

Internal distribution code:

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

**Datasheet for the decision
of 2 October 2009**

Case Number: T 1231/07 - 3.3.06

Application Number: 98951622.4

Publication Number: 1032366

IPC: A61K 7/50

Language of the proceedings: EN

Title of invention:

Personal cleansing wipe articles having superior softness

Patentee:

THE PROCTER & GAMBLE COMPANY

Opponent:

Unilever PLC
Johnson & Johnson
Paul Hartmann AG

Headword:

Nonwoven wet wipes/PROCTER

Relevant legal provisions:

-

Relevant legal provisions (EPC 1973):

EPC Art. 56

Keyword:

"Inventive step (all requests) - no: obvious alternative"

Decisions cited:

-

Catchword:

-



Case Number: T 1231/07 - 3.3.06

DECISION
of the Technical Board of Appeal 3.3.06
of 2 October 2009

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

Representative:
L'Huillier, Florent Charles
Procter & Gamble
Technical Centres Ltd
Patent Department
Rusham Park
Whitehall Lane
Egham, Surrey TW20 9NW (GB)

Respondent I:
(Opponent I) Unilever PLC
Unilever House
Blackfriars
London EC4P 4BQ (GB)

Representative:
Newbould, Frazer Anthony
Unilever Patent Group
Colworth House
Sharnbrook
Bedford MK44 1LQ (GB)

Respondent II:
(Opponent II) Johnson & Johnson
One Johnson & Johnson Plaza
New Brunswick
New Jersey 08933-7003 (US)

Representative:
Schohe, Stefan
Forrester & Boehmert
Pettenkoferstrasse 20-22
D-80336 München (DE)

Respondent III:
(Opponent III) Paul Hartmann AG
Paul-Hartmann-Strasse 12
D-89522 Heidenheim (DE)

Representative:
Friz, Oliver
Dreiss Patentanwälte
Gerokstrasse 1
D-70188 Stuttgart (DE)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted 21 May 2007
revoking European patent No. 1032366 pursuant
to Article 102(1) EPC 1973.**

Composition of the Board:

Chairman: L. Li Voti
Members: P. Ammendola
 U. Tronser

Summary of Facts and Submissions

I. This appeal is from the decision of the Opposition Division to revoke the European patent No. 1 032 366.

II. Claim 1 of the patent as granted reads:

"1. A personal cleansing wipe article having superior softness, feel and cleansing properties, which wipe article comprises:
A. a single layer, nonwoven substrate formed from hydroentangled fibers, said substrate having on a substantial portion of a base surface thereof a three-dimensional pattern, which pattern comprises a plurality of discrete, raised fibrous regions, wherein the raised fibrous regions have a density which is the same as the density of the base surface, and wherein said raised fibrous regions are joined to said base surface by a fibrous transition region; and
B. an aqueous liquid cleansing composition comprising an effective amount of a cleansing surfactant, said aqueous liquid cleansing composition being coated onto or impregnated into said substrate to the extent of from 100% to 400% by weight of the substrate."

Articles as the patented one are commonly indicated as wet wipes (hereinafter referred to as WWs).

III. Opponents I to III sought revocation of the patent in suit, *inter alia*, on the grounds of lack of inventive step (Article 100(a) in combination with Articles 52(1) and 56 EPC 1973). The documents

(9) = US-A-5674591

and

(15) = US-A-5141803

were cited, among others, to substantiate this objection.

During the opposition proceedings the Patent Proprietor filed two sets of amended claims respectively labelled as main request and first auxiliary request.

Claim 1 of the **main request** is identical to claim 1 as granted.

Claim 1 of the **first auxiliary request** differs from claim 1 as granted only in that the wording "*, wherein the single layer, nonwoven substrate has an average basis weight ranging from 40 to 90 grams per square meter and a caliper ranging from 0.3 to 1.05 mm.*" is added at the end of the claim.

IV. The Opposition Division found in the decision under appeal, *inter alia*, that the allegations in the patent-in-suit as to the "*superior softness, feel and cleansing properties*" (hereinafter also referred to as the three superior properties) of the WWs of the invention were unsubstantiated. Hence the subject-matter of claim 1 of the then pending main request was found to represent just an alternative to the WWs disclosed in document (15). No inventive merits could be seen in the use of the hydroentangled nonwoven

substrates (hereinafter HN substrates) of document (9) in the WWS of document (15) in order to solve the existing technical problem. In the opinion of the Opposition Division it was also absolutely clear to the skilled person that the substrates of document (9) were to be used as cleansing wipes and similar. Hence, the subject-matter of claim 1 of the main request was found obvious in view of the combination of documents (15) and (9).

The Opposition Division considered that the same reasoning applied also to claim 1 of the first auxiliary request, because the patent-in-suit attributed to the additional features introduced into such claim no specific technical effect. Moreover, these features appeared to lay within an area that was completely normal in the technical field of application.

- V. The Patent Proprietor (hereinafter Appellant) lodged an appeal against this decision. It filed under cover of the grounds of appeal two sets of claims labelled as **main request** and **first auxiliary request** that are respectively identical to those considered by the Opposition Division.

Only Opponents II and III (hereinafter Respondents II and III) replied in writing to the grounds of appeal.

Oral proceedings took place as scheduled on 2 October 2009 in the announced absence of the Appellant and of Opponent I (hereinafter Respondent I).

- VI. The Appellant disputed in writing the reasoning of the Opposition Division by submitting that the invention

lay in the surprising discovery that a personal care WW having superior properties was obtained when combining the specific substrate of the invention with an aqueous cleansing composition in specific amount.

It agreed that the WWs based on nonwoven substrates of document (15) represented the closest prior art and stressed that this citation was silent as to whether the substrate might comprise a three-dimensional pattern.

The Appellant submitted that the subject-matter of claim 1 of the main request solved the technical problem of providing an article having "superior softness, feel and cleansing properties" in comparison to the WWs of the prior art, such as those based on substrates obtained by embossing or aperturing.

The skilled person aiming at solving this technical problem would receive little help from document (15) which only provided basic information about the possible substrates. Hence, the skilled person would turn to other documents describing how to obtain softness in wipes, but not to document (9) because this latter provided no information at all about the softness or the potential application(s) of the HN substrates disclosed therein and, thus, did not address the problem posed.

The subject-matter of claim 1 of the first auxiliary request was limited to the embodiments of the invention that had been found to provide the best results and thus also solved the technical problem of rendering available personal cleansing WWs having the desired

three superior properties. Moreover, the skilled person would find in document (9) little information about the relevant ranges to be selected.

- VII. Respondents II and III refuted in writing and orally these arguments submitting, *inter alia*, that the allegation in the patent-in-suit of "*superior softness, feel and cleansing properties*" for the WWs of the invention was unsupported by any experimental data, as well as vague and subjective.

Not even the grounds of appeal provided the experimental evidence and/or the technical information necessary for attributing a clear meaning to the relative terms used in such a vague expression and for rendering this latter credible.

The credibility of the alleged three superior properties was also jeopardized in that the patent-in-suit did not indicate which WWs of the prior art had been taken as comparison.

Additionally, these alleged properties were described in the patent-in-suit sometimes as "*superior*" and sometimes as "*desirable*".

The Appellant's definition of the technical problem solved given in the grounds of appeal referred to an hypothetical prior art, different from the one that the Appellant itself had acknowledged to be the most relevant, i.e. that of document (15).

Respondents II and III referred to the reasons of the Opposition Division and stressed that to choose

specifically the substrates of document (9) among those suggested in general in document (15) as suitable for preparing alternative soft WVs, required just an arbitrary selection deprived of inventive merits.

They also submitted that the Appellant had not disputed that the ranges introduced in claim 1 of the first auxiliary request were conventional in the technical field. Hence, also the subject-matter of this request represented an arbitrarily selected obvious alternative to the prior art.

VIII. The Appellant requested in writing that the decision of the first instance be set aside and that the patent be maintained in amended form according to any of the main request or the first auxiliary request attached to the grounds of appeal.

Respondents II and III requested that the appeal be dismissed.

Respondent I filed no request.

Reasons for the decision

Main request

1. Inventive step: claim 1 (Articles 52(1) EPC and 56 EPC 1973)

The only ground of opposition discussed by the parties in these appeal proceedings is the lack of an inventive step.

Claim 1 of the Appellant's main request is identical to claim 1 as granted (see above sections II and III of Facts and Submissions).

It defines a personal cleansing WW comprising a substrate that possesses a specific three-dimensional pattern and is impregnated with a given amount of an aqueous liquid cleansing composition.

- 1.1 According to the established jurisprudence of the Boards of Appeal the starting point for the assessment of inventive step is to be determined taking into account the technical problem mentioned in the patent.

Paragraphs [0001], [0003], [0005] and [0006] of the patent-in-suit are relevant in this respect.

In particular, paragraph [0001] defines the invention as personal cleansing wipe articles that have "*superior softness, feel and cleansing properties*", i.e. the same three superior properties mentioned in the initial portion of claim 1 as granted, and repeated in the subsequent paragraphs [0005] and [0006].

Paragraph [0003] stresses the then existing need for WWs for cleansing of human skin, such as baby wipes, that "*feel softer*" than those commercially available.

Hence, the patent-in-suit aims at the provision of WWs for cleansing delicate human skin with "*superior softness*" and, possibly, also "*superior feel*" and "*superior cleansing properties*".

However, in the opinion of the Board, the skilled reader of the patent-in-suit would also necessarily consider that:

- (a) "*softness*", "*feel*" and "*cleansing properties*" correspond to relative concepts, i.e. their technical meanings are substantially dependent on the methods that are used for evaluating them;
- (b) the patent specification does not indicate any specific method for assessing any of the aimed superior properties;

and

- (c) while paragraph [0001] implicitly identifies the relevant prior art in the WWs for use on human skin that were commercially available, in paragraph [0005] the reference is in general to not further specified "*prior art compositions*" and in paragraph [0006] in general to not further specified "*wipe articles*".

Therefore, the skilled reader of the patent-in-suit would conclude that the technical advantages aimed at actually mentioned therein consist in some "*softness*", "*feel*" and "*cleansing properties*" of WWs at levels that should be "*superior*" in comparison to those observable for the same properties under unspecified conditions in some unspecified WWs of the prior art. It is apparent that such definition of the advantages aimed by the invention is vague and subjective.

Under such circumstances, the sole technically sound conclusion that the skilled reader can derive from the above mentioned paragraphs of the patent-in-suit is that the patented wet wipe articles certainly aimed at achieving those levels in all measurable properties reasonably falling under the vague concept of "softness" - and , possibly, also of "feel" and/or "cleansing properties" - that are at least acceptable for cleansing delicate human skin. This appears also confirmed by the fact that the "softness, feel and cleansing properties" exhibited by the WWs of the examples of the patent-in-suit are described as "desirable" (see paragraphs [0089] and [0090]). Accordingly, the sole clear technical problem certainly implied by the vague and subjective description of the technical advantages aimed at by the invention is that of rendering available **further Wws suitable for cleansing delicate human skin.**

1.1.1 The Board notes that document (15) already discloses WWs that are suitable for cleansing delicate human skin, e.g. as for baby wipes, and that are obtained by impregnating nonwoven substrates, possibly HN substrates, with an aqueous cleansing liquid containing cleansing surfactants in the amounts required in claim 1 under consideration (see document (15), column 4, line 44 to column 5, line 11; column 5, lines 16 to 21 and 45 to 49 and the examples).

1.1.2 Hence, the Board concurs with the finding of the Opposition Division, undisputed by the Appellant, that the WWs disclosed in document (15) represent a reasonable starting point for the assessment of inventive step. The Board considers, in particular,

- each of the two examples in this citation equally suitable as starting point.
- 1.2 The WWs of the invention differ from this prior art only in that in the former the substrate is a HN substrate that comprises a three-dimensional pattern formed of discrete raised regions having the same density as the base surface, whereas the nonwoven substrates used in the examples of document (15) are made by carding and do not appear to comprise any pattern.
- 1.3 The Board has no reason to doubt that the claimed WWs are soft enough to be used e.g. as baby wipes. Moreover, the Appellant has submitted no evidence that the claimed WWs are in any respect better than the WWs of document (15). Hence, the Board finds that the claimed subject-matter solves vis-à-vis the prior art the sole clear technical problem certainly implied by the vague and subjective description of the technical advantages aimed by the invention (see above point 1.1) i.e. a solution to the technical problem of rendering available further WWs suitable for cleansing delicate human skin.
- 1.4 The Appellant has instead reiterated at point 4.7 of the grounds of appeal that the objective technical problem to be solved vis-à-vis the prior art of document (15) would consist in the provision of a personal cleansing wipe article that possesses "*superior softness, feel and cleansing properties*". An attempt to further specify the meaning of such vague and subjective expression appears contained in the immediately preceding paragraph 4.6 of the grounds of

appeal, stating that "As discussed in part 3, the effect of selecting the specific claimed substrate is to provide superior softness, feel and cleansing properties **versus wet wipes based on conventional substrates such a nonwoven obtained by embossing or aperturing**. This is emphasized in the description on page 1, par. [0001], [0005], [0006] and [0008]; page 15, par. (0089] and [0090]" (emphasis added by the Board). These conventional (patterned) substrates are indeed mentioned at the preceding point 3.4 of the grounds of appeal, reading "The specific claimed substrate is different from the conventional patterned nonwoven hydroentangled substrate obtained by mechanical embossing or aperturing. These substrate do not have the same properties of the specific substrate claimed in the present invention, in particular **embossing negatively affects the strength of the substrate and aperturing does not result in the three-dimensional pattern and does not increase the softness of the article** (see page 2, section [0004] of the description)" (emphasis added by the Board).

Hence, the Appellant attempts to clarify and, thus, to render credible the alleged advantages of the WWs of the invention vaguely and subjectively defined in paragraphs [0001], [0005] and [0006], on the basis of the disadvantages described in paragraph [0004] for the patterned substrates prepared by mechanical embossing or aperturing.

- 1.4.1 The Board notes preliminarily that this attempt of the Appellant has not been supported by any evidence other than the reference to paragraph [0004] and that this

latter does not indicate that the disadvantageous substrates mentioned therein have been used for WWs.

In any case, this paragraph only provides possibly relevant information in respect of (existing or hypothetical) WWs based on substrates that are patterned by mechanical embossing or aperturing.

Additionally, only the absence of an "*increased softness*" disclosed in paragraph [0004] as occurring in those substrates that are patterned by aperturing, appears possibly related to at least one of the three superior properties of the WWs of the invention.

Hence, the sole relevant information derivable from paragraph [0004] is that the claimed WWs should presumably be softer than those (already existing or hypothetical) WWs whose substrates have been patterned by aperturing.

Evidently, in the absence of any evidence, this information would **not** allow to make any sound prediction:

- as to the "**feel**" or "**cleansing properties**" of the WWs of the invention vis-à-vis the prior art,

- as to whether the claimed WWs are or not "*softer*" than those of the prior art that are **not** patterned,

and/or

- as to whether the claimed WWs are or not "*softer*" than those that are patterned by **mechanical embossing**

or by other possibly existing patterning methods different from aperturing.

Thus, the Board finds that the alleged disadvantages of conventional patterned substrates referred to by the Appellant in view of paragraph [0004] of the patent-in-suit are, in any case, insufficient for concluding that the level observable in the claimed WWs for at least one of the measurable properties possibly falling under one of the vague terms "*softness, feel and cleansing properties*" would actually be "*superior*" to that of corresponding property as displayed by the non-patterned WWs that are exemplified in document (15).

1.4.2 Accordingly, the Board has no reason to depart from the finding already reached above (see points 1.1 and 1.3) that the technical problem solved by the claimed WWs vis-à-vis the prior art is only that of rendering available further WWs suitable for cleansing the human skin, i.e. the provision of an alternative to the prior art.

1.5 It remains, then, to be established whether the skilled person searching for an alternative to the WWs disclosed in the examples of document (15) would have considered obvious or not to modify this prior art so as to arrive at the presently claimed subject-matter.

The Board notes that, as already indicated above (see point 1.1.1), document (15) expressly lists the HN substrates among the nonwoven substrates suitable for preparing the WWs described therein. Hence, this citation renders obvious to expect that also the modifications of e.g. the examples in which the

substrates made by carding are replaced by HN substrates would result in further WWs suitable for delicate personal cleansing, i.e. would represent a solution to the technical problem posed.

- 1.5.1 The Appellant has not disputed that the HN substrates of document (9) correspond to part "A." of claim 1 of the present main request. Therefore **if** the skilled person following such teaching of document (15) **would** consider using the HN substrate described in document (9), then he/she would inevitably arrive at the claimed subject-matter.

Hence, the assessment of inventive step boils down to the question whether the person skilled in the art would or would not consider using the HN of document (9) as a suitable substrate to be used in document (15) for realizing alternative embodiments of the WWs disclosed in this latter citation.

The Appellant's argument relevant in this respect is that the skilled person would have no incentive to consider document (9) because this latter would not indicate that the patterned HN substrates disclosed therein were suitable for WWs and/or possessed increased softness.

The Board finds this argument not convincing because, as already indicated above, in the present case document (15) itself discloses that WWs suitable for e.g. baby wipes can be prepared by using, *inter alia*, HN substrates. In other words, it is this citation itself that encourages its skilled reader to use, among others, also **any** known HN substrate for realizing

further embodiments of the WWs described in document (15).

Hence, to arrive at the claimed subject-matter the skilled person only needs to arbitrarily select the HN of document (9) among those that the disclosure of document (15) explicitly suggests as suitable for solving the posed technical problem. Such arbitrary selection of one alternative within the whole group of suggested HN substrates is deprived of any inventive merits.

- 1.6 Thus, the Board concludes that the subject-matter of claim 1 according to the main request of the Appellant does not involve an inventive step. Hence, this claim does not comply with the requirement of Articles 52(1) EPC and 56 EPC 1973 and, therefore, this request is not allowable.

First auxiliary request

2. Inventive step: claim 1 (Articles 52(1) EPC and 56 EPC 1973)

This claim differs from claim 1 of the main request only in that it additionally defines ranges for the basis weight and for the caliper of the substrate (see above section III of the Facts and Submissions).

- 2.1 The Board notes preliminarily, that the patent-in-suit does not attribute any criticality to these ranges. Moreover, as noted by the Opposition Division and undisputed by the Appellant, the selected basis weight

and caliper ranges are conventional in the field of HN substrates.

- 2.1.1 The Appellant interprets the fact that these basis weight and caliper ranges are defined as "*preferred*" in paragraph [0017] of the patent-in-suit as an indication that they would be particularly effective in providing "*superior softness, feel and cleansing properties*".

Hence, this argument is substantially based on the same vague and subjective definition of the alleged advantages of the invention that has already been found by the Board as simply implying that the claimed WWS are suitable for cleansing delicate human skin (see above point 1.1). Accordingly, the fact that the claimed subject-matter is disclosed to represent a "*preferred*" embodiment of the originally patented WWS only implies that they also are **suitable for cleansing delicate human skin**. Accordingly, the technical problem credibly solved by the subject-matter of claim 1 of the first auxiliary request is found to be the same as that identified above at point 1.3 for the subject-matter of claim 1 of the main request.

- 2.1.2 The only remaining argument of the Appellant is that document (9) would not provide much information as to which basis weight or caliper ranges to select.

However, as the selected ranges are undisputedly conventional for HN substrates, they also are, if not already present e.g. in the HN substrates exemplified in document (9), at least predictably obtainable when using the hydroentanglement process described in this citation. Indeed, this is expressly confirmed at least

in respect of the basis weight in example 2 of document (9) (see column 16, lines 14 to 16).

2.1.3 Therefore, the skilled person would have arrived at the subject-matter of claim 1 of the first auxiliary request without exercising inventive ingenuity for substantially the same reasons indicated above for claim 1 of the main request, the sole difference being the more specific arbitrary selection, i.e. a selection deprived of any inventive merit, of the HN substrates of document (9) **that possess certain conventional basis weights and calipers** among those that document (15) qualifies as suitable substrates for realizing further WWs solving the posed technical problem.

2.2 Thus, the Board concludes that the subject-matter of claim 1 according to the first auxiliary request of the Appellant does not involve an inventive step. Hence, this claim does not comply with the requirements of Articles 52(1) EPC and 56 EPC 1973 and, therefore, also the auxiliary request is not allowable.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Rauh

L. Li Voti