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**Datasheet for the decision
of 31 January 2007**

Case Number: T 0852/04 - 3.3.10

Application Number: 95939598.9

Publication Number: 0794804

IPC: A61L 15/34

Language of the proceedings: EN

Title of invention:

Diaper having a lotioned topsheet

Patentee:

THE PROCTER & GAMBLE COMPANY

Opponents:

SCA Hygiene Products AB
Kimberly-Clark Worldwide, Inc.

Headword:

Lotion-coated diaper/PROCTER & GAMBLE

Relevant legal provisions:

EPC Art. 56, 123(2)

Keyword:

"Main request and auxiliary requests 3 and 4: inventive step (no) - improvement not shown - reformulation of problem - obvious alternative"

"Auxiliary request 1: amendments (not allowable) - fresh combination"

"Auxiliary requests 2, 2a, 3a, 4a, 5, 5a (not admitted): late filed - not clearly allowable - added subject-matter"

Decisions cited:

T 0020/81, T 0789/89, T 0800/91, T 0099/93, T 0068/95,
T 0401/95

Catchword:

-



Case Number: T 0852/04 - 3.3.10

DECISION
of the Technical Board of Appeal 3.3.10
of 31 January 2007

Appellant:

(Patent Proprietor)

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(Opponent I)

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Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 3 May 2004
revoking European patent No. 0794804 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: R. Freimuth
Members: J. Mercey
J. Seitz

Summary of Facts and Submissions

I. The Appellant (Proprietor of the Patent) lodged an appeal on 30 June 2004 against the decision of the Opposition Division dated 3 May 2004 revoking European patent No. 794 804, and on 13 September 2004 filed a written statement setting out the grounds of appeal. Claim 1 of the granted patent read as follows:

"1. A disposable diaper (50) comprising:

- a) a liquid impervious backsheet (530);
- b) a liquid pervious topsheet (520) joined to said backsheet; said topsheet having an inner surface oriented towards the interior of said diaper and an outer surface oriented towards the skin of the wearer when said diaper is being worn wherein at least a portion of said topsheet outer surface comprises an effective amount of a lotion coating which is partially transferable to the skin of the wearer; and
- c) an absorbent core (540) positioned between the topsheet and the backsheet,

characterized in that

said topsheet is hydrophilic and said lotion coating is solid or semi-solid at 20°C and comprises:

- (i) from about 10 to about 95% of a substantially water free emollient having a plastic or fluid consistency at 20°C and comprising a member selected from petroleum-based emollients, fatty acid ester emollients, alkyl ethoxylate emollients, and mixtures thereof; and
- (ii) from about 5 to about 90% of an immobilizing agent capable of immobilizing the emollient on said outer surface of said topsheet, said immobilizing agent having a melting point of at least 35°; wherein said

immobilizing agent is selected from polyhydroxy fatty acid esters, polyhydroxy fatty acid amides, C₁₄-C₂₂ fatty alcohols, C₁₂-C₂₂ fatty acids, C₁₂-C₂₂ fatty alcohol ethoxylates, waxes, and mixtures thereof."

II. Notice of Opposition had been filed by the Respondents I and II (Opponents I and II), requesting revocation of the patent in its entirety on the grounds of lack of novelty and inventive step (Article 100(a) EPC) and insufficient disclosure (Article 100(b) EPC). The following documents were submitted *inter alia* in opposition proceedings:

- (1) US-A-3 896 807,
- (2) DE-C-33 09 530 and
- (3) US-A-5 352 217.

III. The decision under appeal was based on a main request and an auxiliary request. The Opposition Division decided that the invention was sufficiently disclosed and was novel over document (2). However, the subject-matter according to the then pending main request did not involve an inventive step starting from either document (1) or (2) as the closest prior art, said documents both teaching lotion-coated diapers, wherein the disclosed lotion compositions overlapped with the lotions of the patent in suit. In the light of the disclosure of documents (1) or (2), the problem to be solved by the patent in suit was to provide an alternative lotion-coated diaper. As solution, the patent in suit proposed a three-layered diaper configuration having a hydrophilic topsheet. However, such a diaper was already known from *inter alia* document (3). Since breathable backsheets were a normal

design option for a diaper, the subject-matter of the then pending auxiliary request also lacked inventive step.

IV. At the oral proceedings before the Board, held on 31 January 2007, the Appellant submitted auxiliary requests 1, 2, 2a, 3, 3a, 4, 4a, 5 and 5a superseding any previous auxiliary requests. Auxiliary request 1 was identical to auxiliary request II that was submitted together with the Statement of Grounds of Appeal and auxiliary requests 3a and 4a corresponded to auxiliary requests VIa and VIb filed on 30 January 2007.

Claim 1 of auxiliary request 2 differed from claim 1 of the main request exclusively in that the lotion coating was restricted to being semi-solid at 20°C and having the following melt profile:

Characteristic	Range
% liquid at 20°C	3-25
% liquid at 37°C	30-90
final melting point (°C)	≥45

Claim 1 of auxiliary request 3 differed from claim 1 of the main request exclusively in that the list of immobilizing agents (ii) was restricted to C₁₄-C₂₂ fatty alcohols, waxes, and mixtures thereof.

Claim 1 of auxiliary request 4 differed from claim 1 of auxiliary request 3 exclusively in that the waxes in the list of immobilizing agents were restricted to carnauba wax, beeswax, candelilla wax, paraffin wax, ceresin wax, esparto, ouricuri and rezowax.

Claim 1 of auxiliary request 5 differed from claim 1 of auxiliary request 4 exclusively in that the petroleum-

based emollients, fatty acid ester emollients, alkyl ethoxylate emollients, and mixtures thereof were replaced by mineral oil and petrolatum.

Claim 1 of auxiliary requests 1, 2a, 3a, 4a and 5a differed from claim 1 of the main request and auxiliary requests 2, 3, 4 and 5, respectively, exclusively in that the absorbent core comprised a superabsorbent polymer.

The Appellant submitted that the subject-matter of claim 1 of the main request and auxiliary requests 3 and 4 was inventive. The Appellant argued that document (2) should be regarded as the closest state of the art and not document (1), this latter document being acknowledged in the specification of the patent in suit merely as one of many prior art documents, and not as the closest. Furthermore, document (1) merely mentioned diapers in passing and did not address the problem of bowel movement (BM) clean up. Starting however from document (1) as closest prior art, the Appellant submitted that the problem to be solved by the patent in suit was to identify a lotion to be applied to a diaper in order to reduce the adherence of BM to the skin of the wearer, thereby improving the ease of BM clean up, without adversely affecting other diaper properties. It was argued that although the lotions known from document (1) overlapped with those of the patent in suit, the skilled person would not have applied such lotions to a diaper having a hydrophilic topsheet in order to solve the problem posed, since hydrophobic topsheets were less expensive and it was to have been expected that any benefits of a hydrophilic topsheet would be counterbalanced by the presence of

the lotion coating which was itself intrinsically either hydrophilic or hydrophobic.

The Appellant submitted that the amendments to the auxiliary requests found support in the application as filed, and thus complied with the requirements of Article 123(2) EPC. More particularly, with regard to the freshly claimed combinations of specific lotions and diapers, it was argued that in view of the fact that the absorbent article and lotion composition were described as separate items in the specification, and since any lotion composition was applicable to any absorbent article, any diaper configuration could be combined with any lotion, such that the specifically claimed combination was indeed disclosed. Furthermore, there was no interaction between the lotion and diaper, such that no special effect resulted from a particular combination.

In the course of the appeal procedure, the Appellant submitted fresh documents in order to show that diapers with breathable backsheets result in a reduced level of moisture on the baby's skin.

- V. The Respondent I submitted that the subject-matter of claim 1 of the main request and of auxiliary requests 3 and 4 was not inventive. In the light of the disclosure of document (1), the problem to be solved by the patent in suit was to provide merely a further lotion-coated diaper, no data having been provided by the Appellant supporting any alleged improvements for the claimed diapers. It was obvious for the skilled person to apply the lotions of documents (1) to a disposable diaper, since it would not make technical sense to apply them

to a reusable diaper, as the lotion would be washed out. Disposable diapers typically comprised a liquid pervious topsheet, a liquid impervious backsheet and an absorbent core between these two sheets, and the use of a hydrophilic topsheet was also well known, as illustrated by *inter alia* document (3).

With regard to auxiliary requests 1, 2, 2a, 3a, 4a, 5 and 5a, the Respondent I argued that all of these requests, apart from auxiliary request 1, were late filed and should not be admitted into the proceedings. The amendments made to claim 1 of each of these requests offended against the provisions of Article 123(2) EPC, since the freshly introduced features were not disclosed in combination in the application as filed. In addition, the amendments made to auxiliary requests 2 and 2a lacked clarity and gave rise to fresh issues.

During the appeal procedure, the Respondent I submitted fresh documents in order to show that Vaseline is a wax.

VI. The Respondent II, after having made submissions as to the substance, withdrew its opposition by a letter dated 6 May 2005.

VII. The Appellant requested that the decision under appeal be set aside and the patent be maintained on the basis of the claims as granted or, subsidiarily, on the basis of any of the auxiliary requests 1, 2, 2a, 3, 3a, 4, 4a, 5 and 5a, all auxiliary requests submitted during the oral proceedings on 31 January 2007.

The Respondent I requested that the appeal be dismissed.

VIII. At the end of the oral proceedings, the decision of the Board was announced.

Reasons for the Decision

1. The appeal is admissible.
2. *Parties to the appeal*

The Respondent II's withdrawal of its opposition (see point VI above) is to be treated as a withdrawal of all its pending requests and as a withdrawal from the appeal proceedings. Thus, it ceases to be a party to appeal proceedings as far as the substantive issues are concerned (see decision T 789/89, OJ EPO 1994, 482, points 2.3 and 2.6 of the reasons).

3. *Sufficiency of Disclosure and Novelty*

The appealed decision found the invention to be sufficiently disclosed and the subject-matter of the claims to be novel (cf. point III *supra*). Sufficiency of disclosure and novelty were no longer contested during the appeal proceedings, nor does the Board see any reason to take a different view to the Opposition Division. Hence, it is unnecessary to go into more detail in this respect.

Main request

4. *Inventive step*

4.1 Claim 1 of the main request and of auxiliary requests 3 and 4 each embraces the embodiment wherein the emollient is a petroleum-based emollient and the immobilizing agent is a C₁₄-C₂₂ fatty alcohol. In case this embodiment according to the main request lacked inventive step, the subject-matter of the auxiliary requests 3 and 4, which also embraces that obvious embodiment, could not involve an inventive step either. For this reason, it is appropriate that the subject-matter of claim 1 of the main request, insofar as it relates to the embodiment that the emollient is a petroleum-based emollient and the immobilizing agent is a C₁₄-C₂₂ fatty alcohol, is examined first as to its inventive ingenuity.

4.2 According to the established jurisprudence of the Boards of Appeal it is necessary, in order to assess inventive step, to establish the closest state of the art, to determine in the light thereof the technical problem which the invention addresses and successfully solves, and to examine the obviousness of the claimed solution to this problem in view of the state of the art. This "problem-solution approach" ensures assessing inventive step on an objective basis and avoids an *ex post facto* analysis.

4.3 The patent in suit is directed to a lotion-coated diaper. A similar lotion-coated diaper already belongs to the state of the art in that document (1) describes a diaper (cf. col. 2, line 34), the inside portion of

which comes into direct contact with the user's skin in the area to which the cream is to be applied (cf. col. 2, lines 35 to 38) and is coated (cf. col. 6, line 61) with a dry non-oily solid, said solid comprising 30 to 70% of an oily material (cf. col. 3, lines 30 to 31 and 33) such as mineral oil or petrolatum (cf. col. 3, line 37) and 70 to 30% of an emulsifier such as cetyl alcohol (cf. col. 3, lines 34 to 35 and 48). Since mineral oil and petrolatum are described in the patent in suit as suitable petroleum-based emollients (cf. claim 2) and cetyl alcohol as a suitable C₁₄-C₂₂ fatty alcohol for use as an immobilizing agent (cf. claim 5), the non-oily solid of document (1) fulfils the melting point requirements of claim 1 of the patent in suit.

Where the patent in suit indicates a particular piece of prior art as the starting point for determining the problem underlying the patent in suit, in the present case document (1), then the Board should adopt this as the starting point for the purpose of a problem-solution analysis unless it turns out that there is closer state of the art of greater technical relevance (see e.g. decisions T 800/91, point 6 of the reasons; T 68/95, point 5.1 of the reasons, neither published in OJ EPO).

- 4.3.1 The aims of the present invention outlined on page 3, lines 3 to 11 of the specification of the patent in suit are formulated in the light of the drawbacks of *inter alia* the disclosure of document (1), the claimed invention being designed to overcome the problems associated with the disclosure of document (1), thus forming a starting point of the invention. Furthermore,

document (1) addresses explicitly diapers as examples of lotion-coated articles (cf. col. 2, line 34, col. 3, line 16, col. 7, line 15 and claim 13). BM may indeed not be specifically mentioned in this document, but diaper use necessarily implicates problems associated with BM clean up, with the consequence that document (1) cannot be discarded for that reason.

- 4.3.2 The Appellant argued at the oral proceedings before the Board that rather document (2) was the closest state of the art. However, the Appellant did not provide any reasons as to why the disclosure of document (2) is of greater technical relevance to the claimed invention than that of document (1) and none are apparent to the Board, particularly since the lotion used in the present invention is not specifically disclosed in document (2), but in document (1).

Thus, the Board considers, in agreement with the Respondent I, that in the present case the lotion-coated diaper of document (1) represents the closest state of the art and, hence, takes it as the starting point when assessing inventive step.

- 4.4 In view of this state of the art the problem underlying the patent in suit, as formulated by the Appellant at the oral proceedings and indicated on page 3, lines 5 to 7 of the specification of the patent in suit, consists in identifying a lotion to be applied to a diaper in order to reduce the adherence of BM to the skin of the wearer, thereby improving the ease of BM clean up, without adversely affecting other diaper properties.

4.5 As the solution to this problem, the patent in suit proposes a lotion-coated diaper as defined in claim 1 wherein the diaper is characterised as having a liquid impervious backsheet, a liquid pervious hydrophilic topsheet and an absorbent between the two with lotion coating on the topsheet outer surface.

4.6 However, no evidence has been provided that adherence of BM to the user's skin is reduced *vis-à-vis* a diaper according to document (1), such that better BM clean up has not been shown, which has been conceded by the Appellant. According to the jurisprudence of the Boards of Appeal, alleged but unsupported advantages cannot be taken into consideration in respect of the determination of the problem underlying the invention (see e.g. decision T 20/81, OJ EPO 1982, 217, point 3, last paragraph of the reasons). Since in the present case the alleged improvement, namely better BM clean up, lacks the required experimental support, the technical problem as defined in point 4.4 above needs reformulation.

4.7 In view of the teaching of document (1), the objective problem underlying the patent in suit can thus be seen in providing merely a further lotion-coated diaper.

4.8 Finally, it remains to decide whether or not the proposed solution to that objective problem underlying the patent in suit is obvious in view of the state of the art.

4.8.1 Document (1) teaches that a diaper may be coated with the lotion disclosed therein, without specifying the configuration of said diaper, such that the skilled

person, seeking to provide a further lotion-coated diaper, would expect that the lotion of document (1) may be applied to any diaper configuration. Document (3) teaches a disposable diaper (cf. col. 1, line 7) having an absorbent core (cf. col. 2, line 34), a liquid impervious backsheet (cf. col. 5, lines 38 to 39) and a liquid pervious topsheet (cf. col. 5, line 67) which is hydrophilic (cf. col. 8, lines 29 to 30), wherein the topsheet and backsheet are joined, the absorbent core is positioned between said topsheet and backsheet (cf. Fig. 2) and the topsheet has an inner surface oriented towards the interior of the diaper and an outer surface oriented towards the wearer's skin (cf. Fig. 2 (21)). The skilled person would thus take document (3) into consideration when seeking a further lotion-coated diaper using the lotion according to document (1). Since document (1) teaches the application of the lotion to the inside portion of the article which comes into direct contact with the user's skin, said portion necessarily including the topsheet outer surface, the skilled person would arrive at the claimed invention without the exercise of inventive ingenuity.

4.9 For the following reasons, the Board is not convinced by the Appellant's submissions in support of the presence of an inventive step.

4.9.1 The Appellant argued that the skilled person would not have selected a diaper having a hydrophilic topsheet, since such topsheets are usually more expensive than hydrophobic topsheets. However, while additional costs resulting from the choice of a hydrophilic topsheet may play a role in relation to economic considerations,

this cannot amount to a technical deterrent against the application of the teaching of document (3).

4.9.2 The Appellant further argued that the skilled person would have been deterred from applying a lotion composition according to document (1) to a diaper having a hydrophilic topsheet, since it was to have been expected that any benefits of such a hydrophilic topsheet would be counterbalanced by the intrinsically hydrophilic or hydrophobic lotion coating. However, since any improvement for the claimed lotion-coated diaper does not form part of the objective problem (cf. point 4.7 *supra*), this argument is devoid of merit.

4.10 For these reasons, the solution proposed in claim 1 to the problem underlying the patent in suit is obvious in the light of the prior art.

4.11 As a result, the Appellant's main request is not allowable for lack of inventive step pursuant to Article 56 EPC.

Auxiliary requests 3 and 4

5. *Admissibility*

These two fresh auxiliary requests were submitted by the Appellant at the beginning of the oral proceedings. The amendments comprised merely the shrinking of the list of immobilizing agents in claim 1 of both requests, together with the indication of the specific waxes of granted claim 11. The Respondent I was not hindered in its argumentation with regard to inventive step by the amendments carried out in the claims of the new

requests, since the amendments, which comprised merely deletion from lists and incorporation of features from a granted dependent claim, did not amount to creating a fresh case necessitating a reconsideration of the objections and evidence brought forward so far by the Respondent I against the patentability of the claimed subject-matter. Consequently, the fresh requests are admitted into the proceedings.

6. *Amendments (Article 123 EPC)*

6.1 The amendment made to claim 1 of both auxiliary requests 3 and 4 *vis-à-vis* claim 1 as granted comprises the restriction of the immobilizing agent to C₁₄-C₂₂ fatty alcohols, waxes, and mixtures thereof, and, additionally in the case of auxiliary request 4, the further restriction of the waxes to carnauba wax, beeswax, candelilla wax, paraffin wax, ceresin wax, esparto, ouricuri, rezowax, and mixtures thereof.

6.2 The definitions "C₁₄-C₂₂ fatty alcohols, waxes, and mixtures thereof" for the immobilizing agent in auxiliary request 3 arise from excising certain definitions from the list given in claim 1 as granted. This shrinking of the list of alternative definitions of the immobilizing agents is not objectionable, nor is the additional specification of particular waxes in auxiliary request 4, these waxes being disclosed on page 26, lines 1 to 2 of the application as filed, since no fresh particular combination of specific definitions is thereby generated.

6.3 Therefore, in the Board's judgement, the amendments made to claim 1 do not generate new subject-matter

extending beyond the content of the application as filed or beyond the scope of the granted claims, such that the requirements of Article 123(2) and (3) EPC are satisfied.

7. *Inventive step*

7.1 Since claim 1 of each of these requests includes the embodiment wherein the emollient is a petroleum-based emollient and the immobilizing agent is a C₁₄-C₂₂ fatty alcohol (cf. point 4.1 *supra*), the considerations having regard to inventive step given in points 4.2 to 4.9 *supra* and the conclusion drawn in point 4.10 *supra* with respect to the main request apply also to auxiliary requests 3 and 4, i.e. the subject-matter claimed is obvious and does not involve an inventive step.

7.2 In these circumstances, the auxiliary requests 3 and 4 share the fate of the main request in that they too are not allowable for lack of inventive step pursuant to Article 56 EPC.

Auxiliary request 1

8. *Admissibility*

This request is identical to auxiliary request II that was submitted together with the Statement of Grounds of Appeal and is thus clearly filed in due time.

9. *Amendments (Article 123(2) EPC)*

- 9.1 The fresh amendment made to claim 1 of auxiliary request 1 *vis-à-vis* claim 1 as granted is the specification that the absorbent core comprises a superabsorbent polymer. This amendment is disclosed on page 7, lines 22 to 23 of the application as filed, wherein superabsorbent polymers are disclosed as examples of suitable absorbent materials for use in the absorbent core. Waxes, however, although present in the list of immobilizing agents in claim 1 as granted, are disclosed in the application as originally filed exclusively on page 26, line 1 of the description as one of many different types of compound that can be used as an immobilizing agent.
- 9.2 It is established jurisprudence of the Boards of Appeal that an amendment extends beyond the content of the application as filed, if the amended subject-matter is not directly and unambiguously derivable from the application as filed.
- 9.3 In the present case, the features that the absorbent core comprises a superabsorbent polymer and the immobilizing agent is a wax are two separate embodiments and taken from two different sections in the application as filed, no link being made in the description between these two particular features. Thus, in the Board's judgement, these two features, superabsorbent polymer and wax, are not originally disclosed in combination.
- 9.4 The Appellant argued that since diapers and lotion compositions were disclosed separately from one another in the description of the application as filed, they could be combined with one another in any way whatever,

such that the claimed combination was indeed originally disclosed. However, the diaper and the lotion are not claimed separately, since the invention is directed to a lotion-coated diaper. Features which are disclosed exclusively as two separate embodiments in different sections of the application as filed, cannot be claimed in combination unless there is a specific link between those two embodiments in the application as filed. Whether or not the lotion and the diaper interact as submitted by the Appellant is not a matter of disclosure and is irrelevant to the assessment of the fulfilment of the requirements of Article 123(2) EPC.

- 9.5 Since, thus, the amendments to claim 1 are not unambiguously derivable from the application as filed, claim 1 of auxiliary request 1 is amended in such a way that subject-matter extending beyond the application as filed is added, contrary to the requirements of Article 123(2) EPC, with the consequence that auxiliary request 1 is not allowable.

Auxiliary requests 2, 2a, 3a, 4a, 5 and 5a

10. *Admissibility*

All of these auxiliary requests were submitted by the Appellant at the beginning of the oral proceedings, auxiliary requests 3a and 4a corresponding to auxiliary requests VIa and VIb filed on 30 January 2007, i.e. on the eve of the oral proceedings. Admission into the proceedings of requests filed at such a late stage of the appeal proceedings is a matter of discretion for the Board of Appeal and is not a matter as of right. In exercising due discretion, it is established

jurisprudence of the Boards of Appeal that crucial criteria are whether or not the amended claims of those requests are clearly allowable and whether or not those amended claims give rise to fresh issues which the other party can reasonably be expected to deal with properly without unjustified procedural delay (see T 92/93, point B of the reasons; T 401/95, point 5.2 of the reasons, neither published in OJ EPO).

Auxiliary requests 2 and 2a

11. The amendment common to claim 1 of each of these two requests *vis-à-vis* claim 1 as granted comprises the restriction of the lotion coating to one being a semi-solid and having a specific melt profile (cf. point IV *supra*). This profile is disclosed in the table on page 15, line 16 of the application as filed. As indicated in point 9.1 *supra*, waxes, although present in the list of immobilizing agents in claim 1 as granted, were disclosed exclusively in the description of the application as filed, namely on page 26, lines 1 to 2. Likewise, the particular waxes indicated further in claim 1 of auxiliary request 2a, although present in claim 11 as granted, were also disclosed exclusively in that passage of the description of the application as filed.

11.1 However, the combination of a semi-solid lotion composition having this particular melt profile together with (particular) waxes as immobilizing agent is not disclosed in the application as filed, these two features not being linked in any way therein. As a consequence, the fresh amendment to claim 1 of each of these two requests results in the generation of a new

combination which extends beyond the content of the application as filed, contrary to the requirements of Article 123(2) EPC.

11.2 Furthermore, this particular melt profile is a feature which was mentioned merely in the description of the patent in suit and had never before formed the basis for any claim. Moreover, this feature was never addressed as contributing to solving the problem underlying the invention. Therefore the Respondent could not reasonably be expected to prepare itself for dealing with the fresh issues arising from said amendment.

11.3 For all these reasons, these requests are clearly not allowable with the consequence that the Board exercises its discretion not to admit the late filed auxiliary requests 2 and 2a into the proceedings.

Auxiliary requests 3a, 4a and 5a

12. The same amendment as that made to claim 1 of auxiliary request 1 *vis-à-vis* claim 1 as granted, namely that the absorbent core comprises a superabsorbent polymer, has been made to claim 1 of each of the auxiliary requests 3a, 4a and 5a. As indicated in point 11.1 *supra*, the waxes of claim 1 of auxiliary request 3a as well as the particular waxes of claim 1 of auxiliary requests 4a and 5a, although present in the list of immobilizing agents in claims 1 and 11 respectively as granted, were disclosed exclusively in the description of the application as filed, namely on page 26, lines 1 to 2, without any link to superabsorbent polymers.

12.1 Thus, in the Board's judgement, for the same reasons as given in point 9.3 *supra*, these two features, namely the superabsorbent polymer and the (particular) waxes, are not originally disclosed in combination. Claim 1 of each of these auxiliary requests is thus amended in such a way that subject-matter extending beyond the application as filed is added, contrary to the requirements of Article 123(2) EPC.

12.2 Therefore, by the same token, auxiliary requests 3a, 4a and 5a are also clearly not allowable with the consequence that the Board exercises its discretion not to admit these late filed requests into the proceedings.

Auxiliary request 5

13. The amendments made to claim 1 of auxiliary request 5 *vis-à-vis* claim 1 as granted comprise the replacement of the petroleum-based emollients, fatty acid ester emollients, alkyl ethoxylate emollients, and mixtures thereof by mineral oil and petrolatum and the restriction of the waxes in the list of immobilizing agents to carnauba wax, beeswax, candelilla wax, paraffin wax, ceresin wax, esparto, ouricuri and rezowax. The former amendment is disclosed on page 17, line 15, the latter on page 26, lines 1 to 2 of the application as filed.

13.1 However, the combination of the emollient being selected from mineral oil and petrolatum together with the immobilizing agent being selected from this list of particular waxes is not disclosed in the application as filed, these two features not being specifically linked therein. Nor is there a basis for this combination in

original claim 2 together with page 26, lines 1 and 2 of the description as originally filed, as argued by the Appellant, since original claim 2 discloses mineral oil and petrolatum as emollients only in combination with said emollient containing 5% or less water, this latter feature, however, having been omitted from claim 1 of auxiliary request 5.

13.2 As a consequence the fresh amendment to claim 1 results in the generation of a new combination which extends beyond the content of the application as filed, such that late filed auxiliary request 5 is clearly not allowable under Article 123(2) EPC with the consequence that the Board exercises its discretion not to admit this request into the proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

C. Moser

R. Freimuth