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**Datasheet for the decision
of 20 November 2006**

Case Number: T 0386/05 - 3.2.06

Application Number: 97933540.3

Publication Number: 0912788

IPC: D04H 13/00

Language of the proceedings: EN

Title of invention:

Film-nonwoven laminate containing an adhesively-reinforced stretch-thinned film

Applicant:

KIMBERLY-CLARK WORLDWIDE, INC.

Opponents:

SCA Hygiene Products AB
Paul Hartmann AG

Headword:

-

Relevant legal provisions:

EPC Art. 123(2)(3)

Keyword:

"Main request: amendments - broadening of claim (yes)"
"Auxiliary request: amendments - broadening of claim (no)"

Decisions cited:

-

Catchword:

-



Case Number: T 0386/05 - 3.2.06

DECISION
of the Technical Board of Appeal 3.2.06
of 20 November 2006

Appellant: KIMBERLY-CLARK WORLDWIDE, INC.
(Patent Proprietor) 401 North Lake Street
Neenah, WI 54956 (US)

Representative: Grünecker, Kinkeldey,
Stockmair & Schwanhäusser
Anwaltssozietät
Maximilianstraße 58
D-80538 München (DE)

Respondent I: SCA Hygiene Products AB
(Opponent) S-405 03 Göteborg (SE)

Representative: Furlong, Christopher Heinrich
Hoffman Eitle,
Patent- und Rechtsanwälte
Arabellastraße 4
D-81925 München (DE)

Respondent II: Paul Hartmann AG
(Opponent) Paul-Hartmann-Straße 12
D-89522 Heidenheim (DE)

Representative: Friz, Oliver
Patentanwälte
Dreiss, Fuhlendorf, Steimle & Becker
Gerokstraße 1
D-70188 Stuttgart (DE)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 25 January 2005
revoking European patent No. 0912788 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: P. Alting van Geusau
Members: G. L. De Crignis
K. Garnett

Summary of Facts and Submissions

- I. European Patent No. 0 912 788, granted on application No. 97933540.3, was revoked by the opposition division by decision posted on 25 January 2005. The revocation was based on the finding that the wording in claim 1: "including lines of randomly dispersed fibers or filaments or generally parallel continuous or discontinuous lines extending in the cross machine direction" related to subject-matter extending beyond the content of the application as originally filed (Article 100(c) EPC).
- II. The Appellant (patentee) filed a notice of appeal against this decision on 23 March 2005, and paid the appeal fee simultaneously. On 6 June 2005 the statement of grounds of appeal was filed, accompanied by new sets of claims in accordance with four auxiliary requests.
- III. With a communication dated 13 March 2006, accompanying the summons to oral proceedings, the Board indicated that none of the requests appeared to meet the requirements set out in Article 123 EPC. In the event that there might be a set of claims which met the formal requirements of Article 123 EPC, remittal to the opposition division for further prosecution appeared appropriate.
- IV. Oral proceedings were held on 20 November 2006. The Appellant requested that the decision under appeal be set aside and that in the event that the claims of either the main request (patent as granted) or the new auxiliary request filed during the oral proceedings be found not to infringe the requirements of Article 123(2)

or (3) EPC the proceedings be remitted to the opposition division for continuation of the opposition proceedings.

The Respondents requested that the appeal be dismissed.

Claim 1 according to the main request reads as follows:

"A film-nonwoven laminate (10) comprising:
a first fibrous nonwoven layer (16) having a surface;
a film layer (12) having a first surface (14);
said film layer (12) being oriented in a direction of stretching and having an effective gauge of 15.2 μm (0.6 mil) or less;
said film layer (12) being formed from a blend including a first polyolefin polymer, a filler, and a second polyolefin polymer; said blend including on a total weight percent basis based upon the total weight of the film layer, from about 30 percent to about 70 percent of said first polymer, from about 70 percent to about 30 percent of said filler and from about 0 to about 20 percent of said second polymer;
said film layer (12) having a water vapor transmission rate of at least about 300 grams per square meter per 24 hours;
a pattern of adhesive areas (18) applied to said first surface (14) of said film layer;
said surface of said fibrous nonwoven layer (18) being adhered to said surface (14) of said film layer (12) by said pattern of adhesive areas (18) applied to said film layer surface (14) to form a laminate (10);
a percent bond area of from about 5 percent to about 50 percent per unit area of said surface of said film layer (12);
characterized in that

said laminate (10) is adhesively-reinforced, in that said pattern of adhesive areas (18) has an add-on amount of from about 0.1 to about 20 grams per square meter, and a maximum spacing between adhesive areas in a direction generally parallel to said direction of stretching of about 2.54 cm (about 1.0 inch) or less, including lines of randomly dispersed fibers or filaments or generally parallel continuous or discontinuous lines extending in the cross machine direction."

In claim 1 according to the auxiliary request I the last feature of claim 1 of the main request:

"including lines of randomly dispersed fibers or filaments or generally parallel continuous or discontinuous lines extending in the cross machine direction"

is replaced by:

"and is formed by generally parallel continuous or discontinuous adhesive lines extending in the cross machine direction and printed onto the surface (14) of the film layer (12)."

V. The Appellant argued essentially as follows:

With respect to the main request and the subject-matter of its claim 1, the feature objected to ("including lines of randomly dispersed fibers or filaments or generally parallel continuous or discontinuous lines extending in the cross machine direction") was clearly disclosed in the application as originally filed.

The introductory term "including" should be understood to mean "for example" and therefore, the features which followed were entirely optional.

The features objected to in fact contained three alternatives. These three alternatives were:

- lines of randomly dispersed fibres
- filaments
- generally parallel continuous or discontinuous lines extending in the cross machine direction.

Each alternative could be derived clearly and unambiguously from the original specification.

With respect to the first alternative, "lines of randomly dispersed fibers", this feature was disclosed:

- on page 5, lines 1 to 3, which provided the general information that a pattern or network of adhesive fibres should be present. This passage had to be read in the general context of page 2, lines 32/33 where it was effectively stated that the term pattern should be interpreted as being synonymous with the term "network".
- on page 14, line 10, where it was stated that the "adhesive application process employed must be suited to the particular type of adhesive used". This passage should be read in the context of the disclosure between pages 10 and 13, where reference was made to the manufacturing of the film layer and where it was stated that for such film layers the application of, for example, "a pattern or network of intersecting, randomly dispersed meltblown adhesive fibers" was

suitable (page 14, lines 12/13). Taking these references together, lines of randomly dispersed fibres were implicitly disclosed. Since the types of application were given only by way of example, the skilled person would be aware that such patterns could be lines.

With respect to the second alternative, "filaments", this feature was disclosed:

- on page 5, lines 1 to 3 which contained the general information that a pattern or network of adhesive filaments should be present;

- on page 2, line 33 and page 3, lines 21 to 28, which both referred to a pattern of adhesive areas which implicitly also meant adhesive filaments.

With respect to the third alternative, "generally parallel continuous or discontinuous lines extending in the cross machine direction", this feature was disclosed on page 16, lines 17 to 19. As well as printing processes being disclosed in the application as filed there were also references to other adhesive application methods (page 16, lines 16/17 and page 14, lines 21/22).

So far as claim 1 of auxiliary request I was concerned, the application as originally filed contained a clear and unambiguous, literal disclosure of "generally parallel continuous or discontinuous adhesive lines extending in the cross machine direction and printed onto the surface (14) of the film layer (12)", see page 16, lines 17 to 19.

The term "is formed by" did not extend the protection conferred. On the contrary, the subject-matter of the claim was now limited to adhesive lines of the kind which were specified in the directly following feature.

VI. The Respondents argued essentially as follows:

With respect to the main request, there was no clear and unambiguous disclosure of the disputed term. The term "including" was totally unspecific and allowed any additional type of fibre or filament or other continuous or discontinuous lines, at any location, to be included with respect to the adhesive pattern. There was no definition as to where these elements should be included in, or with respect to, the pattern, nor was it defined from what they should be made. Thus, the subject-matter of claim 1 as granted had been amended by the addition of a non-disclosed generalisation of the original disclosure.

In the application as originally filed reference was made to "a pattern or network of adhesive fibers, filaments, lines or areas" (page 5, lines 2/3). The term "pattern" was not synonymous with the term "network", and a network of adhesive fibres was only mentioned in relation to intersecting, randomly dispersed meltblown adhesive fibres.

With respect to the pattern of adhesive areas three independent alternatives were in fact specified in claim 1: "lines of randomly dispersed fibers" , "lines of randomly dispersed filaments" and "generally continuous or discontinuous lines extending in the

cross machine direction". Neither a literal nor an implicit disclosure of these alternatives was present in the original application.

- Concerning the first alternative, "lines of randomly dispersed fibers": Fibres were disclosed at various passages in the description but randomly dispersed fibres were only disclosed in the context of "a pattern or network of intersecting, randomly dispersed meltblown adhesive fibers "(page 14, lines 12/13).
- Concerning the second alternative, "lines of randomly dispersed filaments": Filaments were only disclosed in the context of a pattern or network of adhesive filaments (page 5, line 2).
- Concerning the third alternative, "generally parallel continuous or discontinuous lines extending in the cross-machine direction": Such lines were only disclosed in connection with printing of adhesive (page 16, lines 17 - 22).

For all these reasons, claim 1 of the main request contravened the requirements of Article 123(2) EPC and should not be allowed.

With respect to the auxiliary request I, the replacement of "including" by "is formed by" was a violation of Article 123(3) EPC. "Including" signifies that the adhesive areas are made partly from the subject-matter which follows whereas "is formed by" should be understood in the same way as "comprising" and thus signifies that the adhesive areas are made

either partly or entirely from this subject-matter. Therefore, claim 1 of auxiliary request I should not be allowed.

Reasons for the Decision

1. The appeal is admissible.
2. Main Request
 - 2.1 It is not in dispute that the feature "including lines of randomly dispersed fibers or filaments or generally parallel continuous or discontinuous lines extending in the cross machine direction" is not *expressis verbis* mentioned in the application as filed. The issue is therefore whether the skilled person would nevertheless derive the three alternatives of adhesive reinforcement of the claimed film-nonwoven laminate, in a direct and unambiguous manner, from the application as filed. It should be noted that this feature has been added to the characterising part of claim 1 and, accordingly, this feature was relied upon by the appellant as a major difference when comparing the claimed laminate with that of the prior art.
 - 2.2 The argument of the Appellant that "including" is synonymous with "for example" cannot be accepted. The expression "for example" would indicate possible choices, amongst others, for the subject-matter referred to whereas "including" indicates a feature or features that must be part of the subject-matter. Thus the passage "including lines of randomly dispersed fibers or filaments or generally parallel continuous or

discontinuous lines extending in the cross machine direction" means that one of the three alternatives must be used in realising the claimed subject-matter, whereas use of the expression "for example" would mean that the three alternatives are given only as possible choices for use, other choices also being permissible.

2.3 It is further to be noted that the term "including" is not limiting in the sense that no other adhesive means could be present. In the absence of any disclosure of other means of adhesive reinforcement, the subject-matter of claim 1 as granted has been amended by a generalisation of the original disclosure, thereby covering added subject-matter.

2.4 Therefore, the addition of the term "including" does not comply with the requirements of Article 123(2) EPC and if for no other reason than this, claim 1 of the main request can therefore not be allowed. Accordingly, it is not necessary to discuss in detail the three alternatives referred to in the wording of the disputed feature. However, for completeness, it should be pointed out that, with respect to the pattern of adhesive areas and the three independent alternatives specified in claim 1, no implicit disclosure of the claimed features is present in the original application, for the reasons given by the Respondents.

3. Auxiliary Request I

3.1 Claim 1 of the auxiliary request I was amended by replacing the term "including" by "is formed by", and then deleting the first two alternatives, leaving only the third alternative, with the additional reference to

the printed application of the adhesive, so that it now reads:

"... and is formed by generally parallel continuous or discontinuous adhesive lines extending in the cross machine direction and printed onto the surface (14) of the film layer (12)".

3.2 Insertion of "is formed by"

The replacement of "including" by "is formed by" limits the subject-matter which follows. Whereas "including" referred to particular embodiments covered by this subject-matter but did not exclude other embodiments, "is formed by" should be understood as equivalent here to "consisting of" and this term thus extends only to the subject-matter which follows. Since this subject-matter is now limited to the third alternative, which is clearly and unambiguously disclosed (see point 3.3 below), the subject-matter claimed does not contravene the requirements of Article 123(3) EPC.

Literal support for "formed by" is not present in the application as filed. However, throughout the application as filed reference is made to a pattern or network of adhesive areas being applied to the surface of the film layer 12. This constitutes an implicit disclosure that the adhesive areas are formed by the adhesive application process. Therefore, this feature represents subject-matter which was already present in the application as filed and hence the requirements of Article 123 (2) EPC are met.

- 3.3 Insertion of "generally parallel continuous or discontinuous adhesive lines extending in the cross machine direction and printed onto the surface (14) of the film layer (12)"

Literal support for this feature can be found on page 16, lines 17 to 19 of the description as originally filed. Therefore, this amendment does not give rise to objections under Article 123(2) EPC either.

4. The decision under appeal dealt with the objection under Article 100(c) EPC only. Neither novelty nor inventive step has yet been examined during opposition proceedings. Under these circumstances, the Board, in the exercise of its discretionary power pursuant to Article 111(1) EPC, finds it appropriate to remit the case on the basis of the first auxiliary request to the opposition division for further prosecution.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for continuation of the opposition proceedings.

The Registrar:

The Chairman:

S. Sánchez Chiquero

P. Alting van Geusau