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**Datasheet for the decision
of 27 February 2024**

Case Number: T 1216/22 - 3.3.07

Application Number: 12733763.2

Publication Number: 2734175

IPC: A61K8/19, A61Q15/00, A61K8/20

Language of the proceedings: EN

Title of invention:

USE, AS ANTIPERSPIRANT, OF A POLYVALENT CATION SALT WITHOUT ALUMINIUM HALIDE ANTIPERSPIRANT OR COMPOUND CAPABLE OF REACTING WITH SAID SALT IN ORDER TO PRODUCE AN ANTIPERSPIRANT EFFECT

Patent Proprietor:

L'OREAL

Opponent:

Beiersdorf AG

Headword:

USE, AS ANTIPERSPIRANT, OF A POLYVALENT CATION SALT WITHOUT ALUMINIUM HALIDE ANTIPERSPIRANT OR COMPOUND CAPABLE OF REACTING WITH SAID SALT IN ORDER TO PRODUCE AN ANTIPERSPIRANT EFFECT/L'Oréal

Relevant legal provisions:

EPC Art. 54, 83, 56

RPBA 2020 Art. 12(4), 12(6)

Keyword:

Main request - Novelty (No)

Admission of auxiliary requests 01, 02, 1-5 (No)

Admission of a new document (No)

Auxiliary request 6 - Sufficiency of disclosure (Yes)

Auxiliary request 6 - Inventive step (Yes)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

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Case Number: T 1216/22 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 27 February 2024

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
16 March 2022 concerning maintenance of the
European Patent No. 2734175 in amended form.**

Composition of the Board:

Chairman E. Duval
Members: D. Boulois
Y. Podbielski

Summary of Facts and Submissions

- I. The European Patent 2 734 175 B1 had been opposed under Article 100 (a), (b), (c) EPC on the grounds that its subject-matter lacked novelty and inventive step, was not sufficiently disclosed, and extended beyond the content of the application as filed.
- II. 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 9 December 2021, auxiliary requests 1 and 2 filed during oral proceedings and auxiliary requests 3-6 filed on 9 December 2021.

The unique claims 1 and 2 of the main request read:

"1. Non-therapeutic use of a cosmetic composition comprising, in a cosmetically acceptable medium, calcium chloride and/or magnesium chloride as antiperspirant agent, for treating human perspiration, said composition containing no aluminium and/or zirconium antiperspirant halogenated salt, nor compound capable of reacting with said calcium chloride and/or magnesium chloride in order to produce together on the skin, in situ, an antiperspirant effect.

2. Use of a cosmetic composition according to claim 1, wherein the concentration of calcium chloride and/or magnesium chloride varies from 0.1% to 20% by weight and more preferentially from 0.5% to 15% by weight relative to the total weight of the composition."

The subject-matter of claims 1 and 2 of auxiliary request 6 corresponded to the claims of the main

request with the restriction in claim 1 to "**calcium chloride**" as unique antiperspirant agent and with the further specification "for treating human perspiration, **in order to reduce the flow of sweat**".

III. The documents cited during the opposition proceedings included the following:

D1 : DE 69600120 T2, published on 10-12-1997

D1a: WO 97/15278

D1b: EP 0770376 A1

D2: Brun, R; Manuila, L; Experiences on perspiration; Dermatologica, Volume 104/4-5 (1952) 267-271.

D3: WO 99/52536 A1, published on 21-10-1999

D4: CA 1076030, published on 22-04-1980

D5: WO 00/10521 A1, published on 02-03-2000

D5a: US 5955065

D6: "Secret" Anti Perspirant Deodorant, Mintel, database accession number 1182147, added to the database 09-2009

D7: Jungermann, E.; Antiperspirants: New Trends in Formulation and Testing Technology; J. Soc. Cosmet. Chem. 25 (11 -1974) 621-638.

IV. According to the decision under appeal, the main request satisfied the requirements of Article 123(2) EPC and Article 83 EPC, but lacked novelty over D1, D2 and D3.

The auxiliary requests 1 and 2 filed during oral proceedings were admitted. None of them was allowable under Article 123(2) EPC.

Auxiliary request 3 was not allowable under Rule 80 EPC, while auxiliary requests 4 and 5 did not meet the requirements of Article 84 EPC.

With regard to auxiliary request 6, D1 was considered to represent the closest prior art. The distinguishing feature was that calcium chloride was acting as antiperspirant. The problem was the provision of further anti-perspirant products which are mild to the skin. The claimed solution was not obvious. Auxiliary request 6 was also inventive when starting from D6.

- V. The opponent (hereinafter the appellant-opponent) and the patent proprietor (hereinafter the appellant-proprietor) both filed an appeal against said decision.
- VI. With its statement setting out the grounds of appeal dated 26 July 2022, the appellant-proprietor submitted ten requests, namely the main request already on file, auxiliary requests 01 and 02, and auxiliary requests 1-7. Auxiliary request 6 was the request maintained by the opposition division, while auxiliary requests 01, 02 and 1-5 were new requests.

The appellant-proprietor also submitted a new item of evidence:

D8: Essais Comparatifs

- VII. With a letter dated 12 December 2022, the appellant-proprietor submitted again the main request on file and the same auxiliary requests 01, 02 and 1-7.

The independent claims of the auxiliary requests read as follows, the differences in bold, unless otherwise indicated, relating to a comparison with the main request:

Auxiliary request 01

1. Non-therapeutic use of a cosmetic composition comprising, in a cosmetically acceptable medium, **calcium chloride** as antiperspirant agent, for treating human perspiration, said composition containing no aluminium and/or zirconium antiperspirant halogenated salt, nor compound capable of reacting with said **calcium chloride** in order to produce together on the skin, in situ, an antiperspirant effect.

2. Non-therapeutic use of a cosmetic composition comprising, in a cosmetically acceptable medium, calcium chloride and/or magnesium chloride as antiperspirant agent, for treating human perspiration, said composition containing no aluminium and/or zirconium antiperspirant halogenated salt, nor compound capable of reacting with said calcium chloride and/or magnesium chloride in order to produce together on the skin, in situ, an antiperspirant effect, wherein said composition comprises at least one aqueous phase.

3. Use of a cosmetic composition according to claim 1 **or 2**, wherein the concentration of calcium chloride and/or magnesium chloride varies from 0.1% to 20% by weight and more preferentially from 0.5% to 15% by weight relative to the total weight of the composition.

Auxiliary request 02

The subject-matter of claim 2 of auxiliary request 02 differed from claim 2 of auxiliary request 01 in the addition of the feature "**wherein the concentration of calcium chloride and/or magnesium chloride varies from 0.1% to 20% by weight, relative to the total weight of the composition**".

Auxiliary request 1

The subject-matter of claim 2 of auxiliary request 1 differed from claim 2 of auxiliary request 01 through the substitution of the feature "wherein said composition comprises at least one aqueous phase" by the feature "**wherein said composition is in the form of an emulsion**".

Auxiliary request 2

The subject-matter of claim 2 of auxiliary request 2 differed from claim 2 of auxiliary request 01 through the substitution of the feature "wherein said composition comprises at least one aqueous phase" by the feature "**wherein said composition is in the form of an emulsion chosen from water-in-oil or oil-in-water emulsions or multiple emulsions**".

Auxiliary request 3

The subject-matter of claim 2 of auxiliary request 3 differed from claim 2 of auxiliary request 01 through the substitution of the feature "wherein said composition comprises at least one aqueous phase" by the feature "**wherein said composition is in the form of an oil-in-water emulsion**".

Auxiliary request 4

The subject-matter of claim 2 of auxiliary request 4 differed from claim 2 of auxiliary request 01 in the specification "for treating human perspiration, **in order to reduce the flow of sweat**" and the through the substitution of the feature "wherein said composition

comprises at least one aqueous phase" by the feature **"wherein said composition is in the form an emulsion"**.

Auxiliary request 5

The subject-matter of claim 2 of auxiliary request 5 differed from claim 2 of auxiliary request 01 in the specification "for treating human perspiration, **in order to reduce the flow of sweat and/or to reduce the sensation of dampness associated with human sweat, and/or to mask human sweat**" and the through the substitution of the feature "wherein said composition comprises at least one aqueous phase" by the feature **"wherein said composition is in the form of an oil-in-water emulsion"**.

Auxiliary request 6

This request corresponded to the request maintained by the opposition division (see point II above).

- VIII. A communication from the Board, dated 8 November 2023, was sent to the parties. In it, the Board expressed its preliminary opinion that *inter alia* the invention was sufficiently disclosed, the subject-matter of claims 1 and 2 of the main request was not novel, that neither auxiliary requests 01, 02 and 1-5, nor D8 should be admitted into the proceedings, and that the claimed subject-matter of auxiliary request 6 was inventive.
- IX. Oral proceedings took place on 27 February 2024.

- X. The arguments of the appellant-opponent may be summarised as follows:

Main request - Novelty

The main request was not novel over D1 (cf. example 4), D2 (cf. pages 270-271) and D3 (cf. example 4).

Admission of auxiliary request 01, 02, and 1-5 into the appeal proceedings

These requests could and should have been filed earlier. They comprised a new independent claim 2 and new features originating from the description. Moreover, all these new requests had to be objected to under Article 123(2) EPC, for lack of novelty and inventive step, and for sufficiency of disclosure.

Admission of document D8 into the appeal proceedings

D8 were comparative tests but but did not relate to the closest prior art D1.

Auxiliary request 6 - Sufficiency of disclosure

It was dependent on many different parameters whether a compound can react with CaCl_2 or MgCl_2 , and would have produced *in situ* an antiperspirant effect on skin or not.

For instance, the addition of carbon dioxide to an aqueous CaCl_2 solution in an aerosol composition involved that the precipitation of CaCO_3 can occur on the skin, which in turn could clog the pores and thus lead to an antiperspirant effect (cf. par. [0141]-[0145] of the patent). The appellant-opponent mentioned

that, in a second comparison experiment shown, the addition of carbon dioxide did not lead to precipitation and therefore to no antiperspirant effect on the skin.

Consequently, the skilled person would have known that it depended on many different parameters, such as pH value, pressure, time, temperature and amounts of products, whether a reaction between CaCl_2 and CO_2 might take place or not. Without specific information about these parameters, which were missing in the patent, the teaching of the patent would not allow a skilled person to reproduce the claimed invention.

The skilled person would not be able to reproduce the claimed invention without an unreasonable effort.

Auxiliary request 6 - Inventive step

D1 was the closest prior art. It was known from D1 to use specifically magnesium chloride as antiperspirant. The problem was the provision of an alternative composition.

The skilled person knew also from D1, D2 or D3, that magnesium chloride or strontium chloride had antiperspirant properties. Calcium was an obvious alternative, since in the periodic system, it was located between magnesium and strontium and the skilled person would have tested also calcium chloride for the antiperspirant property.

There was also an indication in D5 that calcium salts could have an antiperspirant effect.

XI. The arguments of the appellant-proprietor may be summarised as follows:

Main request - Novelty

D1 related to a therapeutic use and not to a cosmetic use, and used compounds such as chloride strontium and talc which were excluded by the disclaimer of claim 1. Moreover, D1 did not give the same definition of antiperspirant as the contested patent, and the antiperspirant effect was obtained through the association of several active compounds.

D2 disclosed the use of magnesium chloride and Triton X100, which was a compound excluded by the claimed subject-matter. Moreover, the Table on page 270 showed that an antiperspirant was not obtained for all cases, showing explicitly a lack of real efficiency.

D3 related also to a therapeutic use and not to a cosmetic use, and did not use a compound falling under the same definition of antiperspirant as the patent. Moreover, talc and kaolin were present in the composition of example 4, while these products were excluded by the claimed subject-matter.

Admission of auxiliary request 01, 02, and 1-5 into the appeal proceedings

These requests were filed in response to the decision of the opposition division with limited amendments, not presenting any complexity. Their filing could not be regarded as unexpected, since the type of the the composition, was discussed in the description of the patent.

Admission of document D8 into the appeal proceedings

D8 was filed in support of the auxiliary requests and were comparative tests showing an effect of the composition according to the claimed invention. The filing of this document did not change the scope of discussion.

Auxiliary request 6 - Sufficiency of disclosure

The appellant-opponent did not provide any evidence that a composition as claimed would not solve the technical problem of the patent. The two examples provided by the appellant-opponent with regard to carbon dioxide did not correspond to the claimed composition, since carbon dioxide was excluded by the proviso of claim 1.

Auxiliary request 6 - Inventive step

D1 was the closest prior art. The problem was the provision of the use of antiperspirant agents which can substitute the halogenated salts of aluminium and/or zirconium, and which are as simple as possible to formulate while being efficient. The solution was not obvious in view of D1 or D5.

XII. Requests

The appellant-patent proprietor requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request, or one of auxiliary requests 01, 02, 1-5, 6 and 7, all filed with letter dated 12 December 2022, whereby auxiliary request 6 was the request held allowable by the opposition division.

The appellant-opponent requested that the decision under appeal be set aside and that the patent be revoked. It also requested that auxiliary requests 01, 02 and 1-5 not be admitted into the appeal proceedings.

Reasons for the Decision

1. Main request - Novelty

Documents D1-D3 have been cited with regard to novelty.

1.1 Document D1

1.1.1 Example 4 of D1 discloses an antiperspirant powder comprising 5 wt% magnesium chloride which is disclosed *expressis verbis* as antiperspirant in example 4, in association with strontium chloride as a second antiperspirant, talc, kaolin and a perfume. Said use is a cosmetic use as also explicitly specified in claims 2 or 15 of D1, which claims the cosmetic treatment of skin perspiration.

The presence of strontium chloride as a second antiperspirant in the composition of example 4 of D1 does not have any effect on the relevance of this document, since there is no restriction in claim 1 of the main request as to the presence of an unique antiperspirant agent.

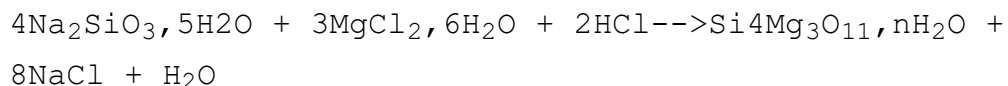
Consequently, claims 1 and 2 of the main request are not novel over D1.

1.1.2 The appellant-proprietor argued that the patent specification provides a particular definition of the

term "antiperspirant agent" in paragraph [0022] which was different from the definition in D1. Paragraph [0022] reads that "the term "antiperspirant agent" means any substance or any composition which has the effect of reducing the flow of sweat and/or of reducing the sensation of dampness associated with human sweat, and/or of masking human sweat".

In the Board's view, the definition of paragraph [0022] appears to be the general definition of the properties of an antiperspirant, and cannot serve to differentiate the claimed antiperspirant agent from any other antiperspirant identified as such in a prior art document, even less if it is, as in the case of D1, the same compound, namely magnesium chloride.

1.1.3 The appellant-proprietor also argued that strontium chloride and talc were to be considered as compounds capable of reacting with magnesium chloride and were excluded by the proviso of claim 1, i.e "nor compound capable of reacting with said calcium chloride and/or magnesium chloride in order to produce together on the skin, in situ, an antiperspirant effect". The appellant-proprietor argued in particular that talc ($\text{Mg}_3\text{Si}_4\text{O}_{10}(\text{OH})_2$) could react with magnesium chloride with the contact of liquid sweat and provide in situ a magnesium silicate having an antiperspirant effect as follows:



The Board notes that the proviso of claim 1 is very vague and that an explanation is given in paragraph [0026] of the specification, which gives a reference as to which kind of compounds are encompassed by this definition and cites three patent applications

disclosing such compounds; it mentions for instance hydrogen phosphate or anionic polymers such as terpolymers based on vinyl acetate, tert-butyl vinylbenzoate and crotonic acid or compounds which can covalently bind to the claimed polyvalent cationic salt to confer an antiperspirant effect. The disclosure of paragraph [0026] is even broader than the proviso of claim 1 since it includes also compounds capable of chemically modifying the skin so that the activity is strengthened on the pretreated skin in order to confer an antiperspirant effect.

There is no explicit mention of strontium chloride or talc in paragraph [0026] and there is no evidence or credible technical argument that talc or strontium chloride could react *in situ* with magnesium chloride and would provide an antiperspirant effect. There is furthermore no evidence that the compound which may possibly be formed by the reaction between talc and magnesium chloride under the conditions specified by the appellant-proprietor has any antiperspirant effect.

In any case, this argument of the appellant-proprietor is technically inconsistent with the teaching of the patent which envisages also the formulation of magnesium or calcium chloride with moisture absorbers, such as aluminosilicate moisture absorbers (see par. [0115]- [0122]; example 8), which are very close to talc in terms of structure, property and moisture absorption action. The possibility of combination with the aluminosilicate disclosed in the description does not make credible that talc may be a compound capable of reacting with said calcium chloride and/or magnesium chloride in order in particular to produce together on the skin, *in situ*, an antiperspirant effect.

With the same reasoning, there is also no verifiable evidence on file of any particular reaction product of magnesium chloride and strontium chloride to form in situ an antiperspirant effect. Therefore, the appellant-proprietor's argument that strontium chloride and talc were to be considered as compounds capable of reacting with magnesium chloride and were thus excluded by the wording of claim 1 must fail.

1.2 Document D2

- 1.2.1 Document D2 discloses *expressis verbis* on pages 270 and 271 a solution comprising $MgCl_2$ as active agent and its use as antiperspirant. The solution of magnesium chloride disclosed in Table 1 comprises also 1 wt% of Triton X100 as wetting agent.

The Table on page 270 shows that an antiperspirant effect was not obtained for all individual cases of the treated sample. It is however clear that an effective antiperspirant treatment is explicitly shown for some cases of the sample. This is sufficient to prejudice the novelty of claim 1. More generally, the extent of a known technical effect does not establish a new use, and especially not if, as in the present case, such extent is not claimed and/or if the claim does not include any characteristic distinct from the prior art.

Consequently, claim 1 of the main request is not novel over D2.

- 1.2.2 The Board could not follow the appellant-proprietor's argument that Triton X100 was a compound falling under the proviso of claim 1, namely that Triton X100 is " a compound capable of reacting with said calcium chloride and/or magnesium chloride in order to produce together

on the skin, in situ, an antiperspirant effect", since it is a skin or membrane cytoplasmic permeation agent.

In the Board's view, the property of permeation agent does not fall under the mechanism defined by the proviso and the compound Triton X 100 cannot be seen as a compound capable of reacting with calcium chloride or magnesium chloride to produce together on the skin, in situ, an antiperspirant.

1.3 Document D3

Example 4 of D3 discloses a cosmetic composition in powder form comprising 5% wt. of $MgCl_2$ used *expressis verbis* as antiperspirant; the composition comprises furthermore *inter alia* talc, kaolin and Herbasol® from *Bellis perrenis*. Claim 12 clearly relates to the cosmetic use of the compositions for decreasing the hypersecretion of the sweat glands and the Board does not see any reason to interpret the term "antiperspirant" in a manner other than in the contested patent (cf. point 1.2.2 above).

As also argued above, the presence of a second antiperspirant, i.e. Herbasol® does not affect the lack of novelty in view of the presence of magnesium chloride in the disclosed composition. There is furthermore no evidence or indication that Herbasol® talc or kaolin might be "a compound capable of reacting with said calcium chloride and/or magnesium chloride in order to produce together on the skin, in situ, an antiperspirant effect" (see also point 1.2.3 above).

Consequently, claims 1 and 2 of the main request are not novel over D3.

2. Admission of auxiliary request 01, 02, and 1-5 into the appeal proceedings

2.1 These requests have been filed by the appellant-proprietor with its statement of grounds of appeal. They are new requests and do not correspond to the previous auxiliary requests 01, 02, and 1-5 filed during the opposition proceedings.

They differ all from the previous requests through the addition of **a new supplementary independent claim 2** and by **the addition of the following features which were also not present in the previous requests on file:**

- the addition of the feature "wherein said composition comprises at least one aqueous phase" in claim 2 of auxiliary request 01;
- the addition of the features "wherein the concentration of calcium chloride and/or magnesium chloride varies from 0.1% to 20% by weight, relative to the total weight of the composition, said composition comprising at least one aqueous phase" in claim 2 of auxiliary request 02;
- the addition of the feature "wherein said composition is in the form of an emulsion" in claim 2 of auxiliary requests 1 and 4;
- the addition of the feature "wherein said composition is in the form of an emulsion chosen from water-in-oil or oil-in water emulsions or multiple emulsions" in claim 2 of auxiliary request 2;
- addition of the feature "wherein said composition is in the form of an oil-in-water emulsion" in claim 2 of auxiliary requests 3 and 5;
- addition of the feature "in order to reduce the flow of sweat and/or to reduce the sensation of dampness associated with human sweat, and/or to mask human sweat" in claim 2 of auxiliary request 5.

2.2 In the Board's view, auxiliary requests 01, 02 and 1-5 represent a clear amendment to the appellant-proprietor's case within the meaning of Article 12(4) RPBA.

Any such amendment may be admitted only at the discretion of the Board, which must exercise its discretion in view of, *inter alia*, the complexity of the amendment, the suitability of the amendment to address the issues which led to the decision under appeal, and the need for procedural economy (Article 12(4) RPBA).

2.3 The Board notes that all the amendments brought to the independent claims of auxiliary requests 01, 02 and 1-5 will change the scope of the discussion, in particular on novelty and inventive step, and introduce a new discussion on Article 123(2) EPC, which would need to focus on the newly introduced features and on the newly introduced independent claim 2. If admitted, the Board would have to take a decision on requests and features which have never been discussed previously during the opposition proceedings, while the purpose of the appeal proceedings is a revision of the decision of the opposition division.

The allowability of these requests with regard *inter alia* to novelty of auxiliary requests 01 and 02, and with regard to the requirements of Article 123(2) EPC of the remaining requests is also *prima facie* questionable.

Hence, none of the criteria of admissibility, i.e the complexity of the amendment, the suitability of the amendment to address the issues which led to the

decision under appeal, and the need for procedural economy, speak in favour of admitting auxiliary requests 01, 02, and 1-5.

- 2.4 Moreover, the requests were filed in particular to overcome inventive-step and novelty objections that were present since the beginning of the opposition proceedings. Therefore, they should have been filed in the opposition proceedings (Article 12(6) RPBA).

The appellant-proprietor filed three successive sets of claims during the opposition proceedings and had a further opportunity to file requests during the oral proceedings before the opposition division, an opportunity that it took by filing new auxiliary request 1 and 2. But none of these requests filed successively during the opposition proceedings correspond to the newly filed requests.

In view of the above, auxiliary request 01, 02 and 1-5 are not admitted into the appeal proceedings (Article 12(4) and 12(6) RPBA).

3. Admission of document D8 into the appeal proceedings

- 3.1 D8 was filed by the appellant-proprietor with its statement of grounds of appeal dated 26 July 2022.

D8 provides a first comparison between the compositions of examples 2 and 5 of the patent. Example 2 is a solution of calcium chloride, while example 5 is an oil in water emulsion comprising calcium chloride.

A second comparison is made in D8 between example 4 of the patent and a new example 10, the former being a

solution of magnesium chloride and the latter an oil in water emulsion comprising magnesium chloride.

- 3.2 The filing of this document amounts to an amendment of the appellant-proprietor's case and the Board has discretion to admit D8 pursuant to Article 12(4) RPBA.

The Board notes in particular that D8 does not provide a comparison with the possible closest prior art D1 and appears to have been filed in the context of the assessment of inventive step of auxiliary requests 01, 02, 1-5, which are not admitted into the appeal proceedings. Accordingly, D8 does not appear to be relevant.

Consequently, the Board decides to not admit D8 into the appeal proceedings (Article 12(4) RPBA).

4. Auxiliary request 6 - Sufficiency of disclosure

- 4.1 According to the appellant-opponent, the skilled person would not be able to reproduce the claimed invention without an unreasonable effort, in particular in view of the exclusion of compounds capable of reacting with calcium chloride as defined by the proviso of claim 1, i.e. "said composition containing no aluminium and/or zirconium antiperspirant halogenated salt, nor compound capable of reacting with said calcium chloride and/or magnesium chloride in order to produce together on the skin, in situ, an antiperspirant effect".

The appellant-opponent gave the example of the addition of carbon dioxide to an aqueous CaCl_2 solution in an aerosol composition, as proposed in paragraph [0142] of the patent, which could involve the possible production and precipitation of CaCO_3 on the skin and a further

potential antiperspirant effect. This precipitation was however not constantly observed and depended on many parameters, such as pH value, pressure, time, temperature and amounts of products, whether a reaction between CaCl_2 and CO_2 may take place or not, for which no specific information was given in the patent.

- 4.2 In the Board's view, the objection of lack of sufficient disclosure raised by the appellant-opponent appears rather to be an objection of lack of clarity of the claim in view of the presence and nature of a proviso.

The description of the patent explains in paragraph [0026] what is to be understood by "compound capable of reacting with said polyvalent metal cation salt(s) in order to produce together on the skin, in situ, an antiperspirant effect" and gives several specific examples of compounds or patent applications identifying such compounds. The skilled person is therefore in a position to identify such compounds.

With regard to the specific example of the association of calcium chloride with carbon dioxide mentioned by the appellant-opponent, there is no evidence that such a reaction may take place when carbon dioxide is used as propellant, as disclosed in the patent in paragraph [0142]. This argument appears therefore not convincing.

Moreover, the examples of the patent show various compositions comprising in particular CaCl_2 and having antiperspirant activity. This appears to be sufficient to show that the claimed invention is reproducible.

Consequently, auxiliary request 6 meets the requirements of Article 83 EPC.

5. Auxiliary request 6 - Inventive step

5.1 The claimed invention relates to a cosmetic method for treating human perspiration, by single step application of a composition comprising calcium chloride.

5.2 D1 was considered as closest prior art in the decision of the opposition division, which applied, in addition, the problem solution approach starting from D6. The appellant-opponent mentioned only D1 in its statement of grounds of appeal, while the appellant-proprietor also mentioned D6.

5.2.1 D1 discloses antiperspirant actives as alternatives to aluminium and zirconium salts (page 1, 5th paragraph - page 2, 1st paragraph). Document D1 identifies a mechanism of action based on "substance P", stating that antagonists thereof are suitable candidates to act as antiperspirants, and indicates among others strontium, manganese, and magnesium chloride as preferred actives (page 5, 4th full paragraph). Formulation example 4 makes use of two antiperspirant agents, namely magnesium chloride and strontium chloride.

This document does not relate to the use of calcium chloride as active substance.

5.2.2 D6 discloses a product called "Anti Perspirant Deodorant" which is available with different fragrances, as shown on page 2. The specific product "Ooh-la-la Lavender" comprised calcium chloride, but is not mentioned as antiperspirant. In any case, calcium chloride has an unknown function in the cited products.

This document cannot therefore constitute the closest prior art in view of its disclosure.

- 5.3 The problem as defined by the opposition division over D1 was the provision of further effective antiperspirant products which are mild to the skin.

The problem as defined by the appellant-opponent over D1 is the provision of an alternative antiperspirant compound.

Starting from D1, the problem as defined by the appellant-proprietor is the provision of the use of antiperspirant agents which can substitute the halogenated salts of aluminium and/or zirconium, and which are as simple as possible to formulate while being efficient.

- 5.4 The solution to any of these problems is the use of calcium chloride as antiperspirant.

- 5.5 In the Board's view, the patent provides in examples 1-3 sufficient evidence that calcium chloride has an antiperspirant effect. Said examples do however not provide any evidence as to a mild effect to the skin, or any comparison with aluminium or zirconium antiperspirants.

The problem appears therefore to be as defined by the appellant-opponent.

- 5.6 The Board does not see any suggestion or disclosure in any cited documents to use calcium chloride or to replace magnesium chloride by calcium chloride as antiperspirant.

The closest prior art D1 does in particular not give any incentive to use a calcium salt as antiperspirant. The document suggest on page 5, 3rd and 4th paragraphs, many possible formation of salts with cationic elements for a possible antiperspirant use, but does not mention calcium.

The appellant-opponent cited also D5 in this context. This document relates to antiperspirant compositions which contain an aluminium or aluminium-zirconium antiperspirant and a water soluble calcium salt, which can be calcium chloride. The calcium salt is used to stabilize the aluminium salts and to improve the antiperspirant efficiency of the aluminium salt. There is no disclosure in this document that calcium chloride has as such an antiperspirant effect. There is even a mention of a prior art document in the background part of D5 disclosing that calcium chloride promotes sweating and was known to reduce the effectiveness of aluminium salts (see D5, page 4, lines 12-16). This document discloses furthermore the association between an antiperspirant aluminium salt and calcium chloride which is excluded by the provision of claim 1. Accordingly, the Board does not see any incentive in D5 to implement calcium chloride as antiperspirant salt.

The Board can neither follow the appellant-opponent's argument that the choice of a calcium salt as antiperspirant was obvious as such, since calcium was an alkaline earth metal which can be found in the periodic table of elements between magnesium and strontium, which chloride salts were already known as antiperspirants. In the Board's view the position of an element in the periodic table gives an indication as to its general physico-chemical properties, but this

is in no way an indicator as to its cosmetic properties.

5.7 The claimed solution is therefore not obvious and auxiliary request 6 meets the requirements of Article 56 EPC.

Order

For these reasons it is decided that:

The appeals are dismissed.

The Registrar:

The Chairman:



B. Atienza Vivancos

E. Duval

Decision electronically authenticated