had improved skin tone, radiance and smoothness in comparison to example CA, an identical formulation without mica.

The objective technical problem was therefore how to improve skin appearance, especially in relation to skin tone, radiance and smoothness of skin treated with a fatty alcohol gelled antiperspirant.

D7 disclosed antiperspirants that included stearyl alcohol as a gellant, but did not relate to improving the skin appearance of skin treated with a fatty alcohol gelled antiperspirant composition, and it related to the general purpose of an aesthetically

acceptable antiperspirant. Therefore, a skilled person starting from D7 and desiring to improve skin appearance of skin treated with a fatty alcohol gelled antiperspirant had no incentives from D7 to incorporate mica pigments into antiperspirant compositions to arrive at the present invention.

D6 could not provide a solution to the problem, since it did not teach to use mica pigments to improve skin appearance of skin treated with a fatty alcohol gelled antiperspirant.

Therefore, the subject matter of claim 1 involved an inventive step.

XIV. Requests

The appellant requested that the decision under appeal be set aside and the patent be revoked.

The respondents requested that the appeal be dismissed, alternatively that the decision under appeal be set aside and the patent be maintained according to the sets of claims filed as auxiliary requests 1-6 with letter of 12 June 2020.

Reasons for the Decision

1. Main request - Inventive step

1.1 The invention relates to an antiperspirant composition gelled by a fatty alcohol wax providing an improved skin appearance (see par. [0001] and [0007] of the specification).

1.2 According to the appellant, the closest prior art is document D7. Example 1 of D7 discloses a composition comprising *inter alia*:

- 20 wt% of aluminium chlorohydrate as antiperspirant
- about 57 wt% of an oil phase consisting of 16 wt% of PPG-14 butylether, 3 wt% of octyldodecanol, 2 wt% of C₁₂-C₁₅ alkyl benzoate and 36 wt% of cyclomethicone
- 18 wt% of stearyl alcohol which is a gelling agent.

Said example 1 does not comprise at least 0.1 % by weight of at least one aliphatic dihydric or trihydric moisturiser having a molecular weight of not greater than 620 and/or at least 0.1 % by weight of a triglyceride oil, as well as at least 0.25 % by weight of a mica pigment dispersed within the continuous lipid phase.

1.3 According to the appellant, the problem must be seen as the provision of an alternative antiperspirant composition enabling an improved appearance.

According to the respondent, the technical problem is how to improve skin appearance, especially in relation to skin tone, radiance and smoothness of skin treated with a fatty alcohol gelled antiperspirant.

1.4 As a solution to any of these alleged problems, claim 1 of the main request proposes a formulation comprising in particular

- at least 0.1 % by weight of at least one aliphatic dihydric or trihydric moisturiser having a molecular weight of not greater than 620 and/or at least 0.1 % by weight of a triglyceride oil, and
- at least 0.25 % by weight of a mica pigment dispersed within the continuous lipid phase.

- 1.5 The description of the contested patent provides several comparisons between a comparative composition CA and compositions according to the claimed invention.
- 1.5.1 Example CA in the patent comprises *inter alia*:
- 20 wt.% antiperspirant salt
 - 53.8 wt.% oils (28.3 wt.% cyclomethicone, 9 wt.% PPG-14 butyl ether, 15 wt.% C₁₂-C₁₅ alkylbenzoate, 1 wt.% dimethicone, and 0.5 wt.% helianthus annuus seed oil),
 - 17 wt.% stearyl alcohol
- 1.5.2 Example 4 of the contested patent comprises *inter alia*:
- 20 wt.% antiperspirant salt
 - 52.3 wt.% oils (26.8 wt.% cyclomethicone, 9 wt.% PPG-14 butyl ether, 15 wt.% C₁₂-C₁₅ alkylbenzoate, 1 wt.% dimethicone, and 0.5 wt.% helianthus annuus seed oil),
 - 17 wt.% stearyl alcohol composition
 - 1.5 wt.% of mica pigment (0.25 wt.% mica, titanium dioxide, tin oxide and 1.25 wt.% of mica, titanium dioxide).
- 1.5.3 Both examples have therefore a composition very close to the composition of example 1 of D7, and example 4 differs from the comparative example CA only in the presence of a mica pigment, and in the amounts of cyclomethicone. As explained by the respondent in its reply (page 2, lines 7-8) the additional amount of cyclomethicone in example CA (1.5%), was added to balance the weight of the ingredients. The Board sees no reason to consider that this negligible amount of cyclomethicone makes questionable the comparison of the two examples. Indeed, the appellant did not submit any argument in this sense.

The presence of a mica pigment in example 4 has the effect of improving skin appearance, especially in relation to skin tone, radiance and smoothness, as shown very explicitly in the Table of pages 12 and 13 of the contested patent.

1.5.4 In view of these results, there is a clear evidence of a technical effect linked with the presence of a mica pigment and the problem is as defined by the respondent. This appears also to concur with the definition of the problem by the opposition division in its decision, namely the improvement of the visual appearance of skin treated with a fatty alcohol gelled antiperspirant composition.

1.6 The question remaining is whether the skilled person, starting from example 1 of D7, would arrive at the subject-matter of claim 1 of the main request in an obvious manner in order to solve the problem posed.

1.6.1 The appellant mentioned documents D7 and D6 in this regard. According to the appellant, the addition of a pigment is suggested in D7 in paragraph [0066], and also in claim 7 of document D6.

1.6.2 D7 mentions in paragraph [0066] a list of possible optional types of excipient which can be used in the compositions disclosed in D7; the addition of "pigments that have a coloring effect" is suggested in said paragraph. The type of pigment is however unspecified, and there is no indication that its use as disclosed relates to the technical effect of an improvement in tone, radiance and smoothness of axillary skin.

1.6.3 D6 relates to the production of mixtures of interference pigments having novel color effects;

hence, the aim of D6 is to achieve multi-color effects which is different from the aimed effect of the patent in suit . As explained by the opposition division in paragraph 2.3.5 of its decision, according to the teaching of D6, by adjusting the particle size of different colored interference pigments unusual color effects are obtained (par.[007]-[0010]). Among the suitable base substrates for the interference pigments natural and/or synthetic mica is mentioned ([0011]). D6 also mentions that the interference pigments mixtures can be used in antiperspirant formulations ([0042], claim 7). Specific examples of antiperspirant compositions containing mica pigments are however not provided by D6. Thus, this document does clearly not teach to use mica pigments to improve appearance of skin treated with antiperspirant compositions in general let alone those containing fatty alcohols gellants.

- 1.6.4 Consequently, there is no suggestion or incentive in any of documents D6 or D7 for the addition of a mica pigment to improve skin appearance, especially in relation to skin tone, radiance and visual smoothness of skin treated with a fatty alcohol gelled antiperspirant.

It might be true that interference pigments, as argued by the appellant, including mica pigments, due to their optical properties, improve the skin appearance in general, but there is no evidence on file in this respect, and the appellant did not provide any.

Moreover, as already stated by the opposition division in its decision, the objective technical problem does not relate to improving the appearance of skin treated with any cosmetic composition but to skin treated with

an antiperspirant composition gelled with fatty alcohols. None of the cited documents contain a general teaching that by incorporating mica pigments in antiperspirant compositions the specific problems related to the skin appearance of the underarm skin would be ameliorated and this irrespective of the chemical composition of this type of formulations. Hence, these documents do not provide the necessary incentive for the skilled person searching to improve the appearance of a skin treated with a fatty alcohol gelled antiperspirant composition to use mica pigments.

- 1.7 Consequently, the claimed subject-matter is inventive, and the main request meets the requirements of Article 56 EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



B. Atienza Vivancos

A. Uselli

Decision electronically authenticated