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**Datasheet for the decision
of 29 September 2009**

Case Number: T 1037/07 - 3.2.06

Application Number: 97949439.0

Publication Number: 1032336

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:

Disposable absorbent article with a skin care composition on an apertured topsheet

Patentee:

THE PROCTER & GAMBLE COMPANY

Opponent:

KIMBERLY-CLARK WORLDWIDE, INC.
SCA Hygiene Products AB

Headword:

-

Relevant legal provisions:

EPC Art. 56

Relevant legal provisions (EPC 1973):

-

Keyword:

"Inventive step (main and auxiliary request 3 - no; auxiliary request 7 - yes)"

Decisions cited:

-

Catchword:

-



Case Number: T 1037/07 - 3.2.06

DECISION
of the Technical Board of Appeal 3.2.06
of 29 September 2009

Appellant: SCA Hygiene Products AB
(Opponent II) S-405 03 Göteborg (SE)

Representative: Stratmann, Klemens
Hoffmann Eitle
Patent- und Rechtsanwälte
Arabellastraße 4
D-81925 München (DE)

Respondent: The Procter & Gamble Company
(Patent Proprietor) One Procter & Gamble Plaza
Cincinnati, OHIO 45202 (US)

Representative: Samuels, Lucy Alice
Gill Jennings & Every LLP
Broadgate House
7 Eldon Street
London EC2M 7LH (GB)

Party as of rights: KIMBERLY-CLARK WORLDWIDE, INC.
(Opponent I) 401 North Lake Street
Neenah WI 54956 (US)

Representative: Beacham, Annabel T. Rose
Frank B. Dehn & Co.
St Bride's House
10 Salisbury Square
London EC4Y 8JD (GB)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 21 May 2007
rejecting the opposition filed against European
patent No. 1032336 pursuant to
Article 102(2) EPC.

Composition of the Board:

Chairman: P. Alting Van Geusau
Members: G. Pricolo
K. Garnett

Summary of Facts and Submissions

I. The appeal is from the decision of the Opposition Division posted on 21 May 2007 rejecting the opposition filed against European patent No. 1 032 336.

II. Claim 1 of the patent as granted reads as follows:

"1. A disposable absorbent article (20) comprising: a liquid pervious structured carrier (24) comprising a non-woven web having an inner surface oriented toward the interior of said disposable absorbent article (20) and an outer surface oriented toward the skin of the wearer when the disposable absorbent article (20) is worn, said structured carrier (24) having an effective open area of at least about 12 percent and a plurality of apertures with an effective size greater than 0.2 square millimeters, said outer surface of said structured carrier (24) comprising an effective amount of a skin care composition which is semi-solid or solid at 20 °C and which is partially transferable to the wearer's skin; a liquid impervious backsheet (26) at least partially peripherally joined to said structured carrier (24); and an absorbent core (28) intermediate said structured carrier and said backsheet."

III. In coming to its decision the Opposition Division held that the claimed subject-matter was inventive over the available prior art including:

D1 : WO-A-94/28843;

D2 : US-A-5 643 588;

essentially for the following reasons:

The subject-matter of claim 1 differed from the closest prior art, represented by a disposable absorbent article according to D2, only in that the non-woven web (topsheet) had an effective open area of at least about 12 percent and a plurality of apertures with an effective size greater than 0.2 square millimeters. These distinguishing features solved the problem of improving the transport of fluids to the underlying structure. D2 provided *"no clear hint as to why the skilled person would be led to substitute the topsheet of D2 with that of D1 in order to solve the problem posed, since the skilled person had not only the possibility to change the topsheet, but also the kind of lotion and even if he were to choose to change the underlying topsheet, which appears to be even less preferred in the light of the teaching of D2, the skilled person could still choose between several possibilities, such as using an already mentioned apertured plastic material or providing a non-woven material with apertures, thus not leading to a one-way street situation"* (page 7 of the decision under appeal).

In its reasoning, the Opposition Division did not need to consider the evidence filed by the parties including:

D19 : Test report dated 26 May 2005, filed by Opponent II;

D20 : Technical report by Donald C. Roe, dated 19 April 2007, filed by the patent proprietor.

- IV. On 25 June 2007 the appellant (opponent II) filed a notice of appeal against this decision and paid the appeal fee. The statement of grounds of appeal was received on 10 September 2007.
- V. With its letter of reply to the grounds of appeal dated 28 January 2008 the respondent (patentee) filed nine auxiliary requests and the document:

D21 : second technical report by Donald C. Roe.

- VI. In an annex to the summons for oral proceedings pursuant to Article 11(1) Rules of Procedure of the Boards of Appeal the Board gave a preliminary assessment of the case which can be summarized as follows.

Notwithstanding the alleged technical effect supported by the technical reports D20 and D21, namely that the claimed topsheets showed little effect on trans-topsheet penetration test results and on increasing lotion basis weight, and that they had good runoff values in the lotioned state, it appeared that the objective technical problem included in any case the aspect of reducing leakage of urine and faecal material. As D1 specifically related to topsheet materials that reduced leakage of faecal material and also allowed liquids to readily penetrate throughout the thickness of the topsheet material, it appeared that the skilled person would consider using one of the topsheet materials disclosed by D1 in the absorbent article of D2.

VII. With letter dated 28 August 2009 the respondent submitted a further document:

D22 : third technical report by Donald C. Roe.

VIII. Oral proceedings took place on 29 September 2009.

The appellant requested that the decision under appeal be set aside and that the European patent be revoked.

The respondent requested that: the appeal be dismissed, alternatively that the decision under appeal be set aside and the patent be maintained on the basis of Auxiliary request 3 filed with the letter dated 28 January 2008, alternatively on the basis of Auxiliary Request 7 filed with the said letter.

As previously announced by letter dated 8 April 2009, the opponent I (party as of right), did not attend the oral proceedings. The proceedings were continued without them (Rule 115(2) EPC). Opponent I did not submit observations in the appeal proceedings.

IX. Claim 1 according to auxiliary requests 3 and 7 differs from claim 1 as granted in that it recites:

- Auxiliary request 3:

"an effective open area of at least about 25 percent"

instead of an effective open area at least 12 percent, and:

- Auxiliary request 7:

"an effective size greater than 2.0 square millimeters";

instead of an effective size greater than 0.2 millimeters.

- X. The arguments of the appellant can be summarized as follows:

The claimed absorbent article did not provide the alleged improvement over the closest prior art D2 of giving skin care benefits without an inhibited ability to handle fluids, i.e. of having a performance which was less dependent on the lotion level. In particular, the technical reports D20 and D21 compared apertured films with apertured nonwovens but did not include significant data relative to the comparison of apertured nonwovens with other topsheet materials, e.g. with non apertured nonwovens. In any case, D1 was concerned with the same problem as the patent in suit of handling low-viscosity faecal material. D1 taught employing the features at issue, i.e. an effective open area of at least 15% (claim 3 of D1) and a plurality of apertures with an effective size greater than 0.2 mm² (claim 5 of D1) precisely for this purpose. D1 moreover taught that there was a direct correlation between the ability of topsheets to handle fluids, expressed in terms of the trans-topsheet penetration (TTSP) and effective open area. Therefore, the skilled person would expect that a topsheet according to D1 would provide a better performance in handling low-viscosity faecal material than the nonwoven topsheet of D2. The fact that D2 itself suggested to the skilled person other options for improving the ability of the absorbent article to handle low-viscosity faecal material, was irrelevant because the skilled person

would not limit itself to the disclosure of D2. Nor was the fact that D1 also disclosed topsheets that were not in accordance with the patent in suit of any relevance, because the selection of topsheets in accordance with the patent in suit amongst the plurality of topsheets disclosed in D1 was an arbitrary one. It would therefore be obvious for the skilled person to provide a topsheet according to D1 in the absorbent article according to D2 thereby arriving at the subject-matter of claim 1 of the patent in suit.

As regards the subject-matter of claim 1 according to auxiliary request 3, it also lacked in inventive step in the light of D2 and D1. D1 taught that a suitable topsheet more preferably had an open area of at least 20%. In view of the direct correlation between trans-topsheet penetration and effective open area, it would be obvious for a skilled person to adjust the effective open area to values greater than 20% such as 25% as recited by claim 1.

Claim 1 according to auxiliary request 7 was restricted over claim 1 as granted by requiring a plurality of apertures having an effective size greater than 2.0 mm². D1 disclosed apertures with an effective size of at least 0.2 mm² and preferably at least 0.3 mm². However, it was obvious for a skilled person seeking to improve trans-topsheet penetration, knowing that the same depended on the effective open area, to adjust the aperture size to sufficiently great values. Moreover, claim 1 recited that a plurality of apertures had an effective size greater than 2.0 square millimetres, and therefore encompassed the possibility that only few apertures had an effective size greater than 2.0 square

millimetres. In such case, however, no improvement over the prior art was, in effect, achieved. Therefore, also the subject-matter of claim 1 according to the auxiliary request 7 lacked an inventive step in view of D2 and D1.

XI. In response to these submissions the respondent essentially argued as follows:

The invention as defined in claim 1 solved the problems that arose when lotion was added to a topsheet, by choosing carefully the characteristics of the topsheet, without needing to be limited to particular levels or patterns of application. These advantages, which were supported by the technical reports D20 to D22, were not suggested by the prior art. The objective technical problem was to provide a lotioned absorbent article having improved fluid handling properties over those in D2. Modifying the topsheet of the absorbent article according to D2 was not an obvious step to take for a skilled person, as there were several other approaches that he would consider instead when dealing with this particular problem. D2 itself taught that the nature of the lotion meant that it could be used in relatively low quantities and still provide the desired skin care benefits but at the same time minimising the negative effects on fluid handling. For the same purpose D2 disclosed the application of the lotion in such a way that there were regions of the topsheet without any lotion. Clearly the skilled person would first consider these suggestions in D2 itself. Moreover, there was considerable focus in D2 on the lotion and therefore, if the skilled person were to consider trying to further improve the fluid handling properties of the

absorbent article even above those achieved using the suggestions in D2 itself, the first aspect of the article that he would look at would be the nature of the lotion. Another approach would be to modify the structure of the absorbent article. This might include modifying the structure of the leg cuffs or adding transfer barriers along the length of the top sheet. As regards D1, it did not say anything about lotioned topsheets. The invention of D1 was based on the use of two topsheets. D1 focused on the aperture sizes of the first topsheet. Since D2 taught that the lotions had a tendency to block apertures in the topsheets, it was hard to see why the skilled person would consider a document focusing on the details of aperture sizes to be a useful reference for improving the performance of a lotioned absorbent article as in D2. Moreover, D1 also disclosed topsheets that were not used in the invention according to the patent in suit, such as apertured film topsheets. Thus even if the skilled person were to go to D1, he still needed to make another choice in order to arrive at the claimed subject-matter. Given that the only type of apertured topsheet that was mentioned in D2 was an apertured film topsheet, then the obvious step for the skilled person to take would be to use the information in D1 about aperture sizes and use of a secondary topsheet and apply it to the apertured film topsheets of D2.

Furthermore both D1 and D2 were by the same inventor, Mr Roe, who did not consider when generating D2 the possibility of using a nonwoven apertured topsheet as defined in the claims. This was relevant as a piece of evidence in support of inventive step, since if one person, who must be at least as skilled in the art as

the "average" skilled person, did not come to the invention at that point despite having all the information at his disposal that was alleged to make it obvious, it could not be said that any other skilled person would have done so either.

D1 disclosed an effective open area of at least 20% and apertures with an effective size of at least 0.2 square millimetres but taught that the apertures should not be too large, otherwise faecal material would still rest against the skin of the wearer because the apertures did not effectively insulate the wearer from the faecal material after it passed through the first topsheet. Accordingly, the skilled person would not be inclined to provide an effective open area of at least 25%, as recited by claim 1 of auxiliary request 3, or an effective size greater than 2.0 mm², as recited by claim 1 of auxiliary request 7. The invention according to auxiliary request 7 allowed the use of relatively large apertures without the disadvantage of faecal material resting against the skin of the wearer due to the fact that the topsheet was lotioned.

Reasons for the Decision

1. The appeal is admissible.
2. *Main request - patent as granted*
 - 2.1 D2, which undisputedly represents the closest prior art, discloses (using the terms of claim 1 of the patent in suit) a disposable absorbent article (see Fig. 3) comprising a liquid pervious structured carrier (520)

comprising a non-woven web (col. 5, lines 14-17 and 25-29) having an inner surface oriented toward the interior of said disposable absorbent article and an outer surface oriented toward the skin of the wearer when the disposable absorbent article is worn, said outer surface of said structured carrier comprising an effective amount of a skin care composition which is semi-solid or solid at 20 °C and which is partially transferable to the wearer's skin (see col. 2, lines 62-65); a liquid impervious backsheet (530) at least partially peripherally joined to said structured carrier; and an absorbent core (540) intermediate said structured carrier and said backsheet.

As correctly affirmed by the Opposition Division (page 6 of the decision under appeal), the subject-matter of claim 1 differs from this known absorbent article in that said structured carrier comprising a non-woven has an effective open area of at least about 12 percent and a plurality of apertures with an effective size greater than 0.2 square millimeters. This was not disputed by the parties.

- 2.2 D2 does not specify structural details of the nonwoven web, in particular whether it is perforated or not. According to the patent in suit (see par. [0011]), the distinguishing features allow urine and low-viscosity faecal material to penetrate through the structured carrier such that a skin care composition can be applied with relative ease as the concern for occlusion of the structured carrier has been removed. The Board is satisfied that this effect is achieved, since occlusion of the apertures, or pores, of a nonwoven web by a skin care composition (herein also referred to as

a lotion) is an undisputed possibility, and occlusion is undoubtedly more difficult if the apertures are made larger. In this respect, it is noted that this conclusion is not invalidated by D19, since these tests made by the appellant only compare a perforated film with an apertured nonwoven and are therefore irrelevant when comparing a nonwoven in accordance with claim 1 of the patent in suit with a nonwoven as used in D2.

2.3 Accordingly, the Board is satisfied that the distinguishing features solve the objective technical problem of providing a lotioned absorbent article having improved fluid handling properties, as submitted by the respondent.

2.4 The respondent argued that the distinguishing features also resulted in the ability of the topsheet to maintain its performance level as levels of lotion were increased. This was supported by the technical reports D20 to D22, which showed in particular that trans-topsheet penetration and runoff values of apertured films were strongly dependent on the amount of lotion applied whilst this was not the case for apertured nonwovens in accordance with the patent in suit.

The objective technical problem is determined by assessing the technical effect of the distinguishing features over the closest prior art, which is an absorbent article having a nonwoven topsheet as disclosed by D2. For a given level of lotion on the nonwoven topsheet of D2, the distinguishing features provide improved fluid handling properties because, as explained above, occlusion of the apertures is effectively avoided. This effect is obtained

irrespective of the level of lotion on the nonwoven topsheet according to D2. Assuming that the effect of maintaining the topsheet's performance level as levels of lotion increase constitutes a further effect, this further effect is independent of the effect of improving the fluid handling properties independently of the level of lotion on the nonwoven topsheet according to D2. Therefore the assessment of inventive step can be made by investigating first whether the claimed solution to the above-mentioned objective technical problem is obvious.

- 2.5 The skilled person faced with the problem of improving the fluid handling properties of the absorbent article according to D2 would look for suggestions in the prior art. In doing this, he would not restrict himself solely to the suggestions found in D2, such as e.g. applying the lotion in a manner such that the topsheet does not become saturated or applying the lotion only to selected portions of the topsheet (see col. 18, l. 66 to col. 19, l. 41). On the contrary, he would search for suggestions in other documents in the same technical field. This would inevitably lead the skilled person to consider document D1 since the latter specifically deals with this problem, in particular with handling urine and low-viscosity faecal material as does the patent in suit (see par. [0001] of the patent in suit; see D1, page 1, lines 26 to 28: *"dealing with faecal material [...] is simply more difficult than dealing with urine insults"*; page 4, lines 26 to 32: *"none of these attempts in the prior art to handle faecal material solve the problem of low-viscosity faecal material [...] which easily migrates within the disposable absorbent article [...]"*

increasing the likelihood of leakage"; page 4, lines 37-40: "it is an object of this invention to provide a disposable absorbent article which reduces leakage of faecal material"). The solution according to D1 to this problem consists in providing a first topsheet and, preferably (see page 5, lines 20, 22) a second topsheet, the first topsheet having a trans-topsheet penetration of at least 0.25 grams per square inch, preferably at least 0.40 grams per square inch, more preferably at least 0.60 grams per square inch (see claim 1). D1 discloses that the trans-topsheet penetration is directly correlated with the effective open area, whereby as the percentage of effective open area increases, trans-topsheet penetration similarly increases (see page 18, lines 7 to 11 and 15, 16). D1 further discloses that the desired values of trans-topsheet penetration are obtained with topsheets having at least 12 percent, preferably at least 15 percent, and more preferably at least 20 percent effective open area (see page 19, lines 11-15) and apertures with a size of at least 0.1 square millimetres, preferably of at least 0.2 square millimetres (see page 18, lines 30-32). Summarizing, the skilled person is taught by D1 that an improvement of the fluid handling properties of an absorbent article, in particular as regards handling of urine and low-viscosity faecal material, is obtained by selecting a topsheet having a sufficiently high trans-topsheet penetration value, this being achieved in practice by providing the topsheet with a sufficiently high effective open area (at least 12 percent) and sufficiently large apertures (more preferably of at least 0.2 square millimetres).

2.6 As stressed by the respondent, D1 is not concerned with an absorbent article with a topsheet on which an effective amount of skin care composition, or lotion, is present. However, this would not deter the skilled person from applying the above-mentioned teaching of D1 to the lotioned absorbent article of D2. On the contrary, on reading D1 the skilled person would consider that high values of trans-topsheet penetration are even more necessary in such case, due to the greater risk of the apertures being blocked (see e.g. D2, col. 19, lines 1-5). Accordingly, he would consider selecting high values for the effective open area (in particular above 20 percent) and for the effective size of the apertures (in particular of at least 0.2 square millimetres) as disclosed by D1.

2.7 The respondent further pointed out that the disclosure of D1 was not limited to nonwoven topsheets, and that even if the skilled person would consider applying the teaching of D1 to the absorbent article of D2 he would not select an apertured nonwoven amongst the various options disclosed by D1 but rather an apertured film. This submission essentially corresponds to the argument of the Opposition Division (see above, section III) according to which the skilled person could *"choose between several possibilities, such as using an apertured plastic material or providing a non-woven material with apertures, thus not leading to a one-way street situation"*.

However, as stated above, the starting point for the assessment of inventive step is the absorbent article according to D2 with a nonwoven topsheet. This is undisputedly an appropriate starting point, and indeed

nonwoven topsheets are often used in absorbent articles for their properties in terms of comfort in use. Under this assumption, there is no reason why the skilled person, when applying the teaching of D1 to the absorbent article according to D2, would consider changing the nature of the topsheet. In fact, he would recognize that the only necessary modification would be the provision of suitable apertures in the nonwoven topsheet such as to achieve the desired trans-topsheet penetration values.

2.8 Therefore, the skilled person would consider modifying the nonwoven topsheet of the absorbent article according to D2 such that it had an effective open area of at least 20 percent and a plurality of apertures with an effective size greater than 0.2 square millimetres in order to solve the above-mentioned objective technical problem, thereby arriving at the subject-matter of claim 1 without the exercise of an inventive activity (Article 56 EPC).

2.9 In this respect it is irrelevant whether the skilled person would use only a "first topsheet", or both the "first topsheet" and the "second topsheet" disclosed by D1, since in both cases he would arrive at a disposable absorbent article within the terms of claim 1 of the patent in suit, comprising a liquid pervious structured carrier comprising a nonwoven web.

It is moreover irrelevant whether the distinguishing features also provide the further effect of maintaining the topsheet's performance level as levels of lotion increase, because, as explained above, the skilled person would directly arrive at the claimed subject-

matter in the process of improving the fluid handling properties of the absorbent article according to D2 with a nonwoven topsheet.

- 2.10 As regards the respondent's submission that Mr Roe did not consider the possibility of using a nonwoven apertured topsheet as defined in the claims even though he was the inventor of D1 and D2, this does not constitute a piece of evidence or an indication of inventive step, because it is based on a subjective view of the inventor, whereas the assessment of inventive step must be based on objective criteria. The fact, even if accepted, that when generating D2 the inventor did not consider the possibility of using a nonwoven apertured topsheet even though he had knowledge of D1, does not necessarily point to the non-obviousness of this measure, as there might well be many other reasons for this. In particular, as submitted by the respondent itself, D2 focuses mainly on the lotion, and it could well be that when generating D2 the inventor (subjectively) only focused on the lotion, not considering at that time other aspects of the absorbent article, e.g. for reasons of time pressure, patent and/or commercial strategies, etc.

3. *Auxiliary request 3*

- 3.1 Claim 1 according to auxiliary request 3 (which is in effect the first auxiliary request of the respondent) is restricted over claim 1 as granted by reciting that the effective open area is of at least 25 percent (rather than 12 percent as in granted claim 1). Basis for this amendment is found in par. [0031] of the

patent as granted, which corresponds to the passage on page 8, lines 9 to 13 of the application as filed.

3.2 As explained above, when applying the teaching of D1 to the lotioned absorbent article according to D2, the skilled person would select high values of trans-topsheet penetration and would therefore select high values of effective open area and of effective size of the apertures as disclosed by D1. D1 discloses that the effective open area should more preferably be at least 20 percent (page 19, lines 14, 15) but does not indicate any upper limit. The respondent submitted that the disclosure in D1 (page 19, lines 11-15), according to which *"the apertures should not be too large, otherwise faecal material will still reside against the skin of the wearer because the apertures do not effectively insulate the wearer from the faecal material after it passes through the first topsheet"* was an indication that the effective open area should not be too large. However, this passage is exclusively concerned with the size of the apertures, which is not directly correlated to the effective open area. Therefore the skilled person would read the indication in D1 that the effective open area should more preferably be at least 20 percent as a hint to select values in the vicinity of and above 20%, such as the claimed value of 25%.

3.3 Therefore, the subject-matter of claim 1 according to the auxiliary request 3 also does not involve an inventive step (Article 56 EPC).

4. *Auxiliary request 7*

4.1 Claim 1 according to auxiliary request 7 (which is in effect the second auxiliary request of the respondent) is restricted over claim 1 as granted by introducing the limitation of claim 7 as granted, according to which the structured carrier has a plurality of apertures with an effective size greater than 2.0 square millimetres (rather than 0.2 square millimetres as in granted claim 1).

4.2 The appellant essentially submitted that the amendment made did not necessarily result in a technically significant limitation over the subject-matter of claim 1 as granted, because according to the wording of claim 1 the structured carrier might only include few apertures with a size greater than 2.0 square millimetres.

However, each claim should be read giving the words the meaning and scope which they normally have in the relevant art, and with an attempt to make technical sense out of it. In the present context, in which the features of claim 1 relating to the effective open area and the effective size of the apertures contribute to penetration of urine and faecal material, it is clear that the apertures having the desired size must be distributed over the structured carrier's surface. Otherwise, by being present at few locations only, the apertures would not be effective in practice as their effect would be negligible. Indeed urine and faecal material are not localized at specific points, but spread over relatively large areas of the topsheet.

This is moreover in agreement with the description of the patent in suit (see e.g. par. [0036]).

- 4.3 Apertures having a size greater than 2.0 millimetres contribute to improving the fluid handling properties of the absorbent article according to D2, as do the apertures having a size greater than 0.2 millimetres recited in claim 1 as granted, although to a different (lesser) extent. Accordingly, the objective technical problem solved starting from D2 remains the same as for claim 1 as granted, namely to provide a lotioned absorbent article having improved fluid handling properties.
- 4.4 As explained above, when applying the teaching of D1 to the lotioned absorbent article according to D2, the skilled person would select high values of trans-topsheet penetration and would therefore select high values of effective open area and of effective size of the apertures as disclosed by D1. D1 discloses that the apertures should have an effective size of preferably at least 0.2 square millimetres (see claim 5). D1 however also discloses (see page 19, lines 11-15) that the apertures should not be too large, otherwise faecal material will still reside against the skin of the wearer because the apertures do not effectively insulate the wearer from the faecal material after it passes through the first topsheet. Although this is not a disclosure of a specific upper limit for the effective size of the apertures, still it is a clear indication for the skilled person that apertures having an effective size much larger than 0.2 square millimetres are not suitable. Accordingly, the skilled person would not be inclined to consider apertures

having an effective size of 2.0 square millimetres or more, which is ten times greater than the value of 0.2 disclosed by D1. Since D1 is exclusively concerned with a non-lotioned absorbent article, the recognition that apertures of such size would be advantageous in the context of a lotioned absorbent article in accordance with D2, in that they would provide improved fluid handling properties without impairing the performance of the absorbent article in terms of adherence of faecal material to the skin of the wearer (see par. [0098] of the patent in suit), cannot be regarded as obvious.

4.5 Accordingly, the arguments of the appellant have not convinced the Board that the subject-matter of claim 1 according to auxiliary request 7 was obvious to the person skilled in the art (Article 56 EPC).

4.6 It follows that claim 1, together with dependent claims 2 to 13 (corresponding to granted claims 2 to 4 and 8 to 15 and 18) according to auxiliary request 7, the description as amended during the oral proceedings (pages 3 and 5 amended to bring the description into conformity with claim 1), and the drawing as granted, form a suitable basis for maintenance of the patent in amended form.

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 with the order to maintain the European patent on the basis of:
 - (a) Claims 1 to 7 according to Auxiliary Request 7 filed with the letter dated 28 January 2008;
 - (b) Description pages numbered 3 and 5 as filed during the oral proceedings and pages numbered 2, 4 and 6 to 15 as granted;
 - (c) Figure 1 as granted.

The Registrar:

The Chairman:

M. Patin

P. Alting Van Geusau

Internal distribution code:

- (A) Publication in OJ
(B) To Chairmen and Members
(C) To Chairmen
(D) No distribution

**Datasheet for the decision
of 4 January 2010**

Case Number: T 1037/07 - 3.2.06

Application Number: 97949439.0

Publication Number: 1032336

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:

Disposable absorbent article with a skin care composition on an apertured topsheet

Patentee:

THE PROCTER & GAMBLE COMPANY

Opponents:

KIMBERLY-CLARK WORLDWIDE, INC.
SCA Hygiene Products AB

Headword:

-

Relevant legal provisions:

EPC R. 140

Relevant legal provisions (EPC 1973):

-

Keyword:

"Correction of decision"

Decisions cited:

-

Catchword:

-



Case Number: T 1037/07 - 3.2.06

DECISION
of 4 January 2010 correcting the decision
of the Technical Board of Appeal 3.2.06
of 29 September 2009

Appellant: SCA Hygiene Products AB
(Opponent II) S-405 03 Göteborg (SE)

Representative: Stratmann, Klemens
Hoffmann Eitle
Patent- und Rechtsanwälte
Arabellastraße 4
D-81925 München (DE)

Respondent: The Procter & Gamble Company
(Patent Proprietor) One Procter & Gamble Plaza
Cincinnati, OHIO 45202 (US)

Representative: Samuels, Lucy Alice
Gill Jennings & Every LLP
Broadgate House
7 Eldon Street
London EC2M 7LH (GB)

Party as of rights: KIMBERLY-CLARK WORLDWIDE, INC.
(Opponent I) 401 North Lake Street
Neenah WI 54956 (US)

Representative: Beacham, Annabel T. Rose
Frank B. Dehn & Co.
St Bride's House
10 Salisbury Square
London EC4Y 8JD (GB)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 21 May 2007
rejecting the opposition filed against European
patent No. 1032336 pursuant to
Article 102(2) EPC.

Composition of the Board:

Chairman: P. Alting van Geusau
Members: G. Pricolo
K. Garnett

Summary of Facts and Submissions

- I. The present decision concerns the correction under Rule 140 EPC of the decision dated 29 September 2009 taken in the case T 1037/07.

- II. The Order of the decision recites that the patent is to be maintained with "Claims 1 to 7 according to Auxiliary request 7 filed with the letter dated 28 January 2008". In the Reasons (point 4.6) it is stated that "claim 1, together with dependent claims 2 to 13 according to auxiliary request 7 [...] form a suitable basis for maintenance of the patent in amended form". There is, therefore, a discrepancy between the Order (Claims 1 to 7) and the Reasons (Claims 1 to 13) of the decision.

Reasons for the Decision

1. Since there is a discrepancy between the Order and the Reasons of the decision, it is clear that the decision includes a mistake. Since the auxiliary request 7 filed with letter dated 28 January 2008 includes dependent claims 2 to 13, it is clear that the mistake is in the Order and that the Reasons correctly specify Claims 1 to 13.

2. The mistake being obvious, it can be corrected under Rule 140 EPC.

Order

For these reasons it is decided that:

The order of the decision of 29 September 2009 is corrected as follows:

"Claims 1 to 7" is replaced by "Claims 1 to 13".

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau