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**Datasheet for the decision
of 11 March 2021**

Case Number: T 0803/16 - 3.3.07

Application Number: 10723075.7

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IPC: A61K8/02, A61K8/06, A61K8/97,
A61Q15/00

Language of the proceedings: EN

Title of invention:
ANTIPERSPIRANT USAGE

Patent Proprietor:
Unilever PLC, A Company Registered in England and Wales under
Company no. 41424
Unilever N.V.

Opponents:
Colgate-Palmolive Company
Beiersdorf AG
Henkel AG & Co. KGaA

Headword:
Antiperspirant usage / UNILEVER

Relevant legal provisions:
EPC Art. 54

Keyword:

Novelty - (no)



Beschwerdekammern

Boards of Appeal

Chambres de recours

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D E C I S I O N
of Technical Board of Appeal 3.3.07
of 11 March 2021

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 16 February
2016 revoking European patent No. 2442779
pursuant to Article 101(3) (b) EPC.**

Composition of the Board:

Chairman A. Usuelli
Members: E. Duval
A. Jimenez

Summary of Facts and Submissions

I. European patent 2 442 779 (hereinafter "the patent") was granted on the basis of 11 claims. Claim 1 of the patent related to:

"The use of a lamellar phase stabilised oil-in-water emulsion as an antiperspirant agent."

II. Three oppositions were filed against the patent on the grounds that its subject-matter lacked novelty and inventive step, and it was not sufficiently disclosed.

III. The opposition division took the decision to revoke the patent.

The decision was based on the patent as granted as main request and on auxiliary requests 1-4 filed on 23 December 2015.

IV. The decision of the opposition division cited among others the following documents:

D4: WO2009063016

D27: experimental report

V. In particular, the opposition division decided that:

(a) D4 showed an emulsion forming a lamellar stabilised oil-in-water emulsion on contact with the skin (as demonstrated in D27). D4 also disclosed the use of this emulsion to control sweat. D4 anticipated the subject-matter of claim 1 of the main request.

(b) D4 remained prejudicial to the novelty of the subject-matter of auxiliary requests 1-4.

VI. The patent proprietors (appellants) lodged an appeal against the decision of the opposition division.

VII. With their statement setting out the grounds of appeal, the appellants defended their case on the basis of a main request and auxiliary requests 1-2 filed therewith. By letter dated 5 January 2017, the appellants filed a corrected main request consisting of claims 1-8 of the patent as granted (see I. above for the wording of claim 1).

Claim 1 of auxiliary request 1 read as follows:

"The use of a lamellar phase stabilised oil-in-water emulsion as an antiperspirant agent, comprising multiple applications of the lamellar phase stabilised oil-in-water emulsion."

Claim 1 of auxiliary request 2 read as follows:

"The use of a lamellar phase stabilised oil-in-water emulsion as an antiperspirant agent, comprising multiple applications of a cosmetic composition comprising the lamellar phase stabilised oil-in-water emulsion."

VIII. The Board set out its preliminary opinion in a communication under Article 15(1) RPBA.

IX. Oral proceedings were held before the Board.

X. The appellants' arguments can be summarised as follows:

(a) The subject-matter of the main request was novel over D4. D4 disclosed emulsions and a range of surfactant phases capable of absorbing sweat. However, an antiperspirant agent was defined as an agent capable of reducing perspiration. Materials that merely absorbed perspiration once it had been secreted, such as the materials disclosed in D4, should not be considered as antiperspirants. The expression "controlling sweat" used in D4 was generic and did not amount to a disclosure of an antiperspirant action. Hence, D4 did not disclose a use as an antiperspirant agent as defined in claim 1.

(b) The subject-matter of claim 1 of each of the auxiliary requests 1 and 2 additionally differed from the disclosure of D4 in that multiple applications of the composition or emulsion were required. While the use of a roll-on as disclosed in D4 implied back and forth movements for the application, this did not constitute "multiple applications" in the sense of claim 1 of auxiliary requests 1 or 2.

XI. The respondents' arguments can be summarised as follows:

(a) Regarding the main request, D4 pertained to topical compositions for the control of sweat. As shown in D27, example 1 of D4 showed an emulsion forming, on contact with sweat, a lamellar phase stabilised oil-in-water emulsion. D4 did not merely describe the ability of the lamellar phase composition to absorb water, but also that the lamellar phase was

responsible for the control of sweat. The expression "controlling sweat" was synonymous with antiperspirancy and was also used in the patent in suit. Thus the subject-matter of the main request lacked novelty over D4.

- (b) In auxiliary requests 1 and 2, the additional feature regarding multiple applications did not establish novelty over D4. These multiple applications were not defined and could relate to several applications over time or at several places of the body. Multiple applications were implicit in D4 since the use of a roll-on for applying the composition would require a back and forth movement. Hence the subject-matter of auxiliary requests 1 and 2 also lacked novelty.

XII. The appellants request that the decision under appeal be set aside and that the patent be maintained according to the corrected main request filed by letter dated 5 January 2017, or, alternatively, on the basis of one of the auxiliary requests 1 and 2 filed with the statement setting out the grounds of appeal.

XIII. Respondent 2 (opponent 2) and respondent 3 (opponent 3) each request that the appeal be dismissed.

Reasons for the Decision

1. Main request, novelty over D4

As explained in the appealed decision (see 16.3), D4 discloses the use of an emulsion to control sweat (claims 1, 16). The emulsion forms a metastable phase

such as a lamellar liquid crystal during topical application to the skin (claims 2, 3, 17). The experimental report D27 shows that the composition of example 1 of D4 is an oil-in-water emulsion forming a lamellar stabilised emulsion on contact with sweat (see figures 4 and 5 of D27).

The appellants do not contest that D4 discloses a lamellar phase stabilised oil-in-water emulsion. The question is however whether D4 discloses its use as an antiperspirant agent. The appellants argue that D4 merely shows materials capable of absorbing sweat, which are not to be considered as antiperspirant agents.

The Board agrees with the appellants that an antiperspirant is defined as a product that reduces the amount of perspiration generated, usually in the underarm area. However, D4 discloses that the compositions shown therein have several effects, including not only sweat absorption but also cooling the skin or "controlling sweat" (e.g. claim 16). As noted by respondent 2, the patent describes the invention in similar terms at paragraphs [0017]-[0019] ("The method of controlling perspiration offered by the invention"). In the Board's opinion, the effect of "controlling sweat" disclosed in D4 should be understood as an effect of reducing sweat. In other words, the expression "controlling sweat" is not seen as more generic, but as synonymous for the antiperspirancy effect as defined in claim 1.

Accordingly, the main request does not meet the requirements of novelty.

2. Auxiliary requests 1 and 2, novelty over D4

In comparison with the main request, claim 1 of each of the auxiliary requests 1 and 2 additionally requires that the use comprise "multiple applications" of the emulsion, or of a cosmetic composition comprising it. Such multiple applications are not further defined in the claim nor in the description of the patent. Consequently, contrary to the appellants' view, claim 1 is not to be interpreted narrowly in this respect, i.e. claim 1 does not define any limitation regarding the times or regions of the body where these multiple applications should take place.

D4 does not explicitly mention multiple applications. However, the disclosure of D4 is not limited to its explicit wording, but also includes subject-matter which can be inferred directly and unequivocally from that disclosure, including features which for the skilled person are implicit in what is explicitly disclosed. Here, D4 (see page 13, line 11) mentions that the compositions disclosed therein may be packaged using a roll-on ball on a dispensing end. In such a case, it is inevitable that the composition would be applied with a back and forth movement on the skin. It is also unrealistic to assume that such a roll-on antiperspirant dispenser could be conceived for a single application on a single region of the body. In other words, multiple applications would necessarily take place. As explained above, there is no basis in the patent for interpreting claim 1 such that the application using a roll-on would not qualify as multiple applications.

Consequently, the subject-matter of auxiliary requests 1 and 2 does not meet the requirements of novelty.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



B. Atienza Vivancos

A. Uselli

Decision electronically authenticated