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**Datasheet for the decision
of 18 June 2018**

Case Number: T 0040/15 - 3.2.06

Application Number: 05785211.3

Publication Number: 1795163

IPC: A61F13/49, A61F13/56,
A61F13/62, A61F13/15,
A61F13/496

Language of the proceedings: EN

Title of invention:

ABSORPTIVE ARTICLE

Patent Proprietor:

Kao Corporation

Opponent:

Kimberly-Clark Worldwide, Inc.

Relevant legal provisions:

EPC R. 84(1)

EPC Art. 114(2), 54

Keyword:

Lapse of patent in all designated states - continuation of
appeal proceedings (yes)
Late submitted document - admitted (yes)
Novelty - (no)



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Case Number: T 0040/15 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 18 June 2018

Appellant: Kimberly-Clark Worldwide, Inc.
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Respondent: Kao Corporation
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 24 October 2014
rejecting the opposition filed against European
patent No. 1795163 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman M. Harrison
Members: G. de Crignis
E. Kossonakou

Summary of Facts and Submissions

I. An appeal was filed by the appellant (opponent) against the decision of the opposition division rejecting its opposition against European patent no. 1 795 163.

II. Claim 1 reads as follows:

"An absorbent article comprising a liquid permeable topsheet (15), a liquid impermeable leak-preventive backsheet, a liquid retentive absorbent member (16) intermediate between the topsheet and the backsheet, and an exterior material (14) extending laterally outward of both rear and front portions of the absorbent member (16), the absorbent article having a side edge portion (18b) of the rear portion (B) thereof and a side edge portion (178a) of the front portion (A) thereof joined to each other via a mechanical fastener (13) comprising a male member (19) and a female member (20) to take on the shape of a pair of pants, the male member (19) being attached to the inner side of the side edge portion (18a, 18b) of one of the rear portion (B) and the front portion (A), the female member (20) being a sheet member attached to the inner side of the side edge portion (18a, 18b) of the other of the rear portion (B) and the front portion (A) on the reverse side of its outer edge portion (20a), with the portion of the female member (A) inward of the outer edge portion (20a) left free as a flap (20b), and the male member (19) engaging the flap (20b) of the female member (20) to join the side edge portion (18b) of the rear portion (B) and the side edge portion (18a) of the front portion (A) with each other, the absorbent article further comprising waist elastic members (12a) and below-waist elastic members (12c),

the waist elastic members (12a) and below-waist elastic members (12c) having no contracting function in the site where the male member (19) is attached and/or the site where the female member (20) is attached."

III. In its grounds of appeal, the appellant requested that the patent be revoked in its entirety. Oral proceedings were requested prior to any other decision being taken. With regard to lack of novelty of the subject-matter of claim 1, reference was made to

D2 US-B1-6 409 858

and to

D7 US-A1-2003/0018315

which was filed for the first time with the grounds of appeal.

IV. In its reply, the respondent (proprietor) requested that the appeal be dismissed and that D7 not be admitted into the proceedings, arguing that it was a family member of D2, that it was owned by the appellant, that it was not more relevant than the prior art already on file and that it should have been cited earlier. In particular, it stated that D7 did not disclose at least feature 1.6 in the feature analysis made in point 1 of the reasons of the decision under appeal. Accordingly, the findings set out in relation to novelty and inventive step in the decision under appeal still applied.

V. In a communication pursuant to Rule 84(1) EPC the parties were informed that the patent had lapsed for all designated Contracting States and that the appeal proceedings might be continued at the request of the appellant, provided that a request to this effect was filed within two months of notification of the communication.

- VI. A request regarding continuation of the proceedings was filed within the time limit set. The appellant maintained its requests for the patent to be revoked and for oral proceedings to be appointed prior to any decision other than revocation of the patent.
- VII. The Board issued a summons to oral proceedings and sent a communication pursuant to Article 15(1) Rules of Procedure of the Boards of Appeal indicating its provisional opinion. Concerning D7, the Board indicated that it intended to exercise its discretion to admit D7 into the proceedings because it appeared to be prejudicial to the novelty of the subject-matter of claim 1.
- VIII. Subsequently, the respondent informed the Board that it would not attend the oral proceedings. It also stated that "a decision in writing may be issued".
- IX. With letter of 13 June 2018, the appellant withdrew its request for oral proceedings.
- X. Oral proceedings were duly cancelled.

Reasons for the Decision

1. Rule 84(1) EPC

Although the European patent in suit had lapsed in all the designated Contracting States, the appellant requested that the opposition appeal proceedings be

continued in response to a communication of the Board under Rule 84(1) EPC informing the appellant of the lapse. Consequently, the Board continued the appeal proceedings.

2. *Admittance D7*

2.1 Under Article 114(2) EPC, the department of first instance as well as the Boards of Appeal have discretion to admit facts or evidence which are not submitted in due time by the parties concerned. The exercise of this discretion depends on the facts of each case. In particular, the relevance of a late-filed submission or document as well as the question why it had not been submitted earlier should normally be factors which are taken into account when considering how to exercise this discretion.

2.2 The respondent requested that D7 not be admitted into the proceedings and argued that D7 was a family member of D2 and thus also a family member of JP 2003-533278 cited in the patent in suit. The respondent argued that it would therefore have been possible for the then opponent to submit D7 within the foreseen time period.

2.3 D2 was filed as application number 09/571,905 on 16 May 2000, and is a family member of WO-A-01/87204.

D7 was filed as application number 10/205,756 on 26 July 2002 and it is referred to as a division of US application No. 09/572,665 filed on 16 May 2000 and is a family member of WO-A-01/87216. Accordingly, D7 and D2 are not members of the same patent family. The inventors partially overlapping in D2 and D7 is not relevant. The appellant was also informed of the

Board's preliminary opinion in this regard and did not contest this.

- 2.4 The reason given by the appellant for filing D7 at a later stage of proceedings was that this was a reaction to the interpretation of feature 1.5.2.2.1 ("on the reverse side of its outer edge portion (20a), with the portion of the female member (A) inward of the outer edge portion (20a) left free as a flap (20b)") by the opposition division which led to the subject-matter of claim 1 being distinguished over arrangements like those shown e.g. in Figure 6 of D2, where although the female member is folded, it is as a whole attached on this reverse side. It was argued that the narrow interpretation of this feature used by the opposition division necessitated the search for another document since the wording had not been understood to reflect a distinction in this regard.
- 2.5 Figure 4 of D7 discloses a plan view of a cross direction assembly of the garment and shows the type of seam understood by the opposition division; paragraphs 96 to 98 in D7 specify the manufacturing method shown in this Figure. D7 thus discloses feature 1.5.2.2.1. Accordingly, the Board finds that the submission of D7 is an appropriate reaction to the reasoning given in the impugned decision.
- 2.6 Since D7 is considered to be more relevant than D2, and it was filed in reaction to the interpretation of the opposition division of the aforementioned feature, the Board exercised its discretion to admit D7 into the proceedings.

3. *Novelty of the subject-matter of claim 1 - D7*

3.1 The appellant submitted that D7 anticipated the claimed subject-matter. The Board also finds that D7 discloses all features of claim 1.

3.2 Although the respondent argued that "at least feature 1.6" (see point 3.3 below) was not disclosed in D7, it did not indicate any other feature of claim 1 which was not disclosed. The Board also cannot find any such feature.

3.3 Feature 1.6 reads "the absorbent article further comprising waist elastic members (12a) and below-waist elastic members (12c), the waist elastic members (12a) and below-waist elastic members (12c) having no contracting function in the site where the male member (19) is attached and/or the site where the female member (20) is attached."

3.4 In its communication giving its provisional opinion, the Board stated that D7 disclosed all features of claim 1. In regard to feature 1.6, the Board explained why this feature was disclosed (see item 6.3 of the Board's communication) making specific reference to Figure 4 and paragraphs 96 to 98 of D7 (also cited in this regard by the appellant).

3.5 The respondent did not provide any counter-argument to the Board's provisional opinion. The Board thus has no reason to deviate therefrom and confirms same herewith. Hence, the Board concludes that D7 discloses the subject-matter of claim 1, such that the subject-matter of claim 1 lacks novelty, contrary to Article 54 EPC.

3.6 In the absence of any further requests, the Board concludes that the patent does not meet the requirements of the EPC and is therefore to 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:



M. H. A. Patin

M. Harrison

Decision electronically authenticated