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**Datasheet for the decision
of 16 July 2019**

Case Number: T 0105/16 - 3.2.06

Application Number: 04775299.3

Publication Number: 1773273

IPC: A61F13/56, A61F13/60,
A61F13/62, A61F13/66

Language of the proceedings: EN

Title of invention:
AN ABSORBENT ARTICLE

Patent Proprietor:
Essity Hygiene and Health Aktiebolag

Opponent:
THE PROCTER & GAMBLE COMPANY

Headword:

Relevant legal provisions:
EPC Art. 56, 123(2), 101(3)(b)
RPBA Art. 13(1), 12(4)

Keyword:

Evidence - public prior use

Inventive step - obvious alternative

Late-filed requests - requests clearly allowable (no)

Decisions cited:

T 0576/11

Catchword:



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Case Number: T 0105/16 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 16 July 2019

Appellant: THE PROCTER & GAMBLE COMPANY
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Respondent: Essity Hygiene and Health Aktiebolag
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 12 November
2015 rejecting the opposition filed against
European patent No. 1773273 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: P. Cipriano
J. Hoppe

Summary of Facts and Submissions

- I. An appeal was filed by the appellant (opponent) against the decision of the opposition division rejecting the opposition against European patent no. 1 773 273. It requested that the decision be set aside and the patent be revoked.
- II. In reply, the respondent (proprietor) requested that the patent be maintained unamended. It also filed eight auxiliary requests.
- III. The following documents, referred to by the appellant in its grounds of appeal, are relevant to the present decision:
- D1 US H1640
 - D2 5 615 460
 - P1 Huggies Ultratrim diaper
 - S1 statement of Heather Engel
 - S2 statement of Daniel Scott Herbert (and its Exhibit A)
 - S3 statement of Bonnie West (and her Exhibits B-F)
 - S4 statement of Mark Albers
 - S5 statement of Heather Engel
 - D9 P&G, "How to read Lot Codes on FemCare Products by Brand", Amanda Gonzalez, 15 August 2008
 - D10 extract from the opposition against EP 1 740 135
 - D11 US 5 858 515
- IV. The Board issued a summons to oral proceedings and a communication containing its provisional opinion, in which it indicated *inter alia* that P1 was considered to be prior art under Article 54(2) EPC and that the eighth auxiliary request seemed to be a legitimate response to the objections in the appeal grounds

regarding inventive step. In addition, the Board stated that it might require discussion whether the circular bending stiffness tests filed by the appellant with letter dated 1 March 2019 could be regarded as factually correct based on the evidence supplied.

V. With letter dated 28 June 2019, the respondent filed a new main request (corresponding to the previous eighth auxiliary request) together with auxiliary requests 1 and 2, replacing all the previous requests.

VI. With letter dated 2 July 2019, the appellant filed

S6 statement of David Ortel comprising additional circular bending stiffness measurements

and requested that the case be remitted to the opposition division if auxiliary request 2 filed with letter dated 28 June 2019 be admitted into the proceedings.

VII. Oral proceedings were held before the Board on 16 July 2019, during the course of which the respondent withdrew the first and second auxiliary requests filed with letter dated 28 June 2019 and replaced these with a new first auxiliary request (labeled main request 16 July 2019, 9:00) and a new second auxiliary request (16 July 2019, 16:43).

The appellant (opponent) maintained its initial requests.

The respondent (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained in amended form based on the claims of the

main request, filed with letter dated 28 June 2019, or auxiliarily based on the first auxiliary request, filed in the oral proceedings (labelled main request 16 July 2019, 9:00), or auxiliarily based on the second auxiliary request filed in the oral proceedings (16 July 2019, 16:43).

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

"1. An absorbent article including an absorbent core (1) and a liquid-impervious backsheet (2), wherein a receiving means (11) is arranged on the opposite side of the backsheet (2) in relation to the core (1) in order to provide a surface (10) for receiving fastening members (12) arranged on the article, and the receiving means (11) and the fastening members (12) are adapted for being joined together when applying the article onto a user, characterized in that the receiving means is a liquid-pervious flexible nonwoven laminate (11), including at least one inner (13) and one outer (14) layer, the inner laminate layer (13) and the outer laminate layer (14) each having a basis weight within the interval 15-80 g/m², and preferably within the interval 20-65 g/m², the nonwoven laminate (11) having a stiffness (measured in accordance with the testing method referred to in the description) which is lower than or equal to 40 gf, and preferably lower than 25 gf, and that the nonwoven laminate (11) and the absorbent core (1) overlap each other so that the overlapping zone (15) formed in that way has an extension amounting to at least 45 cm², and in that the article has a transverse geometrical axis (4), dividing the article into a front portion (7) and a back portion (6), and that the core (1) exhibits a peripheral edge (16) whose main extension in a longitudinal direction is substantially parallel to the transverse geometrical

axis (4), wherein the overlapping zone (15) includes the entire peripheral edge (16)."

Claim 1 of auxiliary request 1 differs from claim 1 of the main request in that the feature regarding the stiffness of the laminate reads:

"the nonwoven laminate (11) having a stiffness (measured in accordance with the testing method referred to in the description) which is lower than 25 gf"

Claim 1 of auxiliary request 2 differs from claim 1 of the main request in that the feature regarding the basis weight of the inner and outer layer reads:

"the inner laminate layer (13) and the outer laminate layer (14) each having a basis weight within the interval 15- $<30 \text{ g/m}^2$ "

IX. The arguments of the appellant as far as relevant for the present decision may be summarised as follows:

Prior use P1

The diaper Huggies Ultratrim 2001 (manufactured and marketed by Kimberly Clark Corporation) denoted P1 was prior art under Article 54(2) EPC.

P1 was purchased from a public source by Mr Ebert, an employee of the opponent, (as shown in Exhibit A) before the priority date and P1 has been used for the consumer-panel study US016487 as documented in Exhibits B-F and statements of the opponent's employees S1-S5. As explained in the statement of Ms Engel (S1), P1 had an overlapping area of 85 cm^2 .

D9 explained how the production date of P1 could be obtained from the lot number printed on Bag 1. This was also confirmed by D10.

S6 was evidence confirming that the circular bending stiffness was below 40 gf.

The landing zone material had a basis weight of "approximately" 60 g/m².

Main request - inventive step

The subject-matter of claim 1 of the main request was not inventive starting from P1 in the light of D11.

P1 disclosed an absorbent article with all the features of claim 1 with the exception of the features:

- the receiving means is a liquid-pervious flexible nonwoven laminate, including at least one inner and one outer layer
- the inner laminate layer and the outer laminate layer each have a basis weight within the interval 15-80 g/m².

The fact that the laminate was liquid-pervious did not provide any recognisable technical effect, since the laminate was applied to the impermeable backsheet. Further, liquid-pervious layers were not necessarily provided with a more open structure, nor were they necessarily less stiff or cheaper to produce. Claim 1 defined a laminate with "at least" one inner and one outer layer each having its basis weight within the same range, such that the basis weight of the layers could be the same yet the laminate could nevertheless

have more layers with an unspecific basis weight. The effect of such a layer disposition would thus not necessarily mean that the compliance of the laminate to the backsheet and to the fastening means was improved.

Further, it was not defined how their basis weight could be adapted according to any specific use depending on the side they were facing. This feature did not provide any technical effect. The objective problem to be solved by this feature was simply to provide an alternative receiving means.

There was no synergy between the differing features.

The filing of D11 was the response to the decision of the opposition division which stated that P1 did not disclose a laminate. D11 should therefore not be held inadmissible. D11 taught the skilled person that a dual layer laminate was an obvious alternative to a single layer (see column 3, lines 54-58 and the Table in column 23).

The basis weight of each of the inner and outer layers did not have any technical effect and such basis weights were therefore arbitrary.

The subject-matter of claim 1 therefore did not involve an inventive step.

Auxiliary request 1 - admittance

Auxiliary request 1 should not be admitted into the proceedings.

There was no unambiguous disclosure in the application as filed of the combination of the narrow stiffness

range with the broader basis weight ranges of claims 15 and 16, i.e. of a material of each layer with a basis weight up to 80 g/m² being able to achieve a stiffness lower than 25 gf.

The subject-matter of claim 1 thus *prima facie* extended beyond the content of the application as originally filed.

Auxiliary request 2 - admittance

Auxiliary request 2 should not be admitted into the proceedings.

None of the effects suggested by the respondent could be attributed to the amended claimed range. The wording of the claim did not exclude the laminate having more than two layers or set any total weight for the laminate. It could thus not be inferred whether the laminate became lighter or cheaper as this depended on the number of layers and on the material and processes used. It was simply an alternative.

Thus, the subject-matter of claim 1, at least *prima facie*, did not involve an inventive step for the same reasons as applied to the main request.

- X. The arguments of the respondent as far as relevant for the present decision may be summarised as follows:

Prior use P1

P1 was not prior art under Article 54(2) EPC.

It was not possible to establish when P1 was purchased and whether it had been acquired through a public

purchase channel, since the receipt was missing. Documents S2-S5 and D10 should not be admitted into the proceedings since they were not a legitimate response to any factual change in the proceedings regarding inventive step, it being noted that the claims had remained unchanged since the preliminary opinion of the opposition division. D11 should also not be admitted since there were other documents showing a laminate already in the proceedings.

In addition, it was not clear whether the production date could be derived from the lot number in the way shown in S1 and whether the coding system of D9 applied. D10 did not alter this.

S6 should also not be admitted into the proceedings.

The standard of proof "up to the hilt" should be used to assess the evidence brought forward by the appellant, since this evidence lay exclusively with the appellant.

There was no evidence that the landing zone material had a basis weight of "approximately" 60 g/m².

Main request - inventive step

P1 disclosed an absorbent article with all the features of claim 1 with the exception of the features:

- the receiving means is a liquid-pervious flexible nonwoven laminate, including at least one inner and one outer layer

- the inner laminate layer and the outer laminate layer each have a basis weight within the interval 15-80 g/m².

The laminate of the invention was liquid pervious and this provided it with a more open structure, less stiffness due to less basis weight and it also required a lower level of quality control, since larger tolerances in the material could be accepted. It was therefore easier and cheaper to produce, as disclosed in paragraph [0024] of the patent.

The provision of a laminate with at least one inner and one outer layer (instead of a single layer), each with a specific basis weight, allowed tailoring one layer to comply with the characteristics of the backsheet and the other layer to comply with those of the fastening members.

D11 should have been filed earlier and therefore it should not be admitted into the proceedings. Further, D11 did not disclose a liquid pervious laminate nor the value of bending circular stiffness of any layer involved. In addition, Figure 6 disclosed a smaller receiving means 76, which would suggest to the skilled person to reduce the receiving means thus reducing also the size of the overlapping area to an unspecific value, possibly below the claimed 45 cm².

The claimed basis weight values were low and provided the layers of the laminate with a high degree of flexibility (see paragraph [0019] of the patent), thus the claim did not define a range which was arbitrary.

The subject-matter of claim 1 therefore involved an inventive step.

Auxiliary request 1 - admittance

Auxiliary request 1 should be admitted into the proceedings.

The subject-matter of claim 1 was a combination of dependent claims. In addition, the description provided pointers that helped the skilled person arrive at this particular combination of ranges. The paragraphs on page 6 relating to the basis weight and one on page 7 relating to the stiffness formed a single disclosure from which the skilled person would derive that a laminate with layers having a basis weight of 80 g/m² could also achieve a stiffness as low as 25 gf.

If the subject-matter of all originally filed claims 1, 14, 15 and 16 had been originally filed as a single independent claim, there would have been no problem under Article 123(2) EPC. For the purposes of a novelty attack, such a combination of features in a prior art document would also have been considered a single disclosure.

The subject-matter of claim 1 *prima facie* did not extend beyond the content of the application as originally filed.

Auxiliary request 2 - admittance

Auxiliary request 2 should be admitted into the proceedings.

The amendment to claim 1 resulted in a basis weight range that had a lower basis weight and implied less

material and thus less weight and reduced costs. The claimed range therefore had a technical effect.

The subject-matter of claim 1 thus *prima facie* involved an inventive step.

Reasons for the Decision

1. Prior use P1
 - 1.1 Due to the importance of P1 for the issue of inventive step of the subject-matter of claim 1 of all the requests, the Board will first consider the issue of whether P1 constitutes prior art under Article 54(2) EPC and which features it discloses.
 - 1.2 According to the statement of Ms Engel, S1, paragraph 10, P1 is a diaper manufactured by Kimberly Clark as Huggies Ultratrim, which had been taken out of Bag 1. As can be seen from figure 2 in S1, a lot number is printed on Bag 1. Furthermore figure 1 and 5 of S1 show that Bag 1 carried, in addition, a sticker relating to a consumer-panel study. S1 gives an explanation of how to read these lot numbers and extract the manufacturing date from them (10 August 2001 in the case of P1). S1, paragraphs 6, 7 and 13, further states that the Bag 1 could only have been obtained from a publicly available source and explains the calculations for arriving at the overlapping area of P1 (stated to be 85 cm²).
 - 1.3 The opposition division considered whether the evidence, which had been on file at that time, was sufficient to substantiate the alleged prior use P1. It questioned, in its decision, the way the lot numbers had been interpreted in order to obtain the

manufacturing date and considered that insufficient information regarding the purchase/testing of the product P1 had been provided.

In reply to this, the appellant filed S2 to S5 along with Exhibits A to F, and D9 to D11 with its grounds of appeal.

- 1.4 The respondent requested that S2-S5, Exhibits A-F, D10 and D11 not be admitted under Article 12(4) RPBA as they should have been filed earlier.

The Board notes that S2 to S5 and Exhibits A to F were filed to attest that the appellant bought Bag 1 comprising the diaper P1 through a public purchase channel and that the diapers in the purchased bags were used to conduct a consumer test US016487, in response to the doubts expressed by the opposition division. D10 is an opposition (where the company Kimberly-Clark, the producer of P1, is a party) including a statement by Linda Bryson containing an explanation on paragraphs 8 and 9 of how to obtain the manufacturing date from the lot number which confirms that the explanation given in D9 (a report of Amanda Gonzalez explaining also how to read the lot codes) is also valid for absorbent articles.

- 1.5 The Board finds that whilst the appellant possibly could have responded in more detail to all the objections made by the proprietor (in the proprietor's reply to the notice of opposition), the communication of the opposition division could well be seen as an indication that only the points addressed therein as regards the prior public use would need to be further discussed and substantiated.

In its communication (see point 4.1), the opposition division was of the opinion that the details of marketing, sale and testing the products were not proven but merely expressed specific concern regarding the fact that Ms Engel, the author of S1, only took up her position in 2005 and that the graphic design of P1 in S1 was not the same as in the supplied model.

Unlike in the decision T 576/11 cited by the respondent, where the evidence should have been filed in response to the opposition division's communication, in the present case it was only the decision of the opposition division (see decision, point 3.1.6) that made the appellant aware of the possible doubt of the opposition division regarding the interpretation of the lot numbers (for which the appellant filed D9 and D10) and the doubts regarding the purchase and testing of P1 (for which the appellant filed statements S2 to S4 and Exhibits A to F), as well as whether the bags were opened or in the original closed condition (for which the appellant filed statement S5).

- 1.6 This evidence should thus not necessarily have been presented before. Consequently the Board did not exercise its discretion under Article 12(4) RPBA to hold S2-S5 along with Exhibits A to F and D10 inadmissible.

The admittance of D9 was not contested by the respondent. The Board also finds no reason to exclude D9 from the proceedings.

- 1.7 The respondent argued that the purchase value of the diapers was not divisible by the number 168, which was stated in Exhibit A to be the number of purchased bags of the diaper P1. The Board is not convinced by this

argument. The bags were purchased in Ohio with a sales tax of 6% that falls on an individual bag price of \$12.49 and results in the exact amount of the purchase report in Exhibit A: \$2224.22. The Board thus sees no credible reason to doubt that Exhibit A discloses (as explained in S1 and S2) 168 bags of Huggies Ultratrim of the type P1 that were purchased on 6 September 2001 for the consumer-panel study US016487.

Further, Figures 1 and 5 of S1 show the label for the study on Bag 1. The Board also has no reason to doubt that the lot number on Bag 1 codifies the manufacturing date of 10 August 2001 as explained in D9 or D10 and shown in S1. This calculated manufacturing date is congruent with the purchase date and the respondent did not put forward any other possible way to decode the lot number. Thus, on the basis of the facts and arguments before it, the Board finds the evidence conclusive.

Contrary to the argument of the respondent, a standard of proof which is "up to the hilt" is not applicable here. Since the diaper in P1 was manufactured and marketed by a third party, the evidence did not lie within the sphere of the opponent at the time of purchasing (see Case Law of the Boards of Appeal of the European Patent Office, 9th edition, III.G.4.3.2 a)).

Thus, although the receipt is indeed not available anymore and the Board is conscious that the burden of proof is on the opponent to establish the facts alleged, the Board finds that S1, S2, Exhibit A, D9 and D10 are indeed sufficient and render proven that P1 was made publicly available before the filing date and is thus prior art under Article 54(2) EPC.

In addition it has been established that P1 has an overlapping area of 85 cm². Contrary to the argument of the respondent, the Board finds that the explanation in point 13 of S1 allows the skilled person to establish the overlap area with the required precision. Further, the measured overlapping of 85 cm² is almost twice the minimum defined in the claim, such that even taking into account any possible imprecision measuring the width and length of the overlapping area, the overlapping area would still fall within the claimed range.

- 1.8 With its letter dated 1 March 2019, the appellant filed statement S6 comprising the results of a circular bend stiffness test carried out using the method of US 5 009 653 (described in the patent) on samples of P1 that show that P1 has a stiffness lower than 40 gf (see below).

The respondent had argued in its letter dated 23 April 2019 that the very succinct assertions of the appellant might not explain how the samples were obtained and the tests carried out, and the Board pointed out in its communication that this point might require discussion (see point 2.5 of communication). As a response thereto, the appellant filed (with its letter dated 2 July 2019) additional circular bending stiffness measurements S6, wherein the mean stiffness of the landing area of P1 was measured to be between 10.6 gf and 16.8 gf (see S6, pages 3 and 4, item 13), i.e. well below the claimed 40 gf maximum value.

The method and the results of these tests were not contested by the respondent and the Board also finds no reason to do so. Further, S6 is indeed a legitimate response to the arguments of the respondent and to the

doubts put forward in the Board's communication. The Board thus exercised its discretion under Article 13(1) RPBA to admit S6 into the proceedings and finds it proven that the nonwoven laminate of the diaper P1 has a stiffness below 40 gf.

1.9 Regarding the basis weight of P1, the appellant stated in its letter dated 1 March 2019 that the landing zone material had a basis weight of "approximately" 60 g/m². However, in the absence of further evidence to establish which measurements were performed to establish this in P1, or how the measurements were carried out and which values were obtained to arrive at the asserted basis weight of "approximately" 60 g/m², the Board finds that it is not proven that the layer of the landing zone in P1 had a basis weight of 60 g/m².

2. Main request - Inventive step

2.1 The Board exercised its discretion under Article 13(1) RPBA and admitted the main request into the proceedings. Since the subject-matter of claim 1 of this request has however been found not to involve an inventive step, the reasons for admitting the request can be dispensed with.

2.2 As discussed above, the diaper P1 is an absorbent article with all the features of claim 1, with the exception of the following:

- the receiving means is a liquid-pervious flexible nonwoven laminate, including at least one inner and one outer layer

- the inner laminate layer and the outer laminate layer each have a basis weight within the interval 15-80 g/m².

2.3 Regarding the feature "the receiving means is a liquid-pervious flexible nonwoven laminate, including at least one inner and one outer layer", P1 comprises a single flexible nonwoven layer as its receiving means, the permeability of which to liquids has not been established. The respondent argued that the fact that the laminate of the invention was liquid pervious provided it with a more open structure, less stiffness due to the resulting less basis weight (due to it not requiring a liquid barrier) and it also required a lower level of quality control, since larger tolerances in the material could be accepted; it was therefore allegedly easier and cheaper to produce. Paragraph [0024] of the patent was given as a basis for this.

2.4 The Board does not however accept this since these alleged effects are not linked to the differing feature "liquid-pervious". The fact that a layer is liquid pervious does not necessarily imply that such a layer has a more open structure, less basis weight and, as a consequence, is less stiff. The effects are in particular not linked to liquid permeability *per se* and would in fact depend on other factors, such as the materials and manufacturing processes used. For example, liquid impervious nonwovens may be just as flexible as liquid pervious ones. Nonwovens can be made liquid pervious through different techniques and even stiff nonwoven materials with a high basis weight can be permeable to liquids, for example through the use of a surfactant to promote liquid strikethrough, or by other means.

Simply making the laminate liquid pervious also does not have any benefits on manufacturing and the price, which are more a factor of the materials and processes used with regard of the quality of the product to be achieved. As pointed out in the previous paragraph, it may even require further manufacturing steps and materials, such as the application of a surfactant, which would reflect negatively on the price and the quality control requirements. Since the layer is applied on the outer side of the backsheet, which is itself defined as being liquid impervious, it would not even perform any relevant function of passing liquids through, since these are contained behind the backsheet. The Board thus finds that making the laminate of the invention liquid pervious does not provide any recognisable technical effect in the context of the claim compared to P1.

- 2.5 The proprietor argued further that the provision of a laminate with at least one inner and one outer layer (instead of a single layer) would allow tailoring of one layer to comply with the backsheet and the other layer to comply with the fastening members. The Board does not accept this either. The claim does not define any feature of the at least two layers besides their basis weights nor how their basis weights could be adapted according to any specific use depending on the side they were facing. Further, it is not even excluded that both layers are identical or that the laminate be provided with even additional layers. Thus, the simple provision of a laminate with at least two layers has not been shown by the respondent to have the effect mentioned. Nor can the Board itself determine any other technical effect in the context of the claim compared to P1.

2.6 Since the provision of a liquid-pervious flexible nonwoven laminate, including at least one inner and one outer layer does not provide any recognisable effect, the objective problem to be solved by the first differing feature is simply to provide an alternative receiving means.

In the absence of any recognizable effect there can also be no synergy with the remaining differentiating feature of the claim.

2.7 The appellant filed D11 with the grounds of appeal to establish lack of inventive step starting from P1.

The appellant originally argued that P1 disclosed all the features of claim 1 (see point 3 of grounds of opposition) and rendered the subject-matter of the claim not novel. In the paragraph bridging pages 2 and 3 of its preliminary opinion, the opposition division had summarized the proprietor's (now respondent) point of view (see reply to the notice of opposition, page 5, first six paragraphs) that there was a contradiction between the arguments of the opponent (now appellant) and the statement of Heather Engel S1.

Although the inventive step objection had already been made by the opponent in its reply to the summons of the opposition division, it was only in its decision that the opposition division had stated specifically its own reasoning that P1 did not disclose the feature "a flexible nonwoven laminate with at least two layers", following discussion during the oral proceedings (see decision, point 3.2).

The filing of D11 with the grounds of appeal was thus the first opportunity for the opponent to react to the

opinion of the opposition division. Therefore the Board did not exercise its discretion under Article 12(4) RPBA to hold D11 inadmissible.

2.8 The skilled person would take D11 into consideration since D11 is concerned primarily with nonwoven fabrics and webs for hook and loop fastening systems (see e.g. paragraph "field of invention"), which is the purpose for which the laminate is used in claim 1, and with the possibility of forming such materials without a backing layer.

D11, column 3, lines 54 to 60, discloses that laminates including two or more layers with a possibly different basis weight are an alternative to fabrics with a single layer. The fabrics of D11 are liquid pervious, as stated in column 4, line 61 to column 5, line 7, since the discrete unbonded areas of their webs are "fluid permeable". In addition, it is clear from Figure 6 as well as the possible uses described in D11 (see e.g. column 4, lines 51 to 56) that such fabrics possess a certain degree of flexibility, since they may also be used in wrapping articles such as diapers. The examples of D11 summarized in the Table of column 23 include several single-layer and dual-layer webs, from which the skilled person would derive that dual-layered webs are not only suitable but also equally valid alternatives for use as a receiving means, and would thus replace the layer of P1 with a dual-layer according to D11 in an obvious manner when looking to solve the problem of finding an alternative.

2.9 The respondent argued that D11 does not disclose the stiffness of any of the materials and that if the skilled person adopted a two-layer material like the ones disclosed in D11, the stiffness would not be

maintained. The Board does not find this argument convincing. When looking for an alternative material, the skilled person would recognize from D11 that a material with two layers is also a possibility (see column 3, lines 54-60). However, and as stated above, the teaching of D11 is directed generally to nonwoven fabrics where no supporting backing layer or film is required and to a method of forming them (see column 3, lines 10-11). It is clear from the whole disclosure of D11 (see e.g. the Table on page 23 and the following two paragraphs) that the values disclosed in the Table are just examples and that the material may be tailored and adjusted according to the user's needs.

As a consequence, although D11 does not disclose any circular bend stiffness values, the skilled person looking for a suitable alternative material for the receiving means of P1, i.e. a material having suitable properties, would derive from D11 that a two-layer material is simply a valid alternative and would not be prompted to change any of the remaining properties of the material.

- 2.10 The further argument of the respondent that the skilled person would also make the receiving means smaller, as suggested in Figure 6 of D11 is not accepted. D11 is concerned primarily with fabrics and not with the products in which such fabrics will be used. The dimensions of the diaper or of the patch 76 made from the nonwoven loop material shown in Figure 6 are not discussed in D11 nor are the dimensions in Figure 6 other than illustrative. The skilled person would thus find no reason to change the dimensions of the receiving means of P1 when confronted with the teaching of D11.

- 2.11 Regarding the second differentiating feature "the inner laminate layer and the outer laminate layer each have a basis weight within the interval 15-80 g/m²", paragraph [0019] of the patent discloses that a basis weight between 20 and 65 g/m² meets the demands for both strength and softness but does not (nor does any other part of the patent) disclose an effect for the range 15 to 80 g/m², which is a broader range and therefore does not necessarily provide the same effects.
- 2.12 The respondent argued that the claimed basis weight values were low and provided a high degree of flexibility to the layers of the laminate. However, the Board cannot recognize this or any other effect in association with the specific choice of the end points 15 and 80 of the basis weight range in question, and finds that the flexibility is also dependent on the number of any additional layers that the laminate might possess and their basis weight, which remains entirely open in the claim due to the wording "at least one inner and one outer layer". The particular choice of the basis weight ranges of the inner and the outer layers is thus devoid of any significance for the claimed absorbent product and its receiving means. It can thus only be considered to represent an arbitrary choice when wishing to provide an alternative basis weight. By the very fact of it being arbitrary, such a choice does not involve an inventive step. Such basis weight values are also generally known for layers of laminates of nonwoven materials (see e.g. D11, Table in column 23).
- 2.13 For the above reasons, the subject-matter of claim 1 of the main request does not involve an inventive step (Article 56 EPC) when starting from P1, given the technical problem to be solved and applying the

teaching of D11. The main request is thus not allowable.

3. Auxiliary request 1 - admittance

3.1 This request was filed with letter dated 28 June 2018 and thus represents an amendment to the proprietor's complete case (Article 12(2) RPBA). Under Article 13(1) RPBA such amendment to a party's case may be admitted and considered at the Board's discretion, such discretion being exercised *inter alia* in view of the need for procedural economy. As is established case law of the Boards of Appeal, the requirement for procedural economy implies that amended requests should at least be *prima facie* allowable in order to be admitted.

3.2 This request is based on the combination of originally filed claims 1, 7, 8, 14, 15, 16 and 20, wherein the stiffness has been limited to the range of lower than 25 gf, which was however originally a preferred range defined in claim 14.

3.3 The Board finds that, at least on a *prima facie* basis, there is no direct and unambiguous disclosure of an absorbent article including a laminate, wherein the inner laminate layer and the outer laminate layer each have a basis weight within the interval 15-80 g/m² in combination with the nonwoven laminate having a stiffness lower than 25 gf.

Originally filed claim 14 defines that the nonwoven laminate has a stiffness which is lower than or equal to 40 gf, and preferably lower than 25 gf. Originally filed claims 15 and 16 define, respectively, that the inner and outer layers have a basis weight within the interval 15-80 g/m², and preferably within the interval

20-65 g/m². By combining the preferred narrow range of stiffness of claim 14 with the broader basis weight ranges of claims 15 and 16, claim 1 now defines a laminate with an inner and outer layer each having a basis weight as high as 80 g/m² that achieves at most a stiffness lower than 25 gf. This possibility was not unambiguously disclosed in the claims as originally filed and constitutes new technical information.

- 3.4 Contrary to the argument of the respondent, the description does not provide any pointers that would help the skilled person arrive at this particular combination of ranges nor does it provide any other alternative basis that supports the combination of features now present in claim 1. The paragraph on page 6, lines 7-14, discloses that a well suited laminate comprises layers with a basis weight of 30 g/m². The following paragraph is linked to this paragraph and states that values under 30 g/m² can also be used and the possible upper and lower limits of basis weight for the layers are discussed - values between 15 g/m² and 80 g/m² are considered preferable.

However, the skilled person reading the application would not consider these two paragraphs specifically linked to the paragraph referring to stiffness on page 7, lines 4-8, in a way that would create a single unambiguous disclosure of a laminate with a stiffness lower than 25 gf comprising layers with a basis weight as high as 80 g/m². There are two paragraphs between the aforementioned paragraphs on page 6 and the paragraph on page 7 that generally discuss the disposition and the bonding methods of the nonwoven laminates of the invention. The skilled person would thus understand the reference to "the nonwoven laminate" in the paragraph of page 7 relating to

stiffness as a general reference to the nonwoven laminate of the invention such as the reference made in the paragraphs immediately before without any specific link to any of the specific ranges of basis weight disclosed previously on page 6.

As argued by the appellant, it would indeed seem technically counter-intuitive when reading the application as filed that the highest possible basis weight (i.e. 80 g/m²) for each of the inner and outer layers would then result in a stiffness which is lower than 25 gf.

It should also be stressed that the Board is considering the *prima facie* allowability of such a claim, due to the amendment having been filed when it was. The analysis made and the arguments given by the parties to support their different positions, led the Board to conclude that, *prima facie*, there was (significant) doubt as to whether Article 123(2) EPC was fulfilled.

- 3.5 The respondent argued also that this matter would have been concluded differently if the subject-matter of originally filed claims 1, 14, 15 and 16 had been originally filed as a single independent claim and the higher stiffness value of 40 gf simply deleted. Albeit this is not the case that the Board had before it, the Board does not accept that it would necessarily have resulted in a different conclusion given the wording of the claim. By restricting the claim to the narrower stiffness range and in the absence of any pointer or alternative support in the whole content of the application that would allow the skilled person to directly and unambiguously derive that a laminate with an inner and outer layer each having a basis weight as

high as 80 g/m^2 could achieve a stiffness lower than 25 gf (which is essentially the situation with the request considered), it is difficult to understand how a different conclusion would have been reached.

3.6 The further argument of the respondent, that for the purpose of a novelty attack such a combination of features would have been considered a single disclosure is not accepted. Also for novelty purposes the content of a prior art document must be considered as a whole and includes only combinations of features that the skilled person can derive directly and unambiguously. The same considerations thus apply.

3.7 The subject-matter of claim 1 thus at least *prima facie* fails to meet the requirement of Article 123(2) EPC. Accordingly, the Board exercised its discretion under Article 13(1) RPBA not to admit this request into the proceedings.

4. Auxiliary request 2 - admittance

4.1 Auxiliary request 2 was filed during the oral proceedings before the Board. In comparison to the main request, claim 1 defines that the inner and the outer laminate layer each have a basis weight within the interval 15 to less than 30 g/m^2 .

4.2 The Board finds that the amendment to the basis weight range does not provide any recognisable effect. Paragraph [0019] of the patent simply opens the possibility of using a basis weight lower than 30 g/m^2 , since the stress involved is not particularly high. However, no effect is associated with the specific range of 15 to less than 30 g/m^2 in the whole disclosure of the patent nor would the skilled person

using their own knowledge recognize implicitly any effect associated with the claimed range.

- 4.3 The argument of the respondent that a lower basis weight implies less material and thus less weight and reduced costs, is not accepted. The wording of the claim does not exclude the laminate having more than two layers nor does it set any total weight for the laminate. The possible provision of further layers might indeed cancel any weight or cost benefit derived from the lower basis weight used in the inner and in the outer layer.

Further, the materials and processes used in any one of the layers are not defined, such that any consideration regarding the price of the laminate is purely speculative.

- 4.4 The amendment to claim 1 of auxiliary request 2 does not provide the amended range with an effect such that, at least *prima facie*, the subject-matter of claim 1 does not involve an inventive step for the same reasons as apply to claim 1 of the main request, since the basis weight range is still found by the Board to be arbitrary (see points 2.11 and 2.12). Accordingly, auxiliary request 2 is *prima facie* not clearly allowable and the Board thus exercised its discretion under Article 13(1) RPBA not to admit this request into the proceedings.

- 4.5 In the absence of any set of claims complying with the requirements of the EPC, the patent has to be revoked (Article 101(3) (b) EPC).

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:



T. Buschek

M. Harrison

Decision electronically authenticated