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D E C I S I O N
of 21 September 2004

Case Number: T 0778/01 - 3.2.6

Application Number: 91102759.7

Publication Number: 0443627

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:
Absorbent structure

Patentee:
KIMBERLY-CLARK WORLDWIDE, INC.

Opponents:
The Procter & Gamble Company
Stockhausen GmbH & Co. KG
Nippon Shokubai Company Limited

Headword:
-

Relevant legal provisions:
EPC Art. 113(2)

Keyword:
"Basis of decision - no longer approval of the text of the patent"

Decisions cited:
T 0230/84, T 0534/01

Catchword:
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Case Number: T 0778/01 - 3.2.6

D E C I S I O N
of the Technical Board of Appeal 3.2.6
of 21 September 2004

Appellant: Stockhausen GmbH & Co. KG
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Respondent: KIMBERLY-CLARK WORLDWIDE, INC.
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Party to the proceedings: The Procter & Gamble Company
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Party to the proceedings: Nippon Shokubai Company Limited
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
28 May 2001 concerning maintenance of European
patent No. 0443627 in amended form.

Composition of the Board:

Chairman: P. Alting van Geusau
Members: G. Pricolo
M. J. Vogel

Summary of Facts and Submissions

- I. The appeal is from the interlocutory decision of the Opposition Division posted on 28 May 2001 concerning maintenance of the European patent No. 0 443 627 in amended form, granted in respect of European patent application No. 91 102 759.7.
- II. The appellant (opponent II) lodged an appeal, received at the EPO on 7 July 2001, against this decision and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received at the EPO on 28 September 2001.
- III. In a letter dated 7 September 2004 the patent proprietor (respondent) stated: "in accordance with the procedure approved in T 230/84, we withdraw our approval of the text of the above patent as granted with the intent that the patent should be revoked".

Reasons for the Decision

1. The appeal is admissible.
2. Although the patent proprietor stated that it no longer approved the text in which the patent was granted, the interlocutory decision of the Opposition Division being based on an amended text different from that of the patent as granted, this statement, taken together with the explicit declaration of the intent that the patent be revoked (which is reinforced by the reference to decision T 230/84, according to which the patent was revoked following withdrawal of the patent proprietor's

approval with the text of the patent as granted), can only be seen as the expression of the patent proprietor's intention to prevent any text whatever of the patent from being maintained.

3. Therefore, considering that Article 113(2) EPC states that the EPO confines its considerations in proceedings to the text of the European patent "submitted to it, or agreed" by the patent proprietor, and that the patent proprietor no longer approves the text in which the patent was maintained by the Opposition Division and does not submit an alternative text, there is no text on the basis of which the Board can consider the appeal. As a consequence, the patent must be revoked (cf. T 230/84; T 534/01).

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:

A. Wallrodt

P. Alting van Geusau