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**Datasheet for the decision  
of 7 October 2020**

**Case Number:** T 1730/19 - 3.2.07

**Application Number:** 05736694.0

**Publication Number:** 1763608

**IPC:** D21F11/14

**Language of the proceedings:** EN

**Title of invention:**

FABRIC CREPE AND IN FABRIC DRYING PROCESS FOR PRODUCING  
ABSORBENT SHEET

**Applicant:**

GPCP IP Holdings LLC

**Headword:**

**Relevant legal provisions:**

EPC Art. 83  
RPBA Art. 12(4)  
RPBA 2020 Art. 15(1), 24, 25

**Keyword:**

Sufficiency of disclosure - (no)  
Late-filed auxiliary requests - requests could have been filed  
in examination proceedings (yes)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
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Case Number: T 1730/19 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 7 October 2020**

**Appellant:** GPCP IP Holdings LLC  
(Applicant) 133 Peachtree Street, N.E.  
Atlanta, Georgia 30303 (US)

**Representative:** Grünecker Patent- und Rechtsanwälte  
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Leopoldstraße 4  
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**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 7 January 2019  
refusing European patent application No.  
05736694.0 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** I. Beckedorf  
**Members:** A. Beckman  
A. Cano Palmero

## **Summary of Facts and Submissions**

- I. The appellant (applicant) lodged an appeal within the prescribed period and in the prescribed form against the decision of the examining division refusing European patent application No. 05 736 694.0.
- II. In its decision, the examining division held with respect to the then main request that the application does not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art and, therefore, does not fulfill the requirements of Article 83 EPC.

An auxiliary request, submitted on the day of the oral proceedings before the examining division, was not admitted into the proceedings as being late-filed and clearly not allowable with respect to Article 123(2) EPC.

- III. The appellant requested
- that the decision under appeal be set aside and that a patent be granted on the basis of one of the sets of claims submitted with the statement setting out the grounds of appeal as main request and as auxiliary requests 1 to 3,
- wherein the set of claims of the main request corresponds to the set of claims of the main request underlying the impugned decision, and wherein auxiliary requests 1 to 3 were filed for the first time in appeal proceedings with the statement setting out the grounds of appeal.

IV. The present decision refers to the following documents which were cited for the first time in appeal proceedings:

Declaration of Mr. Greg A. Wendt

Exhibit A: US 4,191,609

Exhibit B: US 6,622,868 B1

Exhibit C: US 4,551,199

Exhibit D: US 4,849,054

Exhibit E: US 5,887,517

Exhibit F: US 2002/0148584 A1.

V. In a communication pursuant to Article 15(1) RPBA 2020 dated 23 April 2020 the Board provided its negative preliminary, non-binding opinion

- concerning the appellant's main request with respect to the fulfilment of the requirements of Article 83 EPC and
- concerning the appellant's auxiliary requests with respect to their admittance into the appeal proceedings.

The appellant did not respond in substance to the Board's preliminary opinion.

VI. Oral proceedings were held before the Board as scheduled on 7 October 2020.

For further details on the course of the oral proceedings, reference is made to the minutes thereof. The order of the decision was given at the end of the oral proceedings.

VII. Independent claim 1 of the main request reads as follows:

"A method of making a fabric-creped absorbent cellulosic sheet, the method comprising:

(a) compactively dewatering a papermaking furnish to form a nascent web (205) having an apparently random distribution of papermaking fiber;

(b) applying the dewatered web (205) having the apparently random fiber distribution to a translating transfer surface (206) that is moving at a transfer surface speed;

(c) fabric-creping the web (205) from the transfer surface (206) at a consistency of from about thirty percent to about sixty percent utilizing a creping fabric (210) with a patterned creping surface, the creping fabric (210) traveling at a fabric speed that is slower than the transfer surface speed, the fabric-creping step occurring under pressure in a fabric creping nip (208) defined between the transfer surface (206) and the creping fabric (210);

(d) selecting the patterned creping surface of the creping fabric (210), the nip parameters, the velocity delta between the speed of the transfer surface (206) and the speed of the fabric (210), and the consistency of the web (205), such that the web (205) is creped from the transfer surface (206) and redistributed on the creping fabric (210) to form a web (205) with a drawable reticulum having a plurality of interconnected regions of different local basis weights including at least (i) a plurality of fiber-enriched regions (12) of a high local basis weight, interconnected by way of (ii) a plurality of lower local basis weight linking regions (14), wherein the drawable reticulum of the web comprises a cohesive fiber matrix that exhibits an elevated void volume upon drawing;

(e) drying the web (205) to form a dried web (205); and

(f) drawing the dried web (205) between a first roll (240) that is operated at a machine direction velocity

that is greater than the fabric speed and a second roll (242) that is operated at a machine direction velocity that is greater than that of the first roll (240), the step of drawing the dried web being effective to elevate the void volume of the web (205)."

- VIII. In view of the outcome of the present decision it is not necessary to reproduce the wording of any independent claim of the auxiliary requests, the amendments of which concerned the introduction of definitions of the nip pressure, the nip length and the velocity delta in step (d) of claim 1.
- IX. The appellant submits that the decision under appeal is incorrect in respect of the main request, i.e. that the subject-matter of the main request meets the requirements of Article 83 EPC, and that auxiliary requests 1 to 3 should be admitted into the proceedings.

The appellant's corresponding arguments are discussed in detail in the reasons for the decision below.

## **Reasons for the Decision**

### *1. Transitional provisions*

The appeal proceedings are governed by the revised version of the Rules of Procedure which came into force on 1 January 2020 (Articles 24 and 25(1) RPBA 2020), except for Article 12(4) to (6) RPBA 2020 instead of which Article 12(4) RPBA 2007 remains applicable (Article 25(2) RPBA 2020).

2. *Main request - Sufficiency of disclosure (Article 83 EPC)*

2.1 According to step (d) of claim 1 of the main request, to obtain a drawable reticulum comprising a cohesive fiber matrix that exhibits void volume upon drawing, a combination of the following creping step parameters has to be selected, as acknowledged by the appellant (see the statement setting out the grounds of appeal, point 3.3.2):

- a) the patterned creping surface of the creping fabric,
- b) the nip parameters, which include at least
  - b1) nip pressure,
  - b2) nip length,
  - b3) backing roll hardness,
  - b4) fabric approach angle,
  - b5) fabric takeaway angle, and
  - b6) uniformity (as explained on page 18, lines 22 to 24 of the application as filed),
- c) the velocity delta between the speed of the transfer surface and the speed of the fabric, and
- d) the consistency of the web.

2.2 In the decision under appeal, the examining division found that the application does not disclose the invention in a manner sufficiently clear and complete for it be carried out by person skilled in the art because the application as filed does not disclose a combination of specific values of all the creping step parameters that would result in a drawable reticulum comprising a cohesive fiber matrix that exhibits void volume upon drawing.

2.3 It is established case law of the Boards of Appeal that an invention is sufficiently disclosed if at least one



way is clearly indicated enabling the person skilled in the art to carry out the invention (Case Law of the Boards of Appeal, 9<sup>th</sup> edition 2019, II.C.5.2.).

For example, whether or not the disclosure of the application is sufficiently clear and complete within the meaning of Article 83 EPC must be decided by appraising the information contained in the examples as well as other parts of the description in the light of the common general knowledge of the skilled person at the priority date (Case Law of the Boards of Appeal, *supra*, II.C.5.3.), as put forward by the appellant.

- 2.4 The appellant has explained that each of the parameters a) to d) is sufficiently disclosed by referring
- to parts of the description, figures and examples of the application as filed,
  - specifically to the declaration of Mr. Greg A. Wendt (in the following "the declaration") for confirming the common general technical knowledge of the person skilled in the art at the priority date of the present application and
  - in general terms to exhibits A to F as evidences for the common general technical knowledge in the art.

As pointed out by the appellant, the declaration should supplement the common general technical knowledge underlying the application as filed. The technical expert Mr. Greg A. Wendt has confirmed in its declaration that the parameters at stake are either explicitly disclosed in the present specification, or that a person skilled in the art would easily understand from common general knowledge how to select one or more of these parameters. In the declaration it has been further noted that certain parameters are

interrelated and, thus, the selection of one or two of these parameters will necessarily result in certain other parameters being obtained.

Thus, the appellant has submitted that the originally filed application documents provide sufficient guidance for a skilled person in the art to select an appropriate combination of each of the parameters at stake in order to carry out the claimed invention according to claim 1.

- 2.5 The Board agrees with the appellant insofar as the disclosure is aimed at the skilled person which may use common general knowledge to supplement the information contained in the application in order to carry out the invention.

However, the technical expert Mr. Greg A. Wendt is listed as an inventor in the present application, as acknowledged in the declaration, item 1. As an inventor Mr. Greg A. Wendt (in the following "the inventor") has the benefit of privileged knowledge gained in the course of the claimed invention which sets him apart from the notional skilled person.

Hence, the Board is not convinced that the declaration of the technical expert Mr. Greg A. Wendt, being an inventor of the present application, can be taken as proof for the common general technical knowledge of the skilled person in the present case.

- 2.6 The appellant has brought forward that an inventor, however, must know the technical background to achieve its invention. The inventor has common general technical knowledge and it is its inventive contribution that builds on it. As it could be taken

from the voice of the inventor's statements under items 36 and 44 of the declaration, the inventor has made a distinction to the common general knowledge of the skilled person by addressing it as a third person. Hence, in the present declaration, the inventor was capable of recognizing what is common general technical knowledge and the suitability of the declaration as proof for the common general technical knowledge of the skilled person could not be denied.

- 2.7 The Board concurs with the appellant view insofar as the inventor is possessed of common general technical knowledge of the skilled person in the art in the technical field of papermaking and is therefore not to be disqualified *a priori* as a skilled person. However, contrary to the appellant's view, it is inherent in the inventor that the transition between its common general technical knowledge and its inventive contribution is not distinct, but fluent.

The Board notes in this respect that it is neither apparent from the declaration in general nor from items 36 and 44 in particular, where the inventive contribution separates from the common general technical knowledge, *i.e.* it is not clear what was known to the inventor before and after its invention. In fact, the inventor's inventive contribution interfuses its common general technical knowledge. Thus, the common general technical knowledge is not distinctly reflected or cannot be clearly distinguished or identified in the declaration.

The Board concludes in view of the above that the present declaration is not suitable to be considered as common general technical knowledge of the skilled person in the art. Thus, the declaration cannot

contribute to demonstrate the incorrectness of the decision under appeal.

- 2.8 As far as the appellant refers in general terms to exhibits A to F as evidences for the common general technical knowledge in the art, the Board notes that exhibits A to F are patent documents.

The established case law of the Boards of Appeal is that general common knowledge does not normally include patent documents. By way of exception patent specifications may be considered to be common general knowledge when a series of patent specifications provides a consistent picture that a particular technical procedure was generally known and belonged to the common general knowledge in the art at the relevant date (Case Law of the Boards of Appeal, *supra*, I.C. 2.8.2).

As the appellant refers to the patent documents A to F only separately with respect to particular parameters and with respect to the declaration and does not indicate why these documents should be seen as common general knowledge in view of the above-mentioned established case law, the Board is not convinced that patent documents A to F evidence common general knowledge.

Hence, exhibits A to F are not considered as common general technical knowledge of the skilled person in the art. Thus, the disclosure of documents A to F cannot contribute to show the incorrectness of the decision under appeal.

- 2.9 As a consequence, following point 1 of the reasons of the impugned decision, the appellant's argumentation

that the skilled person, in view of its common general knowledge,

- would know how to select the proper fabric approach and takeaway angles,
- would understand the parameter "uniformity" and
- would select an appropriate combination of each of the claimed parameters

remains merely an allegation for which no proof has been given. The appellant did not adequately demonstrate that the appealed decision is incorrect in that the application does not disclose at least one combination of **specific** creping step parameters that would result in a drawable reticulum comprising a cohesive fiber matrix that exhibits void volume upon drawing, *i.e.* that the application does not disclose at least one way of carrying out the invention.

On the contrary, the appellant has merely pointed out information, distinct passages in the application as filed and referred to non-proven common general knowledge pertaining to the at least nine parameters required according to claim 1, wherein the combination of specific creping step parameters to achieve the claimed result remains undisclosed. Thus, no combination of specific creping step parameters is so defined that the skilled person on the basis of the original application documents and using their common general knowledge, could identify, without any inventive effort and undue burden, the technical measures leading to the claimed subject-matter.

Hence, the Board concurs with the finding in the impugned decision, point 1 of the reasons, that the application does not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

3. *Admittance of the first to third auxiliary request into the proceedings*

3.1 Auxiliary requests 1 to 3 have not been the subject of the appealed decision so their admittance into the appeal proceedings depends on the Board's discretion under Article 12(4) RPBA 2007.

By virtue of Article 12(4) RPBA 2007, a Board has discretion not to admit requests which could and should have been presented already in the proceedings leading to the decision under appeal. For the Board decisive in this respect is the issue whether there exists justifying reasons for the filing of such auxiliary requests for the first time with the statement setting out the grounds of appeal.

3.2 The appellant has argued that in the course of the oral proceedings before the examining division it became apparent that the disclosure of certain nip parameters, which were not at stake earlier in the examination proceedings, had to be discussed. Due to lack of contact to the appellant during the oral proceedings, the representative of the appellant could not react promptly and appropriately thereto. Furthermore, the appellant received the exact argumentation of the examining division only with the reasons of the decision under appeal. Thus, it took time to elaborate and to submit additional auxiliary requests in reaction to the examining division's findings.

3.3 The Board cannot share the appellant's view since the Board cannot identify any surprising change in the examination proceedings that could have prevented the appellant from filing additional auxiliary requests

addressing the issue of sufficiency of disclosure already in examination proceedings. On the contrary, the examining division raised the objections under Article 83 EPC already in the first communication under Article 94(3) EPC dated 11 November 2016, point 1.5, in a further communication under Article 94(3) EPC dated 26 May 2017, point 2, and in the annex to the summons to attend oral proceedings issued 16 February 2018, point 3.

In fact, in reaction to the summons to attend oral proceedings, the appellant submitted with letter dated 31 October 2018 an amended set of claims in order to overcome the objection raised under point 2 of the summons with respect to Article 123(2) EPC (see applicant's letter dated 31 October 2018, under point 1). However, at the same time, the appellant obviously failed to submit any additional request in order to overcome the objection raised under point 3 of the summons with respect to Article 83 EPC.

Thus, the appellant was aware of the objections under Article 83 EPC right from the beginning of the examination proceedings, but let pass the opportunity in examination proceedings to react thereto by submitting additional auxiliary requests. The Board concludes that the appellant **could and should** have presented additional auxiliary requests already in examination procedure to address the known objections raised under Article 83 EPC.

For these reasons, submitting the first to third auxiliary request for the first time in appeal proceedings is not justified and the Board exercises its discretion to not admit the auxiliary requests into

the proceedings in accordance with Article 12(4) RPBA 2007.

4. As a consequence, the appellant has not shown in a convincing manner the incorrectness of the decision under appeal in respect of the main request. Since the auxiliary requests are not admitted into the appeal proceedings, there is no valid set of claims on the basis of which a patent could be granted.

### **Order**

#### **For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated