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**Datasheet for the decision
of 9 March 2021**

Case Number: T 1554/17 - 3.2.06

Application Number: 12166561.6

Publication Number: 2660377

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D04H3/16, D04H1/44, D04H1/54,
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Language of the proceedings: EN

Title of invention:

Method of making a double-sided embossed non-woven fabric

Patent Proprietor:

Huang, Chen-Cheng

Opponents:

Kimberly-Clark Worldwide, Inc.
Baumann, Alexander

Headword:

Relevant legal provisions:

EPC Art. 54, 123(2)
RPBA 2020 Art. 13(2), 25
RPBA Art. 12(4)
EPC R. 124(1)

Keyword:

Novelty - main request (no)

Late-filed auxiliary request 1 - justification for late filing
(no)

Amendments - auxiliary requests 2 and 3 - added subject-matter
(yes)

Late-filed request 4 - request could have been filed in first
instance proceedings (yes)

Decisions cited:

T 0263/05, T 0212/97, T 0966/99

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 1554/17 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 9 March 2021

Appellant: Huang, Chen-Cheng
(Patent Proprietor)
Rm. 1206, No.346, Sec. 3
Nanjing E. Road
Songshan District
Taipei City 105 (TW)

Representative: Michalski Hüttermann & Partner
Patentanwälte mbB
Speditionstraße 21
40221 Düsseldorf (DE)

Respondent: Kimberly-Clark Worldwide, Inc.
(Opponent 1)
2300 Winchester Road
Neenah WI 54956 (US)

Representative: Dehns
St. Bride's House
10 Salisbury Square
London EC4Y 8JD (GB)

Respondent: Baumann, Alexander
(Opponent 2)
Hanselmannstraße 12
80809 München (DE)

Representative: Breuer Friedrich Hahner
Patentanwälte PartG mbB
Brienner Straße 1
80333 München (DE)

Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 26 April 2017 revoking European patent No. 2660377 pursuant to Article 101(3) (b) 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 (patent proprietor) against the decision of the opposition division revoking European Patent No. 2 660 377. With the grounds of appeal it requested that the decision under appeal be set aside and the patent be maintained according to a main request or, in the alternative, that it be maintained in an amended form based on one of auxiliary requests 1 to 4.
- II. The respondents 1 and 2 (opponents 1 and 2 respectively) requested that the appeal be dismissed.
- III. The following document is relevant to the present decision:
D1 US 4 741 941
- 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 claim 1 of the main request did not appear to be novel over D1. Additionally, the Board indicated that auxiliary requests 1 to 3 did not fulfil the requirement of 123(2) EPC and that the Board intended to exclude auxiliary request 4 under Article 12(4) RPBA 2007.
- V. Oral proceedings were held before the Board on 9 March 2021 by videoconference, during which the appellant filed a new auxiliary request 1 replacing former auxiliary request 1. It also requested that a particular argument be included in the minutes.

At the end of the oral proceedings, the requests of the parties were as follows:

The appellant requested that the decision under appeal be set aside and the patent be maintained in amended form based on one of the following requests in the given order:

- main request, filed with letter dated 14 August 2015,
- new auxiliary request 1, filed during the oral proceedings,
- auxiliary request 2, filed with letter dated 14 August 2015,
- auxiliary request 3, filed with letter dated 6 March 2017,
- auxiliary request 4, filed with the grounds of appeal.

The respondents (opponents 1 and 2) requested that the appeal be dismissed.

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

"A method of making a double-sided embossed non-woven fabric, comprising:

melting resin pellets (211, 212) to form a melt, followed by feeding the melt through a fiber-forming device (22) to form the semi-molten fibers (50) and subsequently discharging the semi-molten fibers (50) from the fiber-forming device (22) onto the screen assembly (4);

forming a stack of semi-molten fibers (50) on a screen assembly (4) on a suctioning device (6), the screen assembly (4) including a first layer structure (41) that has a plurality of suction holes (411) arranged into a first pattern, and a second layer structure (42) that is disposed on the first layer

structure (41) and that has a plurality of elements (421) arranged into a second pattern; and

embossing the stack of the semi-molten fibers (50) on the screen assembly (4) by suctioning the stack of the semi-molten fibers (50) using the suctioning device (6) such that the stack of the semi-molten fibers (50) is drawn into the suction holes (411) to wrap the elements (421), thereby forming the stack of the semi-molten fibers (50) into a non-woven fabric (7) with a raised pattern corresponding to the second pattern of the screen assembly (4) and a recess pattern corresponding to the first pattern of the screen assembly (4)."

Claim 1 of the first auxiliary request reads as follows:

"1. A method of making a double-sided embossed non-woven fabric, comprising:

melting resin pellets (211, 212) to form a melt, followed by feeding the melt through a fiber-forming device (22) to form the semi-molten fibers (50) and subsequently discharging the semi-molten fibers (50) from the fiber-forming device (22) onto the screen assembly (4);

forming an air permeable stack (5) of semi-molten fibers (50) on a screen assembly (4) on a suctioning device (6) by directly stacking the semi-molten fibers (50), the screen assembly (4) including a first layer structure (41) that has a screen wall body (410) and that has a plurality of suction holes (411) formed in the screen wall body (410) and arranged into a first pattern, and a second layer structure (42) that is disposed on the screen wall body (410) of the first layer structure (41) and that has a plurality of elements (421) arranged into a second pattern; and

embossing the stack (5) of the semi-molten fibers (50) on the screen assembly (4) by suctioning the stack (5) of the semi-molten fibers (50) using the suctioning device (6) such that the stack (5) of the semi-molten fibers (50) is drawn into the suction holes (411) to wrap the elements (421) and an area of the screen wall body (410) which is not covered by the second layer structure (42), thereby forming the stack (5) of the semi-molten fibers (50) into a non-woven fabric (7) having a base portion (70) covering the area of the screen wall body (410), a first level (71) of recessed portions (711) extending downwardly from the base portion (70) and having a recess pattern corresponding to the first pattern of the screen assembly (4), and a second level (72) of protuberant portions extending upwardly from the base portion (70) and having a raised pattern corresponding to the second pattern."

Claim 1 of the second auxiliary request reads as follows:

"A method of making a double-sided embossed non-woven fabric, comprising:

melting resin pellets (211, 212) to form a melt, followed by feeding the melt through a fiber-forming device (22) to form the semi-molten fibers (50) and subsequently discharging the semi-molten fibers (50) from the fiber-forming device (22) onto the screen assembly (4);

forming a stack of semi-molten fibers (50) on a screen assembly (4) on a suctioning device (6), the screen assembly (4) including a first layer structure (41) that has a screen wall body (410) and a plurality of suction holes (411) arranged into a first pattern and formed in the screen wall body (410), and a second layer structure (42) that is disposed on the first

layer structure (41) and that has a plurality of elements (421) arranged into a second pattern and being in the form of elongate ribs that are formed into a net body (420), wherein the screen wall body (410) serves as a conveyor belt trained on and driven by a pair of driving wheels (62); and

embossing the stack of the semi-molten fibers (50) on the screen assembly (4) by suctioning the stack of the semi-molten fibers (50) using the suctioning device (6) such that the stack of the semi-molten fibers (50) is drawn into the suction holes (411) to wrap the elements (421), thereby forming the stack of the semi-molten fibers (50) into a non-woven fabric (7) with a raised pattern corresponding to the second pattern of the screen assembly (4) and a recess pattern corresponding to the first pattern of the screen assembly (4).

Claim 1 of the third auxiliary request reads as follows:

"A method of making a double-sided embossed non-woven fabric, comprising:

melting resin pellets (211, 212) to form a melt, followed by feeding the melt through a fiber-forming device (22) to form the semi-molten fibers (50) and subsequently discharging the semi-molten fibers (50) from the fiber-forming device (22) onto the screen assembly (4);

forming a stack of semi-molten fibers (50) on a screen assembly (4) on a suctioning device (6), the screen assembly (4) including a first layer structure (41) that has a screen wall body (410) and a plurality of suction holes (411) arranged into a first pattern and formed in the screen wall body (410), and a second layer structure (42) that is disposed on the first layer structure (41) and that has a plurality of

elements (421) disposed on the screen wall body (410) and arranged into a second pattern and being in the form of elongate ribs that are formed into a net body (420), wherein the screen wall body (410) serves as a conveyor belt trained on and driven by a pair of driving wheels (62); and

embossing the stack of the semi-molten fibers (50) on the screen assembly (4) by suctioning the stack of the semi-molten fibers (50) using the suctioning device (6) such that the stack of the semi-molten fibers (50) is drawn into the suction holes (411) to wrap the elements (421) and an area of the screen wall body (410) which is not covered by the second layer structure (42), thereby forming the stack of the semi-molten fibers (50) into a non-woven fabric (7) having a base portion covering the area of the screen wall body (410), a first level of recessed portions extending downwardly from the base portion and having a recess pattern corresponding to the first pattern of the screen assembly (4), and a second level of protuberant portions extending upwardly from the base portion and having a raised pattern corresponding to the second pattern."

Claim 1 of the fourth auxiliary request reads as follows:

"A method of making a double-sided embossed non-woven fabric, comprising:

melting resin pellets (211, 212) to form a melt, followed by feeding the melt through a fiber-forming device (22) to form the semi-molten fibers (50) and subsequently discharging the semi-molten fibers (50) from the fiber-forming device (22) onto the screen assembly (4);

forming a stack of semi-molten fibers (50) on a screen assembly (4) on a suctioning device (6), the

screen assembly (4) including a first layer structure (41) that has a screen wall body (410) and a plurality of suction holes (411) arranged into a first pattern and formed in the screen wall body (410), and a second layer structure (42) that is disposed on the first layer structure (41) and that has a plurality of elements (421) disposed on the screen wall body (410) and arranged into a second pattern, wherein the stack of the semi-molten fibers (50) includes a plurality of first semi-molten fibers (501) and a plurality of second semi-molten fibers (502), the first semi-molten fibers (501) being formed by melting first resin pellets (211) to form a first melt, followed by feeding the first melt through a spinnerette (221), the second semi-molten fibers (502) being formed by melting second resin pellets (212) to form a second melt, followed by feeding the second melt through a melt-blowing die (222):and

embossing the stack of the semi-molten fibers (50) on the screen assembly (4) by suctioning the stack of the semi-molten fibers (50) using the suctioning device (6) such that the stack of the semi-molten fibers (50) is drawn into the suction holes (411) to wrap the elements (421) and an area of the screen wall body (410) which is not covered by the second layer structure (42), thereby forming the stack of the semi-molten fibers (50) into a non-woven fabric (7) having a base portion covering the area of the screen wall body (410), a first level of recessed portions extending downwardly from the base portion and having a recess pattern corresponding to the first pattern of the screen assembly (4), and a second level of protuberant portions extending upwardly from the base portion and having a raised pattern corresponding to the second pattern."

VII. The arguments from the appellant as far as relevant for the present decision may be summarized as follows:

Main request - Article 54 EPC

The subject-matter of claim 1 was novel.
D1 did not disclose the feature "[embossing the stack of the semi-molten fibers (50)] such that the stack (5) of the semi-molten fibers (50) is drawn into the suction holes (411) to wrap the elements (421)... having a raised pattern corresponding to the second pattern."

First Auxiliary request - admittance

The first auxiliary request should be admitted into the proceedings, since it was only with the surprising negative preliminary opinion of the Board in the communication pursuant to Article 15(1) RPBA 2020 that the appellant became aware of the necessity to reply as regards objections under Article 123(2) EPC and Article 84 EPC. In addition, the pandemic situation had delayed the communication between the representative and its client.

Second auxiliary request - Article 123(2) EPC

Claim 1 of the second auxiliary request fulfilled the requirement of Article 123(2) EPC.

Claims 1 and 4 as granted together with the method described on page 6, line 19 to 21 of the application as filed, provided a basis for the method according to claim 1 of the second auxiliary request. The last paragraph on page 9 instructed the skilled person how

to do modifications to the claims such as leaving out features of a specific embodiment.

Third auxiliary request - Article 123(2) EPC

Claim 1 of the third auxiliary request fulfilled the requirement of Article 123(2) EPC. Page 4, lines 15 to 27 and page 5, lines 5 to 17 of the application as filed, provided a basis for the amendments to claim 1.

The objections of the respondents regarding Article 123(2) EPC were vague and did not mention any specific missing feature from the disclosure such that it had been impossible to argue adequately prior to the Board's communication. In any case, the last paragraph on page 9 allowed any possible generalisation such that there was a direct and unambiguous disclosure of the features of claim 1 and there was no additional feature missing.

The appellant requested that the minutes include its argument that the arguments of the respondents were vague and did not mention any specific missing feature from the disclosure, so that the onus cannot be on the appellant to argue why all necessary features are included.

Fourth auxiliary request - admittance

The fourth auxiliary request should be admitted into the proceedings.

No oral proceedings before the opposition division had taken place and it was not foreseeable that a further auxiliary request would be necessary. Thus the

appellant should be granted a further opportunity to amend its case.

VIII. The arguments from the respondents may be summarized as follows:

Main request - Article 54 EPC

D1 disclosed all the features of claim 1. As was disclosed in column 8, lines 50 to 58 in reference to Figure 9, D1 also disclosed a fabric with three levels as defined in claim 1.

First Auxiliary request - admittance

The first auxiliary request was late-filed and should not be taken into account under Article 13(2) RPBA 2020.

Second auxiliary request - Article 123(2) EPC

Only some of the features of the method disclosed on page 4, line 15 to line 6, line 21, were added to claim 1 of the second auxiliary request. The combination of features of claim 1 was therefore not directly and unambiguously disclosed.

Third auxiliary request - Article 123(2) EPC

Claim 1 of the third auxiliary request did not overcome the objections regarding Article 123(2) EPC to the second auxiliary request and thus its subject-matter also constituted an unallowable intermediate generalization.

Fourth auxiliary request - admittance

Auxiliary request 4 could and should have been filed earlier and should be excluded from the proceedings, since all the novelty and inventive step objections against the main request were already filed during the opposition proceedings.

Reasons for the Decision

1. Main request - Article 54 EPC
 - 1.1 Subsequent to the Board's communication (see items 2.4 and 2.5 thereof, where the appellant's written arguments are fully addressed) in the oral proceedings the appellant only contested that D1 failed to disclose the following features (the portion in square brackets being per se known):

"[embossing the stack of the semi-molten fibers (50)] such that the stack (5) of the semi-molten fibers (50) is drawn into the suction holes (411) to wrap the elements (421) and an area of the screen wall body (410) which is not covered by the second layer structure (42), thereby forming the stack (5) of the semi-molten fibers (50) into a non-woven fabric (7) having a base portion (70) covering the area of the screen wall body (410), a first level (71) of recessed portions (711) extending downwardly from the base portion (70) and having a recess pattern corresponding to the first pattern of the screen assembly (4), and a second level (72) of protuberant portions extending upwardly from the base portion (70) and having a raised pattern corresponding to the second pattern."

- 1.2 The appellant submitted for the first time in the oral proceedings that the features above were not disclosed in D1 on the basis that Figure 9 of D1 only disclosed the formation of a non-woven fabric with two levels, whereas claim 1 defined the formation of a fabric having three levels.

Leaving the question of admittance of the new submission aside, the Board is anyway not convinced by it. Figure 9 of D1 discloses a nonwoven fabric web including its cross-section which is formed by using the "flat metal sheet 80" of Figure 2. As also disclosed in column 8, lines 50 to 58 in reference to Figure 9, hollow projections 86 and depressions 90 are formed in the fabric web, the former corresponding to a second level of protuberant portions extending upwardly and the latter corresponding to a first level of recessed portions from the base portion (as defined in claim 1). These projections and depressions can also be unambiguously identified in the long edge cross-section of Figure 9 showing 4 projections alternating with 3 depressions, with an inflection between each depression and projection. These inflections form a base portion as defined in claim 1 on the surface of the sheet 80 as shown on Figure 2 between the perforations 82 and the cone-shaped pins 34. Similar inflections are shown in the web of Figure 11 (see also column 9, lines 1 to 5) corresponding to the forming surface of Figure 4, albeit in a less pronounced way. D1 therefore directly and unambiguously discloses the formation of a non-woven fabric with three levels.

- 1.3 Since no further features of claim 1 were in dispute, the Board finds that D1 discloses all the features of claim 1. The subject-matter of claim 1 is thus not

novel (Articles 52(1) and 54(1) and (2) EPC). The main request is therefore not allowable.

2. First Auxiliary request - admittance

2.1 Claim 1 of the first auxiliary request was filed during the oral proceedings before the Board, i.e. after notification of the summons to oral proceedings. As the parties were summoned in 2020, Article 13(2) RPBA 2020 is applicable according to Article 25(1) RPBA 2020.

2.2 Article 13(2) RPBA 2020 stipulates that any amendment to a party's appeal case made after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

2.3 The appellant argued that it had no reason to doubt the reasoning given in the decision under appeal that had been favorable for it (regarding Articles 84 and 123(2) EPC) and that the mere re-filing of the objections by the respondents did not imply that the Board would agree with them. That being the case, it was only with the surprising negative preliminary opinion of the Board in the communication pursuant to Article 15(1) RPBA 2020 that the appellant became aware of the necessity to reply.

Further, the appellant argued that the patentee was based in Taiwan and that the pandemic situation had delayed communication between the representative and its client such that the oral proceedings were the appropriate occasion to file necessary and straightforward amendments, since this sped up the proceedings.

- 2.3.1 The Board does not find these arguments convincing. The objections under Article 123(2) EPC and Article 84 EPC were filed during opposition proceedings and maintained in the replies to the grounds of appeal. It should certainly not come as a surprise to the appellant that the Board may give a preliminary opinion in favour of the respondents' objection. Also, as the replies to the grounds of appeal were filed in 2018, there had been more than ample time (over two years) before notification of the summons to react to these objections, even in face of the current pandemic situation and the distance between the representative and patentee. As set out in Article 12(3) RPBA 2020 and previously in Article 12(2) RPBA 2007 the parties are expected to present their complete case with the grounds of appeal and the reply respectively. The preliminary opinion of the Board pursuant to Article 15(1) RPBA 2020 preparing the parties for oral proceedings, lays out matters which appear of particular significance for the decision to be taken; the Board's opinion is not an invitation to parties to make amendments to their appeal case (see e.g. Case Law of the Boards of Appeal, 9th edition, V.A.4.7).
- 2.3.2 The Board therefore finds that no exceptional circumstances justified by cogent reasons are present which would lead to the filing of the amendments of the party's appeal case according to the first auxiliary request after the notification of the summons (and here even as late as during the oral proceedings).
- 2.4 Accordingly, the Board used its discretion not to take auxiliary request 1 into account (Article 13(2) RPBA 2020).

3. Second auxiliary request - Article 123(2) EPC

3.1 Claim 1 of the second auxiliary request was amended with regard to claim 1 of the main request by the introduction of the following underlined features:

"forming a stack of semi-molten fibers (50) on a screen assembly (4) on a suctioning device (6), the screen assembly (4) including a first layer structure (41) that has a screen wall body (410) and a plurality of suction holes (411) arranged into a first pattern and formed in the screen wall body (410), and a second layer structure (42) that is disposed on the first layer structure (41) and that has a plurality of elements (421) arranged into a second pattern and being in the form of elongate ribs that are formed into a net body (420), wherein the screen wall body (410) serves as a conveyor belt trained on and driven by a pair of driving wheels (62);"

3.2 Auxiliary request 2 had been filed already during the opposition proceedings and formed part of the appellant's requests in its grounds of appeal. The presence of new auxiliary request 1 nevertheless led to a lack of convergency in the subject-matter of the requests when taken in order. However, the Board did not assess auxiliary request 1 as regards its substance but rather did not take it into account under Article 13(2) RPBA 2020. In the particular circumstances of this case, the lack of convergency as regards the new auxiliary request 1 did not complicate the assessment of the request nor did it lead to divergent considerations, so that the Board saw no reason not to admit auxiliary request 2 in the given order of requests.

3.3 The appellant argued that claims 1 and 4 as granted together with the method described on page 6, line 19 to 21 of the application as filed, provided a basis for the method according to claim 1.

The Board does not agree. The cited passage on page 6, lines 19-21 is part of a disclosure referred to as "this embodiment". "This" embodiment refers to an embodiment of a method described from page 4 line 15 to (at least) page 6, line 21, after which some possible modifications are further disclosed. The appellant has only included some of the features from the more specific screen assembly from "this" embodiment described on page 6. For example, the specific suctioning device disclosed for use in the method of "this" embodiment is described as including a suction box and being surrounded by the screen assembly on lines 17-19 of page 6.

In addition, the method disclosed on pages 4 and 5 of "this" embodiment is also more specific than the one defined in claim 1 of the second auxiliary request, and discloses for example that the stack formed by the suctioning device is an air-permeable stack (see page 4, lines 15-19).

3.4 The appellant further argued that the last paragraph on page 9 instructed the skilled person that they could make modifications to the claims such as leaving out features of the specific embodiment.

3.4.1 The Board does not find this argument convincing. The referred paragraph reads:

"With the invention thus explained, it is apparent that various modifications and variations can be made

without departing from the spirit of the present invention. It is therefore intended that the invention be limited only as recited in the appended claims."

The skilled person cannot directly and unambiguously derive/obtain guidance from this passage on how to perform any specific modification to the claims. The Board finds that this vague wording, being devoid of any unambiguous technical disclosure, can have no influence on the interpretation of the description or the claims to allow introduction of only those features now included in claim 1 and omitting others.

3.5 The subject-matter of claim 1 of the second auxiliary request therefore also does not fulfil the requirement of Article 123(2) EPC. The second auxiliary request is thus not allowable.

4. Third auxiliary request - Article 123(2) EPC

4.1 Claim 1 of the third auxiliary request was amended with regard to claim 1 of the second auxiliary request by the introduction of the following underlined features and the deletion of the struck-out ones:

"forming a stack of semi-molten fibers (50) on a screen assembly (4) on a suctioning device (6), the screen assembly (4) including a first layer structure (41) that has a screen wall body (410) and a plurality of suction holes (411) arranged into a first pattern and formed in the screen wall body (410), and a second layer structure (42) that is disposed on the first layer structure (41) and that has a plurality of elements (421) disposed on the screen wall body (410) and arranged into a second pattern and being in the form of elongate ribs that are formed into a net body

(420), wherein the screen wall body (410) serves as a conveyor belt trained on and driven by a pair of driving wheels (62); and

embossing the stack of the semi-molten fibers (50) on the screen assembly (4) by suctioning the stack of the semi-molten fibers (50) using the suctioning device (6) such that the stack of the semi-molten fibers (50) is drawn into the suction holes (411) to wrap the elements (421) and an area of the screen wall body (410) which is not covered by the second layer structure (42), thereby forming the stack of the semi-molten fibers (50) into a non-woven fabric (7) having a base portion covering the area of the screen wall body (410), a first level of recessed portions extending downwardly from the base portion with a raised pattern corresponding to the second pattern of the screen assembly (4) and having a recess pattern corresponding to the first pattern of the screen assembly (4), and a second level of protuberant portions extending upwardly from the base portion and having a raised pattern corresponding to the second pattern."

- 4.2 The appellant argued that page 4, lines 15 to 27 and page 5, lines 5 to 17 of the application as filed, provided a basis for these amendments.
- 4.3 The Board is not persuaded by this argument. The appellant has added *inter alia* the feature "[the second layer structure has a] plurality of elements (421) disposed on the screen wall body (410)" to claim 1. However, page 4, lines 25-27, which the appellant submitted as being a basis for this amendment, discloses the second layer structure being disposed on the screen wall body and not only a plurality of elements thereof.

4.4 Further, the objections under Article 123(2) EPC for the second auxiliary request have not been overcome, not least since the suctioning device and the stack of semi-molten fibres disclosed in the embodiment of pages 4 to 6 is more specific than the one now defined in claim 1 (see item 3.3 above).

4.5 The appellant further argued that the objections of the respondents regarding Article 123(2) EPC were vague and did not mention any specific missing feature from the disclosure such that it had been impossible to argue adequately before receiving the communication of the Board. And, in any case, the last paragraph on page 9, as stated previously, should allow any possible generalisation such that there was a direct and unambiguous disclosure of the features of claim 1 and there was no additional feature missing.

The Board does not find these arguments convincing. The respective replies to the grounds of appeal filed by the respondent 1 (see page 3, fourth paragraph) and the respondent 2 (see paragraph bridging pages 15 and 16) cite *inter alia* the features on page 6, lines 1-5 and 14-21, as missing. It is clear, even from these (short) cited passages, that the respondents were referring to the spinnerette and melt-blowing die described in lines 1-5 and to the elongate ribs and the conveyor features of the screen assembly described in lines 14-21. As discussed above under item 3.4, the last paragraph on page 9 does not provide any guidance to the skilled person on how to perform any specific modification to the claims.

4.6 The subject-matter of claim 1 of the third auxiliary request therefore also does not fulfil the requirement

of Article 123(2) EPC. Auxiliary request 3 is thus not allowable.

5. Request to include an argument in the minutes

5.1 The appellant requested the inclusion of an argument (as laid out in item 4.5 above) in the minutes.

5.2 Rule 124(1) EPC provides that "Minutes of oral proceedings ... shall be drawn up containing the essentials of the oral proceedings ..., [and] the relevant statements made by the parties..." (emphasis added by the Board)..

5.2.1 This Rule does not require the minutes to reflect the arguments of the parties. It is also the normal practice of the Boards that arguments are not included. An example of such practice may be found in T 263/05 (OJ 2008, 329, Reasons 8.5-8.8), which summarizes in the Headnote that "the arguments of the parties should not be recorded in the minutes, nor should statements or admissions made in oral proceedings which a party considers will be of use to it in any subsequent proceedings in national courts but which have no bearing on the decision which the Board is required to make, such statements or admissions neither constituting "essentials of the proceedings" nor "relevant statements" within the meaning of Rule 76(1) EPC 1973 [now Rule 124(1) EPC]".

5.2.2 It is clear that discretion may be used as to what are the "essentials" or what is "relevant", both in examination/opposition proceedings and in appeal proceedings (see also e.g. T 212/97, not published in OJ EPO, Reasons 2.2, and T 966/99, not published in OJ EPO, Reasons 7.2.2, respectively).

5.2.3 In as far as concerns minutes of oral proceedings of the Boards of Appeal, what constitutes "the essentials of the oral proceedings" or "the relevant statements made by the parties" is determined by reference to what the Board has to decide (T 966/99, Reasons 7.2.2).

5.3 The submissions made by the appellant's representative as to Article 123(2) EPC form part of the appellant's arguments and these have been dealt with in this decision (see e.g. item 4.5 above).

5.4 The Board consequently refused the appellant's request to include its argument in the minutes.

6. Fourth auxiliary request - admittance

6.1 The fourth auxiliary request was filed for the first time with the grounds of appeal. The respondents argued that the fourth auxiliary request should not be admitted into the proceedings, because it could and should have been filed before the opposition division.

6.2 Under Article 12(4) RPBA 2007 (applicable according to Article 25(2) RPBA 2020) the Board has the discretionary power to hold inadmissible facts, evidence and requests that could have been presented in the first instance proceedings.

6.3 The preliminary opinion of the opposition division already considered that the subject-matter of claim 1 was not novel and summarized the further objections regarding the first and second auxiliary requests.

The third auxiliary request was filed with letter dated 6 March 2017 after the issue of the preliminary opinion

of the opposition division and after the communication dated 17 February 2017 stating that the proprietor would not attend the oral proceedings scheduled for 17 May 2017.

6.4 The Board finds that the appellant was well aware, or at least should have been, of the objections of lack of novelty and lack of inventive step based on D1-D5 put forward in regard to the main request and auxiliary requests during the opposition proceedings. The appellant thus had ample opportunity during the opposition proceedings to react to those objections, such that all the auxiliary requests aimed at overcoming the latter could and should have been submitted during the opposition proceedings.

6.5 The appellant argued that no oral proceedings had taken place and thus it should be granted a further opportunity to amend its case.

The Board does not agree. As explained above, the appellant was already well aware of the objections regarding novelty and inventive step and had the opportunity to file auxiliary requests directed to overcoming these objections either in reply to the preliminary opinion of the opposition division and, if it wanted to make use of its right to oral proceedings, it should have requested same. Its conscient decision not to file further requests at the appropriate time cannot be repaired at the expense of procedural economy and procedural fairness.

6.6 The Board thus exercised its discretion to exclude the fourth auxiliary request from the proceedings (Article 12(4) RPBA 2007, Article 25(2) RPBA 2020).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated