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**Datasheet for the decision
of 30 August 2006**

Case Number: T 1018/04 - 3.3.10

Application Number: 95301623.5

Publication Number: 0673657

IPC: A61L 15/58

Language of the proceedings: EN

Title of invention:

Adhesive film for adhesive bandage and adhesive bandage using said adhesive film

Patentee:

JOHNSON & JOHNSON CONSUMER PRODUCTS, INC.

Opponent:

Paul Hartmann Aktiengesellschaft

Headword:

Adhesive film/JOHNSON & JOHNSON

Relevant legal provisions:

EPC Art. 54, 56, 114(2), 123(2)

Keyword:

"Document late filed (no) - filed with grounds of appeal"

"Main and first auxiliary request: (admitted) - minor amendments prompted by objection of opposing party - no reformatio in peius"

"Amendments (allowable)"

"Novelty (yes) - different means of realisation"

"Inventive step (no) - obvious alternative"

"Second auxiliary request: (not admitted) - late filed - not induced by fresh objections - feature taken from description - fresh case"

Decisions cited:

G 0002/92, G 0009/92, G 0001/99, T 0153/85, T 0401/95,
T 0396/97, T 1072/98, T 0540/01

Catchword:

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Case Number: T 1018/04 - 3.3.10

D E C I S I O N
of the Technical Board of Appeal 3.3.10
of 30 August 2006

Appellant: Paul Hartmann Aktiengesellschaft
(Opponent) Paul-Hartmann-Strasse
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
21 June 2004 concerning maintenance of the
European patent No. 0673657 in amended form.

Composition of the Board:

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

Summary of Facts and Submissions

- I. The Appellant (Opponent) lodged an appeal on 13 August 2004 against the interlocutory decision of the Opposition Division of 21 June 2004 which found that European patent No. 673 657 could be maintained in amended form.
- II. Notice of Opposition had been filed by the Appellant requesting revocation of the patent as granted in its entirety on the grounds of lack of novelty and lack of inventive step (Article 100(a) EPC) and of extending the subject-matter of the patent in suit beyond the content of the application as filed (Article 100(c) EPC). *Inter alia* the following documents were submitted in opposition proceedings:
- (1) EP-A-368 541,
 - (3) US-A-3 908 650 and
 - (4) EP-A-292 080.
- III. The decision under appeal was based on an amended set of eight claims, independent claim 1 of which reading as follows:
- "1. An adhesive film for an adhesive bandage in which an adhesive is coated on one surface of a nonwoven fabric, and a film which is permeable to water vapor and substantially impermeable to water is laminated on the opposite surface of the nonwoven fabric, characterised in that said nonwoven fabric is formed from elastomer filaments, and in that the adhesive is water vapour permeable or the adhesive is coated in a pattern."

The Opposition Division held that the amendments made to the claims satisfied the requirements of Article 100(c) and 123(2) EPC, that the invention was novel over documents (1) and (3) and involved an inventive step. More particularly the specification that the nonwoven fabric "is formed from elastomer filaments" was based on page 3, lines 6 to 7 of the application as filed. The claimed subject-matter was novel over the disclosure of document (1), since there was no direct and unambiguous disclosure in this document of all the features of the claimed adhesive film in combination, and was novel over the disclosure of document (3), since this latter document neither disclosed a nonwoven fabric made from elastomer filaments, nor that the film should be substantially impermeable to water. With regard to inventive step, document (3) was considered to represent the closest prior art, and the present invention was held to be non-obvious over the teaching of this document in the light of any of the other documents cited during the opposition proceedings.

IV. At the oral proceedings before the Board, held on 30 August 2006, the Respondent (Proprietor of the patent) defended the maintenance of the patent in suit in amended form on the basis of a main and two auxiliary requests, all requests submitted during these oral proceedings and thus superseding any previous requests. The main request comprised a set of eight claims, independent claim 1 reading as follows:

"1. An adhesive film for an adhesive bandage in which an adhesive is coated on one surface of a nonwoven

fabric, said nonwoven fabric being formed from elastomer filaments made of a polystyrene elastomer, a polyurethane, a polyester or a mixture thereof, and a film which is permeable to water vapor and substantially impermeable to water is laminated on the opposite surface of the nonwoven fabric, characterised in that the adhesive is porous or the adhesive is coated in a pattern."

The dependent claims 2 to 7 were directed to preferred embodiments within the ambit of claim 1 and claim 8 was directed to an adhesive bandage using the adhesive film recited in any one of claims 1 to 7.

Claim 1 of the first auxiliary request differed from claim 1 of the main request exclusively in that it was restricted to the embodiment that the adhesive was porous.

Claim 1 of the second auxiliary request differed from claim 1 of the main request exclusively in that the film was laminated "by heat fusion to" the opposite surface of the nonwoven fabric.

- V. The Appellant argued that the replacement of the feature "water vapor permeable" with "porous" offended against the principle of *reformatio in peius*, since porosity was neither the same nor narrower than water vapour permeability, the former term defining how the adhesive is applied and the latter defining the intrinsic nature of the adhesive.

The Appellant objected to the novelty of the claimed invention, insofar as it related to the embodiment that

the adhesive was coated in a pattern, in view of document (1). Document (1) disclosed in Example 2 a dressing comprising a film of Estane 58309NAT022 polyurethane resin, said film being water vapour permeable and water impermeable. This film was laminated to a nonwoven polyurethane frame and this backing was coated with an isooctyl acrylate adhesive. Since the permanent adhesive reinforcement was applied to the film in a pattern, namely as a frame, then the adhesive, having been applied to the frame, was also applied in a pattern.

In the assessment of inventive step, the Appellant started from document (11):

(11) DE-A-4 203 130

which was submitted with the Statement of the Grounds of Appeal. Document (11) disclosed in Example 5 a dressing comprising a urethane film laminated to a nonwoven fabric which was made from a styrene-isoprene-styrene block polymer and polypropylene, and the nonwoven fabric was coated with a polyacrylate adhesive. The resulting dressing was water impermeable and water vapour permeable, the water vapour permeability being derivable from Example 2, which disclosed an identical dressing, but wherein the adhesive was applied to the surface of the urethane film instead of to the nonwoven fabric. In column 3, lines 50 to 56, it was indicated that the plastics film prevented an infiltration of water.

In the light of this closest prior art, the Appellant argued that the skilled person, faced with the problem

of providing a further water vapour permeable dressing would have turned to documents (3) and/or (4), since both of these documents taught that water vapour permeability may be achieved by applying a porous coating of the adhesive. As such the subject-matter of the claimed invention was not inventive.

The Appellant argued that fresh document (11) was filed in due time, namely together with the Statement of the Grounds of Appeal.

The Appellant challenged the admissibility of the second auxiliary request, since it was filed at the very last moment of the appeal proceedings and gave rise to fresh issues not yet addressed to which the Appellant could not be expected to respond at the oral proceedings.

- VI. The Respondent argued that the amendments did not offend against the principle of *reformatio in peius*, there being no basis in the opposed patent for the adhesive being intrinsically water vapour permeable, i.e. by virtue of its chemical composition, but rather the specification of the patent in suit, more particularly paragraphs [004] and [0010], disclosed that water vapour permeability of the adhesive may be achieved *inter alia* by applying a porous coating thereof.

The Respondent submitted that document (1) was not novelty destroying, since it did not disclose an adhesive coated on the nonwoven fabric in a pattern.

The Respondent, starting from document (11) as closest prior art, submitted that the problem to be solved by the invention of the patent in suit was to provide an adhesive film for an adhesive bandage having high water vapour permeability while retaining sufficient adhesion to the skin. The solution comprised the adhesive being porous or coated in a pattern, the problem being successfully solved since a porous or pattern-coated adhesive clearly exhibited a greater water vapour permeability than a continuous film thereof. The skilled person would not have combined either of documents (3) or (4) with document (11), since document (11) related to a light-transmissive adhesive film, whereas this was not the case for the adhesive films of documents (3) and (4). Documents (3) and (4) were additionally incompatible with the teaching of document (11), since they both achieved water impermeability by treating the nonwoven fabric with a water-repellent agent, whereas in document (11) this property was achieved by a water impermeable film.

The Respondent objected to the admission into the proceedings of the Appellant's document (11) due to its late filing.

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

The Respondent requested that the decision under appeal be set aside and the patent be maintained on the basis of the main request or, subsidiarily, on the basis of either of the first or second auxiliary requests, all requests submitted during the oral proceedings before the Board.

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. *Late filed evidence (Article 114(2) EPC)*

Document (11) is new evidence cited for the first time in the Appellant's Statement of the Grounds of Appeal. The Respondent objected to admitting this document into the proceedings for the reason that it was late filed.

This document was prompted by the amendment made to claim 1 of the patent in suit during the opposition proceedings, namely the introduction of the feature that the adhesive is water vapour permeable, said amendment being made in order to render the subject-matter novel over document (1). The Appellant cited document (11) as novelty destroying for the subject-matter of the patent as maintained by the Opposition Division, since it disclosed the feature that the adhesive was water vapour permeable.

The submission by an Appellant of fresh documents in the Statement of the Grounds of Appeal to overturn the appealed decision is to be considered as a normal action of a losing party (see decision T 1072/98, point 2.3 of the reasons; T 540/01, point 2 of the reasons, neither published in OJ EPO).

Thus, in the present case, the fresh document (11) submitted with the Appellant's Statement of the Grounds of Appeal is not filed late in the sense of Article 114(2) EPC.

Therefore, document (11) is to be taken into consideration in the appeal proceedings.

Main and first auxiliary request

These requests both have the embodiment in common that the adhesive is porous, claim 1 of the main request differing from claim 1 of the first auxiliary request only in that it additionally includes the alternative embodiment that the adhesive is coated in a pattern (see point IV above).

3. *Admissibility*

3.1 *Late filed requests*

In response to the objections raised during the oral proceedings with regard to the support in the application as filed (Article 123(2) EPC) for the amended expression "being formed from filaments made of an elastomer selected from polystyrene elastomers, polyurethanes, polyesters and mixtures thereof" in the independent claims of various requests filed in the written stage of the appeal proceedings, the Respondent submitted fresh requests containing minor amendments prompted only by the objections raised. Therefore these amendments are considered to be appropriate and necessary. Furthermore, the Appellant was not hindered in its argumentation with regard to novelty and

inventive step by the amendments carried out at the oral proceedings before the Board in the claims of the present requests, since these amendments did not amount to creating a fresh case necessitating a reconsideration of the objections and evidence brought forward so far by the Appellant against the patentability of the claimed subject matter.

3.2 *Reformatio in peius*

3.2.1 In principle, a claim amended in opposition appeal proceedings, which would put the opponent and sole appellant in a worse situation than if it had not appealed, must be rejected. Furthermore, if the opponent is the sole appellant against an interlocutory decision maintaining a patent in amended form, the patent proprietor is primarily restricted during the appeal proceedings to defending the patent in the form in which it was maintained by the Opposition Division in its interlocutory decision. Amendments proposed by the patent proprietor as a party to the proceedings as of right under Article 107, second sentence, EPC, may be rejected as inadmissible by the Board of Appeal if they are neither appropriate nor necessary (see decisions G 9/92, OJ EPO, 1994, 875; G 1/99, OJ EPO, 2001, 381).

3.2.2 In claim 1 of the claims as maintained by the Opposition Division, the adhesive was defined as being water vapour permeable. In claim 1 of the main and first auxiliary request pending before the Board, the term "water vapour permeable" has been replaced with the term "porous".

3.2.3 This amendment is designed to overcome the novelty objection raised by the Appellant-Opponent based on the disclosure of document (11), said document having been submitted for the first time during the appeal proceedings. Therefore said amendment can be considered as occasioned by that ground of opposition and as such to be appropriate and necessary. The question therefore arises if that amendment puts the Appellant in a worse position than if it had not appealed.

3.2.4 According to the patent in suit, an adhesive having water vapour permeability is coated, and/or an adhesive is coated in a pattern, on the nonwoven fabric. More specifically, an adhesive having water vapour permeability, preferably a porous adhesive is coated or pattern coated, or an adhesive is pattern-coated (see page 2, lines 30 to 32 and 36 to 37 of the patent specification). Porous adhesives are hereby defined as a preferred subset of water vapour permeable adhesives. The claimed adhesive film comprising a porous adhesive thus represents a preferred embodiment of the invention falling completely within the ambit of the adhesive film comprising a water vapour permeable adhesive maintained by the Opposition Division.

3.2.5 Consequently, in the Board's judgement, said amendment does not result in an extension of the subject-matter now claimed over the subject-matter as maintained by the first instance, such that the Appellant as a result thereof is not in a worse situation than if it had not appealed.

3.2.6 The Appellant submitted that porosity was neither the same nor narrower than water vapour permeability, said

amendment thus offending against the principle of prohibiting *reformatio in peius*. More particularly, water vapour permeability was an intrinsic property of the adhesive, whereas porosity merely reflected the manner in which the adhesive was applied.

The Board however holds that the Appellant's interpretation of the term "water vapor permeable" as necessarily meaning having a chemical structure which was **intrinsically** water vapour permeable has no basis, neither in the patent in suit, nor in the art. On the contrary, in the patent specification (see page 3, lines 13 to 14) it is indicated that the adhesive used in the adhesive film of the invention is not particularly limited, as long as it provides pressure-sensitive adhesion to the skin without substantial irritation.

3.3 The Board thus exercises due discretion to admit the main and the first auxiliary request into the appeal proceedings.

4. *Amendments*

4.1 The Appellant opposed the patent in suit on the ground that the subject-matter of that patent extended beyond the content of the application as filed. Therefore the subject-matter of the claims comprised in the patent in suit must be fully examined by the Board as to whether or not that objection is well-founded.

4.2 The subject-matter of claim 1 of both requests is based on original claim 1, the feature that the adhesive is porous or coated in a pattern being disclosed in

original claims 4 and 5 respectively. The feature that the nonwoven fabric is formed from elastomer filaments made of particular polymers is disclosed on page 2, lines 6 to 11 of the application as filed.

4.3 For these reasons, the Board concludes that the subject-matter of claim 1 of the main and first auxiliary request does not extend beyond the content of the application as filed such that the requirements of Article 123(2) EPC are satisfied and the ground for opposition pursuant to Article 100(c) EPC is disqualified.

4.4 These amendments bring about a restriction of the scope of the claims as granted, and therefore of the protection conferred thereby, which is in keeping with the requirements of Article 123(3) EPC.

5. *Novelty*

5.1 The Appellant challenged the novelty of the claimed invention according to the main request, insofar as it related to the embodiment that the adhesive was coated in a pattern, on the basis of document (1). In view of the Respondent's restriction of the subject-matter during the appeal proceedings to adhesive films wherein the adhesive is either porous or coated in a pattern, the Appellant no longer maintained its novelty objection based on document (11). Since the Board does not see any reason to take a different view, the Board limits its consideration with respect to novelty to document (1) only.

5.2 Document (1) discloses in Example 2 a dressing comprising a water vapour permeable and water impermeable film of a polyurethane resin. This film is laminated to a nonwoven polyurethane frame and this backing is coated with an isooctyl acrylate adhesive.

The Appellant argued that since the permanent adhesive reinforcement was applied to the film in a pattern, namely as a frame, then the adhesive, having been applied to the frame, must also be considered as having been applied in a pattern.

In the Board's judgement, although it may be considered that the nonwoven fabric of Example 2 of document (1) is applied in a pattern to the film, there is no disclosure of the adhesive being coated on this nonwoven fabric in a pattern, as required by claim 1 of the patent in suit.

5.3 Therefore, the Board concludes that the subject-matter of claim 1 of the main request is novel within the meaning of Articles 52(1) and 54 EPC.

5.4 The Respondent did not raise any objection with regard to the novelty of the subject matter of claim 1 of the first auxiliary request. The Board on its own does not see any reason to take a different view. Hence, it is unnecessary to go into more details in this respect.

6. *Inventive step*

6.1 Independent claim 1 of the first auxiliary request is directed to one of the embodiments of the main request, namely to the alternative that the adhesive is porous.

In case this embodiment according to the main request lacked inventive step, such a line of requests would mandatorily result in the conclusion that the subject-matter of the first auxiliary request, which relates to that obvious embodiment, cannot 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 adhesive is porous, and that of claim 1 of the first auxiliary request, is examined first as to its inventive ingenuity.

6.2 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.

6.3 The patent in suit is directed to an adhesive film for an adhesive bandage having water vapour permeability and water resistance.

A similar adhesive film already belongs to the state of the art in that document (11) describes in Example 5 a dressing comprising a urethane film laminated to a nonwoven fabric which is made from a styrene-isoprene-styrene block polymer and polypropylene, and the nonwoven fabric is coated with a polyacrylate adhesive. The resulting dressing is water impermeable and water

vapour permeable, the water vapour permeability being derivable from Example 2, column 7, lines 4 and 5. In column 3, lines 50 to 56, it is indicated that the plastics film prevents an infiltration of water.

Therefore, the Board considers, in agreement with the Appellant and the Respondent, that the disclosure of document (11) specified above represents the closest state of the art and starting point in the assessment of inventive step.

- 6.4 In view of this state of the art the problem underlying the patent in suit, as formulated by the Respondent at the oral proceedings and indicated on page 2, lines 27 to 29 of the specification of the patent in suit, consists in providing a further adhesive film for an adhesive bandage which sufficiently secures water vapour permeability and adhesion to the skin.
- 6.5 As the solution to this problem the patent in suit proposes an adhesive film in which an adhesive is coated on one surface of a nonwoven fabric formed from elastomer filaments made of specific polymers, and a film which is permeable to water vapour and substantially impermeable to water is laminated on the opposite surface of the nonwoven fabric, characterised in that the adhesive is porous.
- 6.6 The Appellant never disputed that the claimed adhesive film successfully provides water vapour permeability and adhesion to the skin and the Board is not aware of any reason for challenging this finding. The specification of the patent in suit demonstrates in Table 1 that the film is water vapour permeable, on the

one hand, and has good adhesive properties, on the other. For these reasons, the Board is satisfied that the problem underlying the patent in suit has been successfully solved.

- 6.7 It remains to be decided whether or not the proposed solution to the problem underlying the patent in suit is obvious in view of the cited state of the art.

When looking for an alternative to the adhesive film disclosed in document (11), it is a matter of course that the person skilled in the art, seeking to provide an alternative water vapour permeable adhesive film, would turn his attention to that prior art addressing just that technical problem. He would take document (4) into consideration which aims at providing a non-woven tape for medical applications to be adhered to human skin which provides the combination of both moisture-vapour permeability and hydrostatic-pressure resistance (cf. column 1, lines 1 to 6 and column 2, lines 17 to 20).

This document teaches that by coating the nonwoven with a microporous adhesive, this combination of properties is achieved, the microporous construction being responsible for the high moisture vapour permeability rate (MVTR) (cf. column 2, lines 21 and 28).

The Board concludes from the above that document (4) gives a clear incentive on how to solve the problem underlying the patent in suit of providing a further adhesive film for an adhesive bandage which sufficiently secures water vapour permeability and adhesion to the skin (cf. point 6.4 *supra*), namely by

applying an adhesive to a film-coated nonwoven known from document (11) in a porous manner, thereby arriving at the solution proposed by the patent in suit.

Therefore in the Board's judgement, it was obvious to follow the avenue indicated in the state of the art without involving any inventive ingenuity.

6.8 For the following reasons the Board cannot accept the Respondent's arguments designed to support inventive step.

6.8.1 The Respondent submitted that an essential feature of the dressing according to document (11) was that it was light-transmissive such that a person may see through the dressing to the surface to which the dressing is adhered (cf. column 2, lines 43 to 44). Since document (4) did not address light-transmissibility, the perforated thermoplastic film forming part of the adhesive film therein possibly even impairing light-transmissibility, the skilled person would not have turned to document (4) when seeking to solve the problem posed.

However, document (4) addresses and solves precisely the problem underlying the patent in suit (cf. points 6.4 and 6.7 *supra*) with the consequence that a skilled person necessarily takes that document into consideration when looking for a solution to that problem. The achievement of light-transmissibility is not part of the problem to be solved by the patent in suit, namely to provide further adhesive films securing water vapour permeability and adhesion to the skin, such that the presence or absence of this property of

light-transmissibility in the tape according to document (4) is irrelevant.

- 6.8.2 The Respondent argued that the teaching of document (4) was additionally incompatible with the teaching of document (11), since the former document achieved water impermeability by treating the nonwoven fabric with a water-repellent agent, whereas in the latter this property was achieved by a water impermeable film.

However, in the closest prior document (11) the property of water impermeability is already achieved by using a urethane film (cf. column 3, lines 50 to 56), as does the patent in suit. The Respondent has not provided any argumentation as to why the different method of achieving water impermeability indicated in document (4) would have deterred the skilled person from applying the teaching of that document in order to achieve water vapour permeability by means of porosity, and none is apparent to the Board.

- 6.9 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.

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

8. Since independent claim 1 of the first auxiliary request is directed to the embodiment of the main request that the adhesive is porous (cf. point 6.1 *supra*) the considerations having regard to inventive step given in points 6.2 to 6.8 *supra* and the

conclusion drawn in point 6.9 *supra* with respect to the main request applies also to the first auxiliary request, i.e. the subject-matter claimed is obvious and does not involve an inventive step.

9. In these circumstances, the Respondent's first auxiliary request shares the fate of the main request in that it too is not allowable for lack of inventive step pursuant to Article 56 EPC.

Second auxiliary request

10. *Admissibility*

- 10.1 The second auxiliary request was filed at the very last stage of the appeal proceedings, namely at the end of the oral proceedings before the Board. Claim 1 according to this request comprises the incorporation of the fresh feature that the film is laminated "by heat fusion to" the nonwoven fabric, said amendment being based on page 4, lines 23 to 24 of the application as filed.

- 10.2 The purpose of the appeal procedure in *inter partes* proceedings is mainly to give a party being adversely affected the possibility of challenging the decision of the first instance. If the Opponent is the sole Appellant against an interlocutory decision maintaining the patent in suit in amended form, as in the present case, the Respondent-Patentee is primarily restricted during the appeal proceedings to defend the patent in the form in which it was maintained by the Opposition Division in its interlocutory decision. However, if the Respondent-Patentee wants other requests to be

considered, admission of these requests into the proceedings is a matter of discretion of the Board of Appeal, and is not a matter of right of the non-appealing Proprietor of the patent (see decision G 9/92, *loc. cit.*, point 15 of the reasons). For exercising due discretion in respect of the admission of fresh requests by the non-appealing Patentee that were not before the Opposition Division, it is established case law of the Boards of Appeal that crucial criteria to be taken into account are whether or not the amended claims of those fresh requests are clearly allowable and whether or not those amended claims give rise to fresh issues which the other party, i.e. the Appellant-Opponent, can reasonably be expected to deal with properly without unjustified procedural delay (see decisions T 153/85, OJ EPO, 1988, 1, points 2.1 and 2.2 of the reasons; T 401/95, point 5.2 of the reasons, not published in OJ EPO).

10.3 In the present case, the objections which may have prompted the second auxiliary request, namely lack of inventive step over *inter alia* document (11), were known to the Respondent from the beginning of the appeal proceedings. The Appellant objected from the beginning on that it was obvious to achieve water vapour permeability by means of porosity of the adhesive. Therefore this request was not induced by objections, facts or evidence freshly raised at the oral proceedings and no reasons have been given for the filing of this auxiliary request at the very last moment.

10.4 Furthermore, the amendment made to claim 1 takes up a feature which was merely mentioned in the description

of the patent in suit and had never before formed the basis for any claim. Moreover, this feature is not emphasised in the patent in suit as contributing to solving the problem underlying the invention in any way. Therefore the Appellant could not reasonably be expected to prepare itself for dealing with the fresh issues arising from said amendment, having no possibility to search for new documents or submit other evidence for challenging the patentability of that claim.

Thus, the Board concurs with Appellant's objections that the second auxiliary request gives rise to fresh issues not yet addressed which the Appellant could not be expected to respond at the oral proceedings without possibly violating its right to be heard, whereas to give him time to respond would have led to undue procedural delay.

10.5 The Board additionally notes that document (4) already teaches the lamination of the synthetic film to the nonwoven by thermal welding (cf. page 3, column 3, lines 7 to 8 and 27 to 28) such that *prima facie* no inventive contribution can be seen to be made by the freshly added feature. Thus said feature would not appear to be suitable to overcome the objection of lack of inventive step anyway.

10.6 For all these reasons, the Board exercises its discretion not to admit the second auxiliary request into the proceedings.

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:

C. Moser

R. Freimuth