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Datasheet for the decision of 10 October 2023

Case Number: T 1880/20 - 3.2.06

Application Number: 16167106.0

Publication Number: 3085346

IPC: A61F13/534, A61F13/539

Language of the proceedings: EN

Title of invention:
NONWOVEN CARRIER FOR ABSORBENT ARTICLE

Patent Proprietor:
Ontex BVBA

Opponent:
Bock, Dr. Wolfgang

Headword:

Relevant legal provisions:
EPC Art. 83, 56, 123(2)
RPBA 2020 Art. 13(2)

Keyword:
Sufficiency of disclosure - (yes)
Inventive step - main request (no)
Amendments - added subject-matter - auxiliary requests 1 to 5 (yes)
Amendment after summons - exceptional circumstances (no)

Decisions cited:
T 1294/16, T 1857/19, T 0713/14

Catchword:

Europäisches Patentamt
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Beschwerdekammern

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Case Number: T 1880/20 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 10 October 2023

Appellant: (Opponent)	Bock, Dr. Wolfgang Stuntzstrasse 33 81677 München (DE)
Representative:	Samson & Partner Patentanwälte mbB Widenmayerstraße 6 80538 München (DE)
Respondent: (Patent Proprietor)	Ontex BVBA Genthof 5 9255 Buggenhout (BE)
Representative:	Larangé, Françoise Ontex BVBA Korte Keppestraat 21 9320 Aalst (BE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 11 August 2020 concerning maintenance of the European Patent No. 3085346 in amended form.**

Composition of the Board:

Chairman	M. Harrison
Members:	M. Hannam
	J. Hoppe

Summary of Facts and Submissions

I. An appeal was filed by the appellant (opponent) against the interlocutory decision of the opposition division in which it found that European patent No. 3 085 346 in an amended form met the requirements of the EPC.

II. The appellant requested that the decision under appeal be set aside and the European patent be revoked.

III. In its reply to the appeal, the respondent (patent proprietor) requested that the appeal be dismissed (main request) or, as an auxiliary measure, that the patent be maintained based on one of auxiliary requests 1 to 5 filed therewith.

IV. The following document is relevant to the present decision:

A1 EP-A-0 947 549

V. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that, for the main request, the requirement of Article 83 EPC appeared to be met and that the requirement of Article 56 EPC may require discussion. It further indicated that the subject-matter of claim 1 of each of the auxiliary requests appeared to extend beyond the content of the application as filed.

VI. With its submission of 30 August 2023, the appellant filed objections to the auxiliary requests on file.

VII. Oral proceedings were held before the Board on 10 October 2023, during which the appellant filed a further request numbered auxiliary request 6. At the close of the oral proceedings, the parties requests were as follows:

The appellant requested that the decision under appeal be set aside and the European patent be revoked.

The respondent requested that the appeal be dismissed (main request) or, as an auxiliary measure, that the patent be maintained based on one of auxiliary requests 1 to 5 filed with the reply to the appeal, or according to auxiliary request 6 filed during oral proceedings.

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

"A nonwoven carrier (1) for immobilizing superabsorbent polymer particles (28) in an absorbent article, comprising a nonwoven top layer (7), penetrable by the particles, and a nonwoven bottom layer (8), whereby said top layer is mechanically bonded by hydroentanglement to the bottom layer (8), wherein the bottom layer (8) is porous with a pore size smaller than said particles, characterized in that said top layer (7) is a carded nonwoven made of staple fibers (19), and in that the bottom layer (8) is a spunmelt fabric, and wherein the staple fibers (19) are a blend of at least two types of polyester, polyethylene and/or polypropylene fibers, comprising at most 50% of a first type of fibers which are short and light, and at least 50% of a second type of long and heavy fibers."

Claim 1 of auxiliary request 1 reads as for claim 1 of the main request with the following feature appended:

"wherein the blend comprises between 65% and 75% of the second type of fibers".

Claim 1 of auxiliary request 2 reads as for claim 1 of the main request with the following feature appended:

"wherein the recovery after compression of the nonwoven carrier (1) is greater than 90% according to the EDANA standard method 120.R4(12)".

Claim 1 of auxiliary request 3 reads as for claim 1 of the main request with the following feature appended:

"wherein the blend comprises between 65% and 75% of the second type of fibers and wherein the recovery after compression of the nonwoven carrier (1) is greater than 90% according to the EDANA standard method 120.R4(12)".

Claim 1 of auxiliary request 4 reads as for claim 1 of the main request with the following feature appended:

"wherein the short and fine fibers have a crimp frequency of 12/cm and the long and coarse fibers have a crimp frequency of 3.5/cm and wherein the recovery after compression of the nonwoven carrier (1) is greater than 90% according to the EDANA standard method 120.R4(12)".

Claim 1 of auxiliary request 5 reads as for claim 1 of the main request with the following feature appended:

"wherein the blend comprises between 65% and 75% of the second type of fibers and wherein the short and fine fibers have a crimp frequency of 12/cm and the long and coarse fibers have a crimp frequency of 3.5/cm and wherein the recovery after compression of the nonwoven

carrier (1) is greater than 90% according to the EDANA standard method 120.R4(12)".

Claim 1 of auxiliary request 6 reads as for claim 1 of the main request with the following feature appended:

"and in that the nonwoven carrier comprises superabsorbent polymer particles which are at least partially immobilized by the staple fibers and retained by the bottom layer".

IX. The appellant's arguments relevant to the present decision may be summarised as follows:

Main request
The subject-matter of claim 1 lacked an inventive step when starting from example 9 of A1. The sole differentiating feature was the chemical composition of the short/light fibres. No technical effect was disclosed in the patent in relation to the claimed chemical composition of these fibres. Consequently, the objective technical problem could be seen as 'to provide an alternative material for the short/light fibres of the carded nonwoven'. The chemical composition for the short/light fibres of claim 1 was arbitrary and lacked a demonstrated technical effect. If the technical effect was known from the skilled person's knowledge of such fibres, this was not a hitherto unknown technical effect and so could not justify the recognition of an inventive step.

Auxiliary requests 1 to 5
The subject-matter of claim 1 of each auxiliary request failed to meet the requirement of Article 123(2) EPC.

Auxiliary request 6
This should not be taken into account according to Article 13(2) RPBA 2020. No exceptional circumstances were present. The objections to the auxiliary requests had been raised by both the appellant and the Board and no reaction had been made until the oral proceedings, which was manifestly too late.

X. The respondent's arguments relevant to the present decision may be summarised as follows:

Main request
The subject-matter of claim 1 involved an inventive step. In addition to the chemical composition of the short/light fibres, example 9 of A1 also failed to disclose the long/heavy fibres, as these bicomponent fibres were 41mm long which was less than the definition of long fibres provided in para. [0057] of the patent. The SAP in the slurry of A1 also did not penetrate into the supporting sheet. The objective technical problem was thus 'how to improve the recovery of the nonwoven carrier after compression'. If the appellant's problem were considered, the most obvious modification would be to replace the 50% rayon fibres with MFC which was already available in the slurry. Changing the natural hydrophilic fibre for a man-made hydrophobic alternative would change other technical attributes of the nonwoven, such as crimp and wet-state compression resistance. Even if the patent failed to disclose any advantages of the claimed chemical composition of the short/light fibres, these were evident from the skilled person's general knowledge of fibre properties. The claimed material selection was thus not arbitrary.

Auxiliary requests 1 to 5
Claim 1 of the respective auxiliary requests met the requirement of Article 123(2) EPC. The basis for the claimed subject-matter was from page 10, line 32 of the application as filed.

Auxiliary request 6
This should be admitted. Prior to the oral proceedings, the argument that SAP was not present and did not necessarily penetrate into the top layer in example 9 of A1 had not been raised. Thus exceptional circumstances justified it being taken into account. T 1294/16, T 1857/19 and T 0713/14 also supported exceptional circumstances being recognised in the present case.

Reasons for the Decision

Main request

1. *Article 83 EPC*

Although the Board found that the requirements of Article 83 EPC were fulfilled, the reasons for this are not relevant in view of the finding regarding a lack of inventive step for the subject-matter of claim 1.

2. *Article 56 EPC*

2.1 The subject-matter of claim 1 lacks an inventive step.

2.2 Starting from example 9 of A1 (see paras. [0271] to [0274]), this fails to disclose solely the feature of claim 1 that the short and light fibres are of

polyester, polyethylene and/or polypropylene.

2.3 Leaving aside the fact that the respondent had, until the oral proceedings before the Board not argued as such, the respondent's argument that A1 also failed to disclose the second type of staple fibres, i.e. the long and heavy fibres, is not accepted. Claim 1 does not define how 'long' fibres are to be interpreted. Nor does the patent description provide a definition which might be read into the claims. Para. [0057] of the patent, to which the respondent referred in its argument, states that 'a second type of fibre .... is long, more preferably longer than 50mm' which is not a definition of how the term 'long' is to be understood, but merely a preference. It thus follows that the term 'long' is subject to a technically reasonable interpretation in which the 'long' fibres are simply longer (albeit by an unknown amount) than the 'short' fibres. In para. [0273] of A1, fibres of 35mm length and 41mm length are separately disclosed as included in a mixed carded web. It is thus technically reasonable for the fibres of 41mm length to be classed as 'long', at least in the context of this particular disclosure of two different fibre compositions of different lengths where one part of the staple fibres is simply defined as long and one as short.

For completeness it should be noted that the respondent accepted that the longer fibres in A1 would be considered as 'heavy'.

2.4 With reference to para. [0274] of A1, the respondent's allegation of a further differentiating feature of claim 1 over A1, that the SAP was applied in the slurry and so did not penetrate the supporting sheet 821, is not accepted. Irrespective of the fact that this was an

argument presented for the first time at oral proceedings and thus could, at the discretion of the Board, not be taken into account (Article 13(2) RPBA 2020), the Board sees the supporting sheet structure as necessarily having a pore size allowing SAP particles, which are not defined in claim 1 as being present in the supporting layer anyway (the presence of SAP particles in the supporting sheet is defined only in a later dependent claim 4) to penetrate it. SAP particles are known to be available also in very small sizes which would penetrate the supporting layer. Hence the pores available in the top layer will always be of such a size to allow SAP to penetrate (i.e. merely depending on the size of the SAP particles which might be used).

2.5 Thus, based on the sole differentiating feature indicated in point 2.2 above, the objective technical problem to be solved can be seen as 'to provide an alternative short and light staple fibre material'. The respondent's proposed problem reading 'how to improve the recovery of the nonwoven carrier after compression' is not found to be objective since the recovery from compression is neither technically comprehensibly, nor indeed disclosed in the patent to be, related to the chemical composition of the short and light fibres, namely being of polyester, polyethylene and/or polypropylene.

2.6 The use of man-made fibres, such as polyester, polyethylene and/or polypropylene is commonplace in nonwoven structures used in absorbent articles. Indeed polyethylene is already used, albeit for the long and heavy fibres, in example 9 of A1. No reason is apparent, nor has an argument been presented by the respondent, as to why polyester, polyethylene and/or polypropylene would not be used as a suitable

alternative short and light fibre to rayon in the mixed carded web of example 9 of A1. Therefore, faced with the problem of simply providing an alternative short and light staple fibre material, the skilled person would provide such fibres made from polyester, polyethylene and/or polypropylene and reach the claimed subject-matter without exercising an inventive step. The respondent's argument that example 9 of A1 provided a balance of hydrophilic and hydrophobic properties in the top layer does not dissuade the skilled person from the above modification when trying to solve the posed technical problem. Simply wishing to provide an alternative short and light staple fibre material, this balance of hydrophilic/hydrophobic properties would not be seen as essential to maintain in a modified top layer composition, because the skilled person is merely trying to find an alternative and not to produce any particular effect. Even if it were desired to maintain this balance of properties, para. [0082] of A1 discloses that, when a supporting sheet is fully hydrophobic (which the carded web modified in the light of the technical problem would be), this balance of properties can be achieved by the addition of hydrophilic staple fibres (e.g. wood pulp and fibrillated Lyocell) in the slurry which is deposited on the supporting sheet. This consideration would therefore not dissuade the skilled person from using polyester, polyethylene and/or polypropylene as a suitable alternative short and light fibre to rayon in the mixed carded web of example 9 of A1.

2.7 The respondent's contention that the most obvious modification of example 9 of A1, and thus that which the skilled person would choose, is to replace the 50% rayon fibres with MFC which was already available in the slurry, is not persuasive. The skilled person is

not limited to 'the most obvious' modification of prior art in order to reach the claimed subject-matter. In fact, any number of possible modifications can render the subject-matter not inventive, provided that any such alternative would be obvious to a skilled person. In the present case, the general knowledge of the skilled person would guide the skilled person, in the light of the problem to be solved, to provide short and light fibres made from polyester, polyethylene and/or polypropylene without their having to exercise an inventive step, since no technical effect is achieved by a selection of any such fibre material.

2.8 The respondent's argument that changes to the technical attributes of the nonwoven would dissuade the skilled person from providing a man-made (hydrophobic) short and light fibre composition rather than the rayon (hydrophilic) fibre composition in A1 is not accepted. The objective problem simply demands that an alternative for the short and light fibres be found. With no technical effect being attributable to the short and light fibres of polyester, polyethylene and/or polypropylene with respect to the nonwoven top layer, the skilled person would have no reason to question the suitability of this chemical composition as being an appropriate alternative.

2.9 As to the respondent's argument that, even though no advantages of the claimed chemical composition of the short/light fibres were disclosed in the patent, these would be evident from the skilled person's general knowledge of fibre properties, this does not justify the recognition of an inventive step. Firstly, the respondent failed to identify any technically reasonable advantages offered by the short and light fibres merely being of polyester, polyethylene and/or

polypropylene. Secondly, even if such advantages of the claimed solution were known to the skilled person through their general knowledge at the priority date of the patent, such advantages cannot then provide the basis for an inventive step, since the skilled person's knowledge of these would render the modifications obvious.

2.10 The respondent further argued in relation to advantages of the claimed chemical composition of the short/light fibres that, being man-made rather than a natural fibre, these allowed tailor-made properties to be selected. Nothing in claim 1 suggests anything tailor made in the properties resulting from the top layer using solely man made fibres. Whilst a man-made fibre may enable properties of the resultant web to be tailored to particular requirements, nothing in claim 1 or even the patent as a whole, discloses any such consideration having been made. A similar conclusion is reached as regards the claimed composition providing an improved compression resistance over the rayon fibres of A1. No evidence has been provided that the chemical composition alone of the short/light fibres provides any structural benefit in the claimed web. Any such advantage would anyway be expected to further depend upon many variables of the specific fibre chosen, such as its length and weight as well as any further processing undergone (e.g. crimping).

2.11 In summary, therefore, starting from example 9 of A1 and in the light of the objective technical problem to be solved, the skilled person would reach the claimed subject-matter on the basis of common general knowledge without exercising an inventive step.

2.12 The requirements of Article 56 EPC are thus not met and the main request is not allowable.

Auxiliary request 1

3. *Article 123(2) EPC*

3.1 The respondent filed auxiliary request 1 in reply to the grounds of appeal. The basis for the amendment to claim 1 relative to the main request (the addition of the blend comprising between 65 and 75% of the second type of fibres) was given as para. [0058] of the patent as granted (i.e. page 13, lines 1 to 6 of the application as filed).

3.2 In its preliminary opinion, the Board opined that this passage was just part of the disclosure of a preferred embodiment starting on page 9, line 28, such that a plurality of additional features were disclosed in combination with that sole feature which had been taken-up into claim 1.

3.3 At oral proceedings, the respondent argued that the 'base disclosure' of this embodiment started on page 10, line 32 rather than page 9, line 28, such that no features had been unallowably omitted in the amended claim.

3.4 Irrespective of this being a change to the respondent's appeal case, this alternative passage of the description as filed still fails to provide a direct and unambiguous basis for the subject-matter of claim 1. The nonwoven carrier forming the 'base disclosure' from page 10, lines 32 onwards, includes superabsorbent polymer (SAP) particles trapped between the staple fibres of the top layer of the nonwoven carrier. Claim

1 does not include SAP, such that a direct and unambiguous disclosure of the claimed subject-matter is anyway not to be found in the passage of the originally filed description provided by the respondent as the basis.

3.5 To this objection the respondent presented no counter argument.

3.6 The Board thus finds the subject-matter of claim 1 not to meet the requirement of Article 123(2) EPC. Auxiliary request 1 is thus not allowable.

Auxiliary requests 2 to 5

4. *Article 123(2) EPC*

4.1 To the objection that the subject-matter of claim 1 of each of the auxiliary requests 2 to 5 suffered from the same lack of basis as claim 1 of auxiliary request 1, the respondent presented no counter argument.

4.2 The Board thus finds the subject-matter of claim 1 of each of auxiliary requests 2 to 5 not to meet the requirement of Article 123(2) EPC at least for the same reasons as apply to auxiliary request 1. Auxiliary requests 2 to 5 are thus not allowable.

Auxiliary request 6

5. *Admittance*

5.1 According to Article 13(2) RPBA 2020, an 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.

5.2 Auxiliary request 6 was filed during the oral proceedings before the Board such that exceptional circumstances are required for the request to be taken into account.

5.3 The respondent's contention that the argument regarding SAP not being included in the claimed nonwoven carrier of the auxiliary requests and not having been raised before the oral proceedings does not present exceptional circumstances. After the negative preliminary opinion of the Board, it was only during the oral proceedings that the new basis for the subject-matter of claim 1 of each of the auxiliary requests 1 to 5 was given by the respondent. The indication by the Board that claim 1 of these requests failed to include SAP in the nonwoven carrier could thus not have been given earlier and is a direct consequence of the respondent more comprehensively arguing its basis for claim 1 of the auxiliary requests only during the oral proceedings. No exceptional circumstances can thus be recognised in this sequence of events justifying auxiliary request 6 being taken into account.

5.4 As for the respondent's argument that the SAP in example 9 of A1 not penetrating into the top layer was a new factual situation presenting exceptional circumstances, this is not accepted. Not only was this an argument presented by the respondent itself for the first time at oral proceedings (see point 2.4 above) when discussing which features of claim 1 of the main request were known from A1 (it had been accepted in the written proceedings that the fibre type of the short

and light fibres was the only difference over A1), this argument was found not to be persuasive such that the Board's preliminary opinion as to which features were known from A1 was simply confirmed at oral proceedings. The presentation of this argument thus had no bearing on the outcome of the inventive step objection and thus cannot be seen to have presented exceptional circumstances justifying a new auxiliary request being taken into account.

5.5 The respondent cited three decisions in support of its contention that exceptional circumstances were to be recognised.

5.5.1 In T 1294/16, an appeal resulting from the refusal of a patent application, the Board found that exceptional circumstances justifying the admittance of a new request were to be recognised if the submission was not detrimental to procedural economy, provided that this did not adversely affect any other party. As an *ex parte* appeal case, there was no 'other party' that could be adversely affected. This contrasts with the present *inter partes* case in which the appellant would also have to familiarise itself with a new request during the oral proceedings.

5.5.2 In case T 1857/19 an auxiliary request was filed which, in comparison to the former request considered, deleted all apparatus claims. The Board held that such a significant enhancement of procedural economy could be seen as exceptional circumstances justifying the request being taken into account. As indicated in point 5.5.1 above, no such procedural economy was to be recognised in the present case such that the findings regarding exceptional circumstances in T 1857/19 did

not apply here.

5.5.3 At the time of filing the appeal in case T 0713/14, the Rules of Procedure of the Boards of Appeal were those of 2007, which permitted amendments to be admitted if any issues raised could be dealt with without adjournment of the oral proceedings (Article 13(3) RPBA 2007). Despite the parties having no doubt been aware of the introduction of the new Rules of Procedure, the Board in that case held that it might overstretch a party's obligations of due diligence to pre-empt possible communications in all pending cases, particularly when cases had been pending long before the entry into force of the new rules. In contrast, the present appeal had been filed after entry into force of the 2020 version of the Rules of Procedure meaning that no change in procedural conditions had had to be accommodated by the respondent. The exceptional circumstances justifying the consideration of a new request in T 0713/14 thus did not apply in the present appeal case.

5.5.4 Therefore, none of the cited cases provided justification for exceptional circumstances to be recognised in the present case.

5.6 In summary of all the above, absent exceptional circumstances justifying admittance of auxiliary request 6, the Board decided not to take auxiliary request 6 into account (Article 13(2) RPBA 2020).

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:

D. Grundner M. Harrison

Decision electronically authenticated