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**Datasheet for the decision  
of 10 September 2015**

**Case Number:** T 2174/12 - 3.2.06

**Application Number:** 05016561.2

**Publication Number:** 1621168

**IPC:** A61F13/15

**Language of the proceedings:** EN

**Title of invention:**

Pull-on disposable diaper

**Patent Proprietor:**

KAO CORPORATION

**Opponent:**

The Procter & Gamble Company

**Headword:**

**Relevant legal provisions:**

EPC Art. 84, 123(2)

RPBA Art. 13(1)

**Keyword:**

Claims - clarity - main request (no) - added subject-matter -  
auxiliary request 1 (yes)

**Decisions cited:**

G 0002/10

**Catchword:**



**Beschwerdekammern  
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Case Number: T 2174/12 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 10 September 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  
19 July 2012 concerning maintenance of the  
European Patent No. 1621168 in amended form.**

**Composition of the Board:**

**Chairman** M. Harrison  
**Members:** M. Hannam  
W. Ungler

## Summary of Facts and Submissions

- I. An appeal was filed by the appellant (opponent) against the interlocutory decision of the opposition division in which it found that European patent No. 1 621 168 in an amended form met the requirements of the EPC.
- II. The appellant requested that the aforementioned decision be set aside and that the patent be revoked.
- III. The respondent (proprietor) requested that the appeal be dismissed.
- IV. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that the subject-matter of claims 1 and 4 appeared neither to meet the requirement of Article 123(2) EPC nor those of Article 84 EPC.
- V. With letter of 31 July 2015 the respondent filed a replacement main request and auxiliary requests 1 and 2.
- VI. Oral proceedings were held before the Board on 10 September 2015, during which the proprietor filed a new auxiliary request 1 replacing auxiliary requests 1 and 2 on file.

The appellant requested that the decision under appeal be set aside and that the European patent No. 1 621 168 be revoked.

The respondent's (final) requests were that the decision under appeal be set aside and that the patent be maintained on the basis of the claims of the main

request filed with letter dated 31 July 2015, or on the basis of the claims of auxiliary request 1 filed during the oral proceedings of 10 September 2015.

VII. Claim 1 of the main request reads as follows:

"A pull-on disposable diaper having a waist opening and a pair of leg openings,

the diaper comprising a front section (A) and a rear section (B), and having regions (71) located between the waist opening and the leg openings at the front section and the rear section, respectively, and adapted to be applied to the part of a wearer from the iliac crest to the anterior superior iliac spine and which, while worn by a wearer, apply a pressure of 1.1 to 2.5 kPa to the wearer's body, the regions having a width of 15 to 35 mm, wherein

the diaper (1) has a number of elastic members extending in the diaper width direction between a waist portion (5) and leg portions (6) in each of the front section (A) and the rear section (B), first elastic members (71a) being disposed between the waist portion (5) and the leg portions (6) to form a first portion (71), and second elastic members (72a) being arranged between the first portion (71) and the leg portions (6) to form a second portion (72), the first portion (71) and the second portion (72) extending in the diaper width direction, the first portion (71) being located between the waist portion (5) and the leg portions (6), the second portion (72) being located between the first portion (71) and the leg portions (6), wherein

all the first elastic members (71a) and the second elastic members (72a) are fixed in their stretched out state between an outer sheet (12) and an inner sheet (13) of an exterior laminate (11), the first elastic members (71a) being arranged such that their ends

located at the side edges (A1 or A2) of the front section (A) and their ends located at the side edge (B1 or B2) of the rear section (B) overlap with each other or continue to each other when the side edges (A1 and A2) of the front section (A) and the side edges (B1 and B2) of the rear section (B) are joined together, the second elastic members (72a) being arranged in the same way, thus being formed a below-waist gather in the first portion (71) and the second portion (72) in the front section (A) and in the rear section (B),

the distance from the longitudinal centerline of the diaper in the opened and stretched out state to the widthwise middle of the region in the front section being 180 to 220 mm,

the distance from the longitudinal centerline (22) of the diaper in the opened and stretched out state to the widthwise middle of the region in the rear section being 180 to 220mm, and

a waist portion (5) around the waist opening, while worn by a wearer, applies a pressure of 0.3 to 1.5 kPa to the wearer's body, wherein

a plurality of waist elastic members (51) being disposed along, and over the whole width of, the front and the rear ends of the exterior laminate (11) between the outer sheet (12) and the inner sheet (13) in their stretched state form said waist portion (5) along the waist opening, the waist elastic members (51) being arranged such that those on the front section (A) and those on the rear section (B) overlap at their ends or continue to each other at the side seals (S) when the side edges (A1 and A2) of the front section (A) and the side edges (B1 and B2) of the rear section (B) meet and are sealed together, thus there being formed a substantially continuous loop of waist gather along the waist opening."

Claim 1 of auxiliary request 1 reads:

"A pull-on disposable diaper having a waist opening and a pair of leg openings,

wherein the diaper (1) is composed of an absorbent body (10) having a liquid permeable topsheet (2), a water repellent backsheet (3), and a liquid retentive absorbent core (4) interposed between the topsheet (2) and the backsheet (3) and an exterior laminate (11) which is disposed on the backsheet side of the absorbent body (10), the exterior laminate (11) having its middle portion narrowed in a sandglass shape to define the outline of the diaper,

leg elastic members (61a, 61b) being disposed along the inward curves on both sides of the exterior laminate (11) to form a pair of leg portions (6),

the diaper comprising a front section (A) and a rear section (B), and having regions (71) located between the waist opening and the leg openings at the front section and the rear section, respectively, and adapted to be applied to the part of a wearer from the iliac crest to the anterior superior iliac spine and which, while worn by a wearer, apply a pressure of 1.1 to 2.5 kPa to the wearer's body, the regions having a width of 15 to 35 mm, wherein

the diaper (1) has a number of elastic members extending in the diaper width direction between a waist portion (5) and the leg portions (6) in each of the front section (A) and the rear section (B), first elastic members (71a) being disposed between the waist portion (5) and the leg portions (6) to form a first portion (71), and second elastic members (72a) being arranged between the first portion (71) and the leg portions (6) to form a second portion (72), the first portion (71) and the second portion (72) extending in the diaper width direction, the first portion (71)

being located between the waist portion (5) and the leg portions (6), the second portion (72) being located between the first portion (71) and the leg portions (6), wherein

all the first elastic members (71a) and the second elastic members (72a) are fixed in their stretched out state between an outer sheet (12) and an inner sheet (13) of the exterior laminate (11), the outer sheet (12) serving as the outer surface of the diaper, the first elastic members (71a) being arranged such that their ends located at the side edges (A1 or A2) of the front section (A) and their ends located at the side edge (B1 or B2) of the rear section (B) overlap with each other or continue to each other, the diaper having the side edges (A1 and A2) of the front section (A) and the side edges (B1 and B2) of the rear section (B) joined and sealed together, the second elastic members (72a) being arranged in the same way, thus being formed a below-waist gather in the first portion (71) and the second portion (72) in the front section (A) and in the rear section (B),

each of the first elastic members (71a) and the second elastic members (72a) extends between the lateral sides of the diaper (1) and the lateral, long side edges of the absorbent core (4), wherein neither the first elastic members (71a) nor the second elastic members (72a) exists in the area where the absorbent core (4) exists,

the leg elastic members (61a, 61b) being sandwiched between the outer sheet (12) and the inner sheet (13) and fixed in their stretched out state,

the distance from the longitudinal centerline of the diaper in the opened and stretched out state to the widthwise middle of the region in the front section being 180 to 220 mm,



the distance from the longitudinal centerline (22) of the diaper in the opened and stretched out state to the widthwise middle of the region in the rear section being 180 to 220 mm, and

a waist portion (5) around the waist opening, while worn by a wearer, applies a pressure of 0.3 to 1.5 kPa to the wearer's body, wherein

a plurality of waist elastic members (51) being disposed along, and over the whole width of, the front and the rear ends of the exterior laminate (11) between the outer sheet (12) and the inner sheet (13) in their stretched state form said waist portion (5) along the waist opening, the waist elastic members (51) being arranged such that those on the front section (A) and those on the rear section (B) overlap at their ends or continue to each other at the side seals (S), the diaper having the side edges (A1 and A2) of the front section (A) and the side edges (B1 and B2) of the rear section (B) met and sealed together, thus there being formed a substantially continuous loop of waist gather along the waist opening."

VIII. The appellant's arguments may be summarised as follows:

Main request

Through the inclusion of the expression 'when the side edges ... are joined together', a contradiction existed between the claimed pull-on diaper and a possible intermediate, open rather than closed, product. Claim 1 was thus unclear (Article 84 EPC). The feature 'exterior laminate' was unclear as it was not apparent from the claim in what way the laminate was exterior. Furthermore, should layers external to the laminate be possible, the lack of clarity in the feature became even more evident. The feature 'leg portion' was also unclear as it had no understandable meaning and its

location was completely undefined, particularly in relation to what were termed 'leg openings'; its sole definition concerned the location of the claimed first and second portions; it did not clearly define where the first and second elastic members were located in the diaper.

#### Auxiliary request 1

This request was filed unjustifiably late given that clarity objections had been raised by the Board in its communication in preparation for oral proceedings and the respondent had made no previous attempt to address these clarity issues, other than by simply arguing on the main request. The present request also failed to *prima facie* meet the requirement of Article 123(2) EPC. Detail disclosed in para. [0013] concerning the exterior laminate had not been included in claim 1; further detail regarding the leg elastic members from para. [0016] had also been omitted, each omission amounting to an unallowable intermediate generalisation of the disclosure in the description and drawings. The underlying objections in this regard had already been in the grounds of appeal. The request should thus not be admitted.

IX. The respondent's arguments may be summarised as follows:

#### Main request

Regarding the alleged inconsistency and lack of clarity in claim 1, it was clear from the whole claim context that the claim was directed only to joined and sealed side edges. The expression 'when the side edges ... are joined together' would thus be understood by the skilled person in this light rather than that an

intermediate product with unjoined side edges was being claimed.

The expression 'exterior laminate' was clear to the skilled person. This simply meant the laminate was exterior to the internal components of the diaper (such as the absorbent core). Para. [0064] of the patent implied that the exterior laminate did not necessarily define the outline of the diaper, so that such a limitation to the nature of the exterior laminate was not appropriate. The claimed diaper could include a further material layer on the outside of the exterior laminate which thus negated the need to define the exterior laminate as presenting the outer surface of the diaper.

As regards the 'leg portions', these were clearly located next to the leg openings in an analogous way to the waist portion being next to the waist opening. The position of the leg portions was thus clearly defined allowing the elastic members to be located with respect to them.

#### Auxiliary request 1

The detail of the exterior laminate taken from para. [0010] was sufficient to clearly and completely define the laminate; the further details from para. [0013] concerning the nonwoven fabric and adhesive joining of the inner and outer sheet were not structurally related to the features of the laminate taken-up into the claim, nor was it directly related to the essential features of the invention, such that it was irrelevant for the definition of the invention; omission of such features from claim 1 did not offend Article 123(2) EPC.

The detail of the leg elastic members introduced into claim 1 completely defined the leg portions. Further detail of the leg elastic members from para. [0016] was not necessary since those parts of the elastic members in the crotch region were remote from the regions (71) of concern for the definition of the invention. The subject-matter of the claim thus met the requirement of Article 123(2) EPC and the request should be admitted.

## **Reasons for the Decision**

1. Main request

1.1 *Lack of clarity - Article 84 EPC*

1.1.1 Amendments made to claim 1 post grant result in the claim lacking clarity in three respects:

- a. The location of the 'exterior laminate' and what form it takes are unclear;
- b. The expressions 'when the side edges of the front section and the side edges of the rear section are joined (or meet and are sealed) together' is unclear in the context of a pull-on diaper; and
- c. The location and extent of the 'leg portions' is unclear.

1.1.2 As regards the expression 'exterior laminate', it is not clear to the skilled person where this is located relative to both the features explicitly disclosed in claim 1 and those components implicitly included in such a diaper (such as an absorbent core). The skilled person is not provided with any indication in the claim

itself as to the way in which the claimed 'exterior laminate' is 'exterior', be that through comprising the outer surface of the diaper or otherwise.

The Board can accept the respondent's argument that the exterior laminate is positioned in the diaper externally to certain internal components, even though these components are not explicitly disclosed in the claim. However, merely indicating that it is external to the internal components neither clearly defines the extent of the laminate nor its location in the diaper to allow a clear understanding of it as a physical feature of the claimed diaper. Indeed, the respondent's argument that a further material layer could be located on the outside of the exterior laminate exemplifies the lack of clarity associated with the feature since paras. [0011] and [0014] of the patent suggest that the exterior laminate itself serves as the outer surface of the diaper. The respondent's further reference to para. [0064] suggesting that the exterior laminate need not define the outline of the diaper does not provide any greater clarity for the claimed exterior laminate. The second sentence in this paragraph in fact simply presents an alternative embodiment in which an exterior laminate is not present in the diaper, the topsheet and backsheet defining the diaper outline. This thus does not provide any further information which gives a clear understanding for the skilled person of the claimed feature 'exterior laminate'.

- 1.1.3 Regarding the expression 'when the side edges ... are joined together', this is contradictory in the context of a claim directed to a pull-on disposable diaper which by definition should have joined edges forming waist and leg openings. The skilled person is thereby presented with unclear subject-matter for the claimed

pull-on disposable diaper as this appears to not necessarily have joined side edges.

The respondent's argument that the whole claim context was clearly directed only to joined and sealed side edges is not persuasive. The expressions in the claim 'when the side edges ... are joined (or meet and are sealed) together' suggest a possibility of this not being the case i.e. that the side edges could possibly not be joined / sealed. The reader of the claim is thus presented with contradictory information regarding the joined or unjoined nature of the side seals and this has the implication that an intermediate product, rather than a finished pull-on diaper, is being claimed. This results in a lack of clarity in the claim directed to a pull-on diaper.

- 1.1.4 As regards the nature of the claimed 'leg portions', it is not clear in claim 1 where these leg portions are located with respect to the other features of the claimed diaper. This is particularly apparent with respect to the leg openings to which the leg portions, alone for linguistic reasons, can be expected to have some relationship, yet this is not defined in the claim.

The respondent's argument that leg portions would be clearly understood as being located next to the leg openings in an analogous way to the waist portion being next to the waist opening does not convince the Board that the feature leg portions as claimed was therefore clear. Despite a linguistic link to the leg opening, the expression 'leg portion' is not defined in any manner in the claim to allow its location or extent to be ascertained. In claim 1 the expression 'leg portions' is used simply to identify the location of

elastic members in the first and second portions without any detail being provided as to where the leg portions themselves are located. This leaves the reader in the dark as regards the location and physical extent of a physical feature of the claimed diaper and thereby also the position of those elements of the diaper which are defined in relation to it.

1.1.5 Claim 1 thus lacks clarity in each of the three respects identified above, contrary to Article 84 EPC. The main request is thus not allowable.

2. Auxiliary request 1

2.1 *Non-admittance of request (Article 13(1) RPBA)*

2.1.1 In appeal proceedings, the Rules of Procedure of the Boards of Appeal (RPBA) apply. Article 12(2) RPBA specifies that the statement of grounds of appeal and reply must contain the party's complete case. After filing the grounds of appeal or reply, any amendment to a party's case may be admitted and considered at the Board's discretion, which is set out in Article 13(1) RPBA, such discretion being exercised *inter alia* in view of the need for procedural economy. As is established case law of the Boards of Appeal, such procedural economy implies that amended requests should at least be *prima facie* allowable in order to be admitted as a change to the party's case.

2.1.2 The respondent filed auxiliary request 1 during oral proceedings. The request thus represented a change to the respondent's complete case as defined in Article 12(2) RPBA) and its admittance is to be considered at the Board's discretion under Article 13 RPBA.

2.1.3 As regards *prima facie* compliance with Article 123(2) EPC, this is not achieved in claim 1.

The exterior laminate has admittedly been defined more clearly through addition of features taken from para. [0010] of the application as filed. However, the features taken-up into claim 1 with respect to the exterior laminate are not disclosed in isolation in the description; para. [0013] provides further details of the laminate at least having two sheets of nonwoven fabric. The exterior laminate is thus structurally disclosed in the description as having 'at least two sheets of nonwoven fabric', such that the omission of this feature from those taken-up into claim 1, to more clearly define the exterior laminate, gives rise at least *prima facie* to an unallowable intermediate generalisation of the original disclosure in this respect. Although reference was made to paragraph [0062] as a further basis of disclosure, this refers to a nonwoven fabric sheet and a water repellent sheet. Although it might be argued that a water-repellent sheet is an alternative to one of the nonwoven fabrics (and even this is not considered to be unambiguously disclosed) this anyway would not be a disclosure obviating the presence of a nonwoven fabric in the exterior laminate, but one rather confirming it.

As regards compliance of an amendment with Article 123(2) EPC when features are taken from an embodiment in the description and Figures, it is not of relevance whether features not taken-up into the claim are considered essential to the invention or not. Rather the standard to be met is that the subject-matter resulting from the amendment must be directly and unambiguously derivable, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of the application as



filed (see e.g. G2/10).

In the present case, the necessary direct and unambiguous derivability requires that all features structurally or functionally related to the exterior laminate be taken up into the claim. This thus includes not just those features from lines 1 to 2 of para. [0010] of the A-publication but also at least the detail of the exterior laminate in para. [0013] regarding the laminate comprising two sheets of nonwoven fabric. This detail regarding the exterior laminate having at least two sheets of nonwoven fabric is clearly structurally related to the structure of the exterior laminate disclosed in that embodiment and so, at least *prima facie*, needs to be included in the claim for its subject-matter to meet the requirement of Article 123(2) EPC. This feature of the exterior laminate is however not included in claim 1.

- 2.1.4 A further, at least *prima facie*, non-compliance with the requirement of Article 123(2) EPC arises due to only a selection of features concerning the location of the leg portions having been included in claim 1, which features have been taken from a disclosure of a larger number of features disclosed in combination in the description in the specific context of the leg elastic members. Para. [0016] discloses not only that the leg elastic members are disposed along inward curves of the exterior laminate to form the leg portions, but also at least that these members extend to the side edges and overlap with, or continue to, each other, and that a substantially continuous loop of leg gather is formed. These features are structurally related to the leg elastic members taken-up into claim 1 since they describe the only disclosed arrangement of these members, and thus the extent of the leg portions.

It thus follows that the omission of at least these features from claim 1 presents the skilled person with new information in the form of a new combination of features which is at least *prima facie* not directly and unambiguously derivable from the application as originally filed, such that the subject-matter of claim 1 would contravene the requirement of Article 123(2) EPC.

Regarding the respondent's argument that further detail of the leg elastic members from para. [0016] was not necessary, since those in the crotch region and at the side edges were remote from the regions (71) of concern for the definition of the invention, this is not found relevant as regards the matter of compliance with Article 123(2) EPC. The leg elastic members, as stated in lines 1 to 2 of para. [0016], form the leg portions such that the extent and nature of the leg elastic members is of fundamental structural importance for defining the leg portions. In para. [0016] the leg elastic members are stated to 'overlap ... in the crotch section' and to 'overlap with each other .... when the side edges ... are joined together' thus forming a 'substantially continuous loop of leg gather'. By the above definition of the leg elastic members forming the leg portions, these further features of the leg elastic members from para. [0016] define the physical extent of the leg portions and thus have a fundamental structural relationship with the leg portions. It thus follows that the omission from claim 1 of these further features of the leg elastic members *prima facie* offends Article 123(2) EPC.

2.1.5 The subject-matter of claim 1 thus at least *prima facie* fails to meet the requirement of Article 123(2) EPC.

2.1.6 Since the subject-matter of claim 1 is not *prima facie* allowable, which would be necessary for fulfilling the need for procedural economy and consequently admitting the request into the proceedings, the Board exercised its discretion under Article 13(1) RPBA not to admit this request into proceedings.

3. No further request was filed by the respondent. With no request on file which is both admitted and allowable, the patent must be revoked.

## 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:



Ms. Laure Malécot-Grob

M. Harrison

Decision electronically authenticated