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**Datasheet for the decision
of 6 July 2015**

Case Number: T 2196/11 - 3.2.06

Application Number: 99308527.3

Publication Number: 0997124

IPC: A61F13/15

Language of the proceedings: EN

Title of invention:

Disposable body fluids absorbent article

Patent Proprietor:

UNI-CHARM CORPORATION

Opponent:

The Procter & Gamble Company

Relevant legal provisions:

EPC Art. 54, 84

Keyword:

Main request: novelty - (no)

Auxiliary request 1: novelty - (no)

Auxiliary requests 2 to 6, 9: clarity (no)

Auxiliary requests 7, 8: claim 1 not supported by description



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Chambres de recours**

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Case Number: T 2196/11 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 6 July 2015

Appellant: The Procter & Gamble Company
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
5 August 2011 concerning maintenance of the
European Patent No. 0997124 in amended form.**

Composition of the Board:

Chairman M. Harrison
Members: G. de Crignis
W. Ungler

Summary of Facts and Submissions

- I. By way of its interlocutory decision, the opposition division held that, account being taken of the amendments made by the patent proprietor during the opposition proceedings, European patent No. 0 997 124 and the invention to which it relates, meet the requirements of the EPC.
- II. An appeal was filed against this decision by the opponent (appellant) requesting revocation of the patent.
- III. In its reply, the respondent (proprietor) requested dismissal of the appeal, or that the patent be maintained according to one of its first to ninth auxiliary requests.
- IV. By communication of the Board dated 29 August 2014 pursuant to Rule 84(1) EPC, the parties' attention was drawn to the fact that the patent had lapsed with effect for all designated Contracting States, that the continuation of proceedings may be requested, provided that such a request was filed within a time limit of two months and that the proceedings would be discontinued if no request for continuation of the proceedings was filed in due time and the state of the file gave no grounds for the proceedings to be continued by the European Patent Office of its own motion.
- V. With letter of 10 November 2014, the appellant requested the opposition proceedings to be continued, but that it did "not intend to continue with opposition proceedings after the patent has irrevocably lapsed".

VI. In a communication annexed to the summons to oral proceedings, the Board indicated its preliminary view that the requirement of Article 83 EPC was met but that the subject-matter of claim 1 of the main request and of the first auxiliary request appeared to lack novelty in view of at least D6.

With regard to the auxiliary requests 2 to 9 it was indicated that whether the requirements of Article 84 EPC and 123(2) EPC were met may require discussion, and additionally that only sets of claims of these requests had been filed but no adapted description and that without such amended description pages, the question might well arise as to whether any of those requests were allowable.

VII. With letters of 24 February 2015 and 8 April 2015, the respondent stated that it would not attend the oral proceedings and that the patent had lapsed in all Contracting States.

VIII. With letter of 28 April 2015 the respondent stated that it withdrew its request for oral proceedings, that it was the patentee's intention for the patent to lapse in all Contracting States by non-payment of renewal fees and that no application for restoration had been made or would be made by the patentee in any Contracting State in the future.

IX. With telefax of 3 July 2015 the appellant stated that it would not attend the oral proceedings but that it maintained its request for the decision of the opposition division to be set aside and the patent to be revoked.

- X. Oral proceedings were held before the Board on 6 July 2015.

As announced previously, neither the appellant nor the respondent attended the oral proceedings. The appellant requested in writing that the decision under appeal be set aside and the patent be revoked. The respondent requested in writing that the appeal be dismissed, auxiliarily that the patent be maintained in amended form on the basis of the claims of auxiliary requests 1 to 9 filed with letter dated 23 April 2012.

Claim 1 of the main request reads:

"A disposable body fluids absorbent article (1) including a body fluids absorbent core (4) having a surface (6A) thereof at least partially covered with a liquid-pervious sheet (2) of nonwoven fabric, said nonwoven fabric being partially formed with a plurality of alternately arranged high density zones (7, 8) and low density zones (9) extending substantially in a longitudinal direction, characterized in that said nonwoven fabric is formed of thermoplastic synthetic fibers having a basis weight of 20 - 80 g/m² and formed with a plurality of pleats (5) extending in said longitudinal direction, said pleats (5) repeating undulation transversely of said longitudinal direction, said high density zones (7,8) being defined by crests (7) and troughs (8) of said pleats (5) and said low density zones (9) defined between said crests (7) and troughs (8), and said troughs (8) being in contact with the surface (6A) of said core (4)."

Claim 1 of the 1st auxiliary request differs from claim 1 of the main request in that the liquid-pervious sheet is defined as being the topsheet.

Claim 1 of the 2nd auxiliary request differs from claim 1 of the main request in that the following wording is inserted:

"the nonwoven fabric having been firmly compressed at the crests and troughs so that the nonwoven fabric is relatively thin and has a relatively high density at the crests and troughs, and said low density zones (9) defined by side walls extending between said crests (7) and troughs (8), which have been substantially not compressed or slightly compressed so that the nonwoven fabric is relatively thick and has a relatively low density at these side walls,".

Claim 1 of the 3rd to 6th and 9th auxiliary requests all include the added wording of claim 1 of the 2nd auxiliary request. This wording already being decisive for the decision on allowability of these requests, it is not necessary to specify the further amendments made.

Claim 1 of auxiliary requests 7 and 8 differ from claim 1 of the main request in that the feature of originally filed (and granted) claim 6 has been added: "said high density zones intermittently extend in said longitudinal direction". Claim 1 of auxiliary request 8 additionally includes the amendment to specify the liquid-pervious sheet being the topsheet.

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

D6 (WO-A-96/00625) was more relevant to the question of lack of novelty than D5. Claim 1 of the patent lacked novelty over a sanitary napkin disclosed in D6 which

was described therein as an alternative embodiment of the sanitary napkin shown in Figures 14 and 15. The alternative embodiment, described at page 14, line 32 to page 15, line 3, comprised a pleated cover sheet in which the wrapping sheet (backing sheet 107 in Figures 14 and 15) was omitted and the shape of pleats was fixed by plastic deformation of the peaks between embossing or stamping rollers, as shown in Figure 11. Figure 11 showed that the crests and troughs of the pleated cover sheet were compressed between the embossing rollers.

XII. The arguments of the respondent can be summarized as follows:

D6 disclosed a number of absorbent articles that featured a pleated cover sheet. Contrary to the appellant's assertion, there was no disclosure in D6 of an absorbent article that omitted a backing sheet but only disclosure of a pleated web without a backing sheet; the use of this web in an absorbent article, and in contact with the surface of an absorbent core was not disclosed.

Moreover, there was no explicit disclosure in D6 of a pleated web that featured crests and troughs that were plastically deformed to result in high density zones defined by the crests and troughs. Rather, there was reference to peaks only. The appellant's view was not correct that this term must refer to both the crests and troughs, since deformation of both would be required to fix the pleats of the web. Plastic deformation of the troughs only would fix the material in pleated form. Also when taking into account the description in combination with Figure 11, there was no teaching of plastic deformation of both the crests and

the troughs of the web of D6. Hence, the subject-matter of claim 1 was novel.

The arguments in support of novelty presented in respect of claim 1 of the main request were applicable to all of the auxiliary requests.

Claim 1 of auxiliary request 1 was amended to specify a liquid-pervious topsheet.

Auxiliary requests 2 to 6 and 9 specified that the high density zones were formed by compression. Accordingly, the high density zones were clearly identifiable and there could be no problem measuring their widths.

Auxiliary requests 7 and 8 specified additionally that the high density zones intermittently extended in the longitudinal direction. No disclosure in this respect was present in D6.

Reasons for the Decision

1. Continuation of the proceedings

Although the respondent (proprietor) had stated that the patent had lapsed in all Contracting States and that no application for restoration had been made in any Contracting State, it did not however withdraw its approval of any text on which the patent could be maintained and indeed it maintained its main request and all of its auxiliary requests. The appellant (opponent) also requested that the opposition

proceedings be continued. The stated intention of the appellant not to continue proceedings if the patent had irrevocably lapsed is a conditional request over which the Board has no control. Furthermore, by telefax dated 3 July 2015 it explicitly maintained its request that the patent be revoked.

The Board thus continued proceedings.

2. Main request

2.1 In its provisional opinion, the Board had already stated that it considered the subject-matter of claim 1 to lack novelty over D6. The respondent did not provide any reply in this regard and the opinion is confirmed herewith, for the reasons given below.

2.2 D6 discloses an alternative embodiment at page 14, lines 32 to page 15, line 3 which comprises a pleated cover sheet in which the wrapping sheet (backing sheet 107 in Figures 14 and 15) is omitted and the shape of pleats is fixed by plastic deformation of the peaks between embossing or stamping rollers, as shown in Figure 11.

2.3 The respondent argued that there would be no disclosure of an absorbent article that omitted a backing sheet but only of a pleated web without a backing sheet. The use of this web in an absorbent article, and in contact with the surface of an absorbent core would not be disclosed.

2.4 In regard to the respondent's argument that the pleated cover sheet would not be in contact with the surface of an absorbent core, it was already stated in the Board's provisional opinion that claim 1 did not define what

- structures constituted the core and thus did not exclude the presence of a sheet, such as sheet 107 of D6.
- 2.5 The respondent argued further that in D6, there was no explicit disclosure of a pleated web that featured the plastic deformation of the crests and troughs. Plastic deformation of the troughs only would fix the material in pleated form.
- 2.6 In regard to this argument, it was already stated in the Board's provisional opinion that the method of formation of the crests and troughs, necessarily would lead to them having higher density than the zones therebetween.
- 2.7 The respondent further argued that in the paragraph bridging pages 5 and 6 of the description in D6, it was expressed that the webs were advantageous when compared to the prior art webs formed by stamping because they were practically not compacted in the forming process and so offered superior wearing comfort. According to the respondent this would lead away from the plastic deformation of the crests and instead lead towards an interpretation where only the troughs are compacted.
- 2.8 However, contrary to the respondent's viewpoint, D6 points to the use of embossing rollers which inevitably compact or consolidate the material and deform the undulating web. A plastic deformation of also the crests cannot be avoided by such an embossing procedure. Accordingly, there is no feature in claim 1 which distinguishes the crests and troughs of the pleats from the ones defined in D6. Hence, the subject-matter of claim 1 lacks novelty.

3. Auxiliary request 1

Claim 1 has been amended by additionally defining the liquid-pervious sheet as being the topsheet. D6 (claim 53) also discloses the liquid-pervious sheet as being the topsheet of the article. Hence, this amendment does not change the assessment of novelty with respect to D6. Accordingly, the reasons given for the main request above apply equally, whereby the subject-matter of claim 1 of auxiliary request 1 also lacks novelty (Article 54 EPC) over D6.

4. Auxiliary requests 2 to 6 and 9

Claim 1 was amended by adding a feature introducing a series of expressions using comparative or relative terminology, such as "firmly compressed", "relatively thin", "relatively high", "slightly compressed", "relatively thick", "relatively low". These expressions are vague as they provide no clear limits; the introduction of these terms contravenes the requirement of Article 84 EPC that the claims shall be clear. Hence, auxiliary requests 2 to 6 and 9 are not allowable at least for this reason.

5. Auxiliary requests 7 and 8

The Board had already stated in its communication annexed to the summons to oral proceedings, that (with regard to the auxiliary requests) no amended pages of the description had been filed together with the amended claim requests and that accordingly, no complete requests were seemingly available and that the question might arise as to whether any of the requests would be allowable.

With regard to the amendments made by way of auxiliary requests 7 and 8, a feature which was previously in dependent claim 6 was combined with claim 1 as granted. The description in the patent, paragraph 0006, however states which features are provided according to the invention, whereas paragraph 0011 states that the feature which has been introduced from granted claim 6 is merely a feature "according to an additional embodiment" of the invention. Moreover, this feature is in contradiction with the feature referred to in another additional embodiment (see paragraph 0010) which states that the high density zones continuously extend in one (the longitudinal) direction. It is thus evident that even if it were assumed that the claims of the requests 7 or 8 were allowable, the lack of amended description pages which were consistent with the amended independent claim of either request contravenes at least Article 84 EPC according to which the claims should be supported by the description.

Auxiliary requests 7 and 8 are therefore not allowable at least for this reason.

Even if adaptation of the description had been the only objection still open, and the Board has anyway not concluded this to be the case, and although adaptation of the description to be consistent with the claims might have been easily possible, in accordance with Article 15(3) of the Rules of Procedure of the Boards of Appeal, the Board is not obliged to delay any step in the proceedings, including its decision, merely because the parties are not present. Moreover, in this case, the respondent had been made fully aware of this situation in the Board's communication and had not reacted with substantive comment nor amended description pages.

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:



M. H. A. Patin

M. Harrison

Decision electronically authenticated