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**Datasheet for the decision
of 26 November 2014**

Case Number: T 0738/11 - 3.2.06

Application Number: 00203299.3

Publication Number: 1074200

IPC: A46B5/02, A46B9/04, B25G1/10

Language of the proceedings: EN

Title of invention:
Toothbrushes

Patent Proprietor:
Colgate-Palmolive Company

Opponent:
The Procter & Gamble Company

Relevant legal provisions:
EPC Art. 123(2), 84, 56, 114(2)
RPBA Art. 13(1), 12(4)

Keyword:
Main request and 1st to 4th auxiliary requests:
extension beyond the content of the application as filed -
not allowable;
5th to 7th auxiliary requests:
extension beyond the content of the application as filed -
not admitted;
D12 and D13 filed during oral proceedings - admitted;
8th auxiliary request:
admitted into proceedings, inventive step (yes)



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

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Case Number: T 0738/11 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 26 November 2014

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
9 February 2011 concerning maintenance of the
European Patent No. 1074200 in amended form.**

Composition of the Board:

Chairman M. Harrison
Members: G. de Crignis
K. Garnett

Summary of Facts and Submissions

- I. By way of its interlocutory decision, the opposition division found that European Patent No. 1 074 200 as amended met the requirements of the European Patent Convention (EPC).
- II. The appellant (opponent) filed an appeal against this decision and paid the appeal fee. In its grounds of appeal, the appellant relied on the following documents:
- | | |
|-----|-----------------|
| D3 | US-A-4 283 808 |
| D4 | US-A-2 179 266 |
| D5 | US-A-4 263 691 |
| D6 | US-A-4 091 404 |
| D7 | US-A-5 305 490 |
| D8 | US-A-1 899 252 |
| D9 | EP-A-0 366 641 |
| D10 | US-A-5 339 482 |
| D11 | US-A-4 949 457. |
- III. With its reply to the grounds of appeal dated 27 October 2011, the respondent (proprietor) filed a main request and first to fourth auxiliary requests.
- IV. With its communication annexed to a summons to oral proceedings, the Board indicated its preliminary view that the requirement of Article 123(2) EPC was not met with regard to all requests.
- V. In its reply of 24 October 2014, the respondent maintained the previously submitted requests and additionally filed fifth to seventh auxiliary requests.

VI. Oral proceedings were held before the Board on 26 November 2014.

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

The respondent requested that the decision under appeal be set aside and the patent be maintained on the basis of its main, alternatively one of its first to fourth auxiliary requests, all as filed with its letter dated 27 October 2011, alternatively on the basis of one of its fifth to seventh auxiliary requests filed with its letter dated 24 October 2014, alternatively on the basis of its eighth auxiliary request filed during the oral proceedings of 26 November 2014.

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

"A toothbrush handle (35) having a head portion (40) carrying or adapted to carry a bristle configuration (50) and a grip enhancing unitary mat (41) **characterised in that** the grip enhancing unitary mat (41) comprises grip enhancing surfaces (42, 43, 44) arranged continuously around at least two adjacent surfaces of the handle (35), the grip enhancing unitary mat (41) being entwined around the handle (35) and being substantially elongated along the longitudinal axis of the handle (35)."

Claim 1 of auxiliary request 1 includes the following additional feature:

"wherein the grip enhancing surfaces of the mat also afford grip enhancing configurations which are ribs inclined diagonally to the handle."

Claim 1 of auxiliary request 2 includes the following feature added to claim 1 of auxiliary request 1:

"and the grip enhancing configurations (45) are provided on at least one location at the front or back of the handle and at at least one side of the handle."

Claim 1 of auxiliary request 3 includes the following feature in addition to claim 1 of auxiliary request 2:

"and at three separate locations on the handle."

Claim 1 of auxiliary request 4 includes the following feature in addition to claim 1 of the main request:

"wherein the grip enhancing surfaces of the mat also afford grip enhancing configurations, which are ribs, inclined diagonally to the handle, the unitary mat being wrapped around the handle and the grip enhancing configurations (45) being provided at three separate locations on the handle."

Claim 1 of auxiliary request 5 differs from claim 1 of the main request in that the characterising portion reads as follows:

"... the handle has a body portion having a palm engaging end portion (36) with a rounded free end (47), a waist (37), a finger engageable shoulder (38), a neck (39) and the head portion (40) for receiving bristles of the bristle configuration (50) in a surface (46), the end portion (36) being wider than the shoulder (38) which is wider than the waist (37), the grip enhancing unitary mat (41) comprises grip enhancing surfaces (42, 43, 44) arranged continuously around at least two adjacent surfaces of the handle (35), the grip

enhancing unitary mat (41) being entwined around the handle (35) so as to wrap around the waist (37) and provide a first grip enhancing surface (42) on the shoulder (38) on a front bristle face of the handle as well as a second grip enhancing surface (43) on a back face of the shoulder of the handle and a third grip enhancing surface (44) on a back face of the palm engaging end portion (36) of the handle, and the grip enhancing unitary mat (41) being substantially elongated along the longitudinal axis of the handle (35)."

Claim 1 of auxiliary request 6 differs from claim 1 of the main request in that the characterising portion reads as follows:

"the grip enhancing unitary mat (41) comprises grip enhancing surfaces (42, 43, 44) arranged continuously around four adjacent surfaces of the handle (35), the four adjacent surfaces comprising a front surface, a back surface and respective side surfaces therebetween, the grip enhancing unitary mat (41) being entwined around the handle (35) and being substantially elongated along the longitudinal axis of the handle (35)."

Claim 1 of auxiliary request 7 differs from claim 1 of the main request in that the characterising portion reads as follows:

"... the handle has a body portion having a palm engaging end portion (36) with a rounded free end (47), a waist (37), a finger engageable shoulder (38), a neck (39) and the head portion (40) for receiving bristles of the bristle configuration (50) in a surface (46), the end portion (36) being wider than the shoulder (38)

which is wider than the waist (37), the grip enhancing unitary mat (41) comprises grip enhancing surfaces (42, 43, 44) arranged continuously around four adjacent surfaces of the handle (35), the four adjacent surfaces comprising a front surface, a back surface and respective side surfaces therebetween, the grip enhancing unitary mat (41) being entwined around the handle (35) so as to wrap around the waist (37) and provide a first grip enhancing surface (42) on the shoulder (38) on a front bristle face of the handle as well as a second grip enhancing surface (43) on a back face of the shoulder of the handle and a third grip enhancing surface (44) on a back face of the palm engaging end portion (36) of the handle, and the grip enhancing unitary mat (41) being substantially elongated along the longitudinal axis of the handle (35)."

Claim 1 of auxiliary request 8 differs from claim 1 of auxiliary request 7 in that the wording "characterised in that" has been replaced by "made of a rubber-like material, wherein".

VIII. The arguments of the appellant may be summarised as follows:

Claim 1 of the main request (and of auxiliary requests 1 to 4) contained subject-matter which extended beyond the content of the application as filed (Article 123(2) EPC). The feature of entwining the mat around the handle was only disclosed on originally filed page 9 linked to the embodiment shown in Figures 1 to 5. All of the features of that embodiment needed to be included. Moreover, the claim no longer required that the handle had grip enhancing surfaces on at least two

separate locations of the handle which was specified in originally filed claim 14 upon which claim 1 was based.

The fifth and sixth auxiliary requests should not be admitted into the proceedings. Claim 1 of these requests neither met the requirements of Article 84 EPC nor those of Article 123(2) EPC.

The seventh auxiliary request should also not be admitted into the proceedings. The amendments did not overcome the objection under Article 123(2) EPC. The now claimed embodiment was only disclosed in the context of the grip enhancing unitary mat being made of rubber like material.

The eighth request should not be admitted. All objections and arguments had been known before the oral proceedings. The arguments concerning lack of clarity and contravention of Article 123(2) EPC were maintained. Moreover, the subject-matter of claim 1 of the eighth auxiliary request did not involve an inventive step.

D12 US-A-5 369 835 and
D13 DE-U-79 26 156

should be admitted into the proceedings. No inventive step was present when starting from either D12 or D13 as representing the closest prior art in combination with D8, or starting from D8 as the closest prior art in combination with either of D12 or D13.

IX. The arguments of the respondent may be summarised as follows:

The main request should be allowed. The characterising portion of claim 1 should be interpreted such that it was the grip enhancing unitary mat which was arranged continuously around at least two adjacent surfaces of the handle, not the grip enhancing surfaces. This was clear from the description on pages 2, 7 and 9 of the application as filed as well as from Figures 1 to 5 which showed and referred to "entwining" and "wrapping". From the cited passages and Figures the skilled person understood that it was not the grip enhancing surfaces which were arranged continuously around any surfaces of the handle but that these surfaces were on specific locations of the mat and handle. It was not necessary to define this further in claim 1.

The fifth auxiliary request should be admitted into the proceedings. Its claim 1 further characterised the handle and its different portions. The feature of the grip enhancing unitary mat defined as being arranged continuously around at least two adjacent surfaces of the handle did not contradict the feature of three surfaces defined for the grip enhancing surfaces. Moreover, three grip enhancing surfaces being specifically defined was consistent with the feature in originally filed claim 14 that the grip enhancing surfaces were provided on at least two separate locations of the handle.

Additionally, the entwining of the mat around the handle was more explicitly set out in claim 1. To this effect contributed the feature of the extension of the grip enhancing unitary mat "substantially elongated along the longitudinal axis of the handle" which was further defined as being "to wrap around the waist" and to "provide" the grip enhancing surfaces on the

specified faces of the handle. Claim 1 did not need to define that the grip enhancing unitary mat had to cover - to some extent - four surfaces of the handle; there was sufficient basis in the description (pages 2 and 7) - without consideration of the Figures - in order to instruct the skilled person that the mat did not need to be wrapped around all surfaces of the handle.

The sixth auxiliary request specifically defined four adjacent surfaces of the handle for the grip enhancing surfaces. No lack of clarity was present, as the skilled person understood that a handle basically had four surfaces. There was no link between the feature of the grip enhancing unitary mat being arranged around four adjacent surfaces (shown in the Figures) and the feature of the grip enhancing surfaces being present on at least two separate locations of the handle (originally filed claim 14). Therefore, it was not necessary to specify any further features. The request should be admitted.

Claim 1 of the seventh auxiliary request was a combination of the features set out in claim 1 of the fifth and the sixth auxiliary requests. In this way, the previously raised objections with respect to Article 84 EPC and Article 123(2) EPC had been overcome. It was not necessary to further include the feature of the grip enhancing unitary mat being made of rubber like material as this feature was not essential, but would be included if it were considered part of the direct and unambiguous disclosure. The skilled person realized that it was sufficient when the grip enhancing unitary mat provided a good grip. The request should be admitted.

Concerning the eighth auxiliary request, it should be admitted into the proceedings as it met all requirements of the EPC. Although the request was filed during the oral proceedings, D12 and D13 should not be admitted for considering inventive step of a more limited request. These documents had already been cited in the EPO Search Report. Accordingly, they could and should have been submitted at the beginning of the opposition proceedings if they were relevant for any of the claimed subject-matter. D8 as well as D12 and D13 were anyway not relevant. The claimed grip enhancing unitary mat was arranged continuously around at least two adjacent surfaces of the handle and should be entwined around the handle. Such a grip enhancing unitary mat was not disclosed in any of these documents. Hence, the subject-matter of claim 1 involved an inventive step.

Reasons for the Decision

1. Main Request - Interpretation of the claim

1.1 Before deciding whether the requirement of Article 123(2) EPC was met, it is necessary to establish the meaning of the characterising part of claim 1 since the parties disagreed on the interpretation to be given to the wording "the grip enhancing unitary mat (41) comprises grip enhancing surfaces (42, 43, 44) arranged continuously around at least two adjacent surfaces of the handle".

- 1.2 The appellant considered the grip enhancing surfaces to be the object which was arranged continuously around at least two adjacent surfaces of the handle whereas the respondent considered the grip enhancing unitary mat to be the object which was to be arranged in that manner.

- 1.3 When following the interpretation given by the appellant, originally filed claim 14 - upon which claim 1 is mainly based - as well as the embodiment shown in Figures 1 to 5 are then inconsistent. Claim 14 requires - consistent with the embodiment shown in the Figures - the handle to have a grip enhancing unitary mat providing grip enhancing surfaces on at least two "separate" locations of the handle. The wording of claim 1 that the grip enhancing surfaces shall be "arranged continuously around at least two adjacent surfaces of the handle" would be inconsistent with that disclosure. For this reason, the skilled person would recognise that such an interpretation is incorrect.

- 1.4 When following the interpretation given by the respondent, it is the grip enhancing unitary mat which is arranged continuously around at least two adjacent surfaces of the handle. The basis for this can be found on originally filed page 7, lines 3 to 6 which refers to the mat being "entwined around the handle" and originally filed page 7, line 12, which refers to the mat "wrapped around the handle". Consistent with this understanding is also the embodiment shown in Figures 1 to 5 which is referred to in the paragraph specified on originally filed page 7.

- 1.5 Hence, the skilled person would conclude that the latter interpretation is the only one which is consistent with the description and with the Figures

and, accordingly, only this interpretation is found to be correct.

2. *Main Request - claim 1 - Article 123(2) EPC*

2.1 When adopting the interpretation set out above, whereby the grip enhancing unitary mat is that which is arranged continuously around at least two adjacent surfaces of the handle, the consequence is that there is no feature in claim 1 which specifies the location of the grip enhancing surfaces in the manner originally disclosed.

2.2 Claim 14 as filed - upon which current claim 1 is based (this was also not disputed by the respondent) - however includes the feature that the grip enhancing surfaces are present on at least two separate locations of the handle - as already set out under point 1.3 above. Also, the embodiment shown in Figures 1 to 5 illustrates grip enhancing surfaces being present on at least two separate locations of the handle.

2.3 Accordingly, the subject-matter of claim 1 no longer includes the limitation of the grip enhancing surfaces being present on at least two separate locations of the handle. This is neither explicitly defined nor is it implicit from the claim wording. The Board can identify no disclosure in the application as filed on which such omission could be based. Accordingly, the subject-matter of claim 1 extends beyond the content of the application as filed contrary to Article 123(2) EPC at least for this reason. The main request is thus not allowable.

3. *Auxiliary requests 1 to 4*

3.1 As regards the subject-matter of claim 1 of these requests, it also does not include the feature of the grip enhancing surfaces being provided on at least two separate locations of the handle.

3.2 Accordingly, the subject-matter of claim 1 of these requests extends beyond the content of the application as filed as set out above for the subject-matter of claim 1 of the main request, contrary to Article 123(2) EPC. These requests are therefore also not allowable.

4. *Fifth auxiliary request*

4.1 The subject-matter of claim 1 includes, with regard to the grip enhancing surfaces, also the features of these being provided by the grip enhancing unitary mat on the shoulder on a front bristle face of the handle, on a back face of the shoulder of the handle, and on a back face of the palm engaging end portion of the handle. Accordingly, three specific separate locations of the grip enhancing surfaces are defined. Hence, the objection set out above for claim 1 of the main request and of auxiliary requests 1 to 4 is overcome.

4.2 However, claim 1 defines that:

- (a) the grip enhancing unitary mat is arranged continuously around at least two adjacent surfaces of the handle;
- (b) the grip enhancing surfaces are provided on
 - the shoulder on a front bristle face
 - on a back face of the shoulder
 - on a back face of the palm engaging end portion of the handle.

These definitions are inconsistent in the context of the claim: when the grip enhancing unitary mat is only arranged continuously around two adjacent surfaces of the handle, it is not possible to provide grip enhancing surfaces on all the defined locations. Accordingly, the subject-matter of claim 1 is not consistent in itself and thus lacks clarity (Article 84 EPC).

4.3 The specific definitions also would require that there is a clear and unambiguous disclosure for such a combination of features. The only specific disclosure concerning the provision of the grip enhancing surfaces as defined in the claim is on page 9, lines 5 to 18 and concerns the embodiment shown in Figures 1 to 5. This embodiment requires a grip enhancing unitary mat which is wrapped continuously around four adjacent surfaces of the handle. There is no disclosure of a more general embodiment in which the grip enhancing unitary mat may be arranged continuously around less than four surfaces of the handle and on three specifically defined locations. Thus, the subject-matter of claim 1 does not meet the requirement of Article 123(2) EPC.

4.4 The fifth auxiliary request was filed with letter of 24 October 2014 after the summons to oral proceedings and the annexed communication of the Board. According to Article 13(1) of the Rules of Procedure of the Boards of Appeal (RPBA), it lies within the discretion of the Board to admit any amendment to a party's case after it has filed its grounds of appeal or reply. In order to be admitted at such a late stage of proceedings, such a request should normally be clearly allowable at least in the sense that it overcomes the objections raised and does not give rise to new objections.

4.5 As set out above, an objection concerning lack of clarity (Article 84 EPC) as well as an objection to lack of disclosure (Article 123(2) EPC) of the claimed combination of features arise out of the chosen wording of the claim. Accordingly, the Board exercised its discretion under Article 13(1) RPBA not to admit the request into the proceedings.

5. *Sixth auxiliary request*

5.1 Claim 1 defines specifically the grip enhancing unitary mat as being arranged continuously around four adjacent surfaces of the handle and further defines that the four adjacent surfaces comprise a front surface, a back surface and respective side surfaces therebetween.

5.2 These features are only disclosed in combination in relation to the embodiment shown in Figures 1 to 5 and described on originally filed page 9, lines 5 to 18. With regard to this embodiment, specific locations of the grip enhancing surfaces are disclosed in this paragraph, these surfaces being the shoulder on the bristle face of the handle, the back face of the shoulder of the handle and the back face of the palm engaging end portion of the handle. These specific locations have however been omitted from claim 1. Accordingly, the subject-matter of claim 1 does not meet the requirements of Article 123(2) EPC.

5.3 As with the fifth auxiliary request, also the sixth auxiliary request was filed with letter of 24 October 2014 after the communication of the Board. As set out under point 4.4 above, according to Article 13(1) RPBA, it lies within the discretion of the Board to admit any amendment to a party's case after it has

filed its grounds of appeal or reply. In view of also the sixth auxiliary request not being clearly allowable, the Board exercised its discretion under Article 13(1) RPBA not to admit the request into the proceedings.

6. *Seventh auxiliary request*

6.1 Claim 1 includes the amendments effected in claim 1 of both the fifth and the sixth auxiliary request in combination. Accordingly, the grip enhancing unitary mat is limited to being arranged continuously around four adjacent surfaces of the handle while the specific locations of the grip enhancing surfaces are defined.

6.2 The amendments are based on the embodiment shown in Figures 1 to 5 and disclosed on page 9, lines 5 to 18. In this paragraph, the single embodiment is disclosed as including a mat of "rubber like" material which is attached to the handle so as to wrap around the waist and provide a grip surface on the locations defined in claim 1. Accordingly, it is the rubber like material which ensures that the mat is a grip enhancing unitary mat in addition to grip enhancing surfaces being present. The feature of the mat being of rubber like material accordingly forms part of this integral disclosure. Its omission from claim 1 is therefore an inadmissible intermediate generalisation of the disclosed subject-matter. Hence, the requirement of Article 123(2) EPC is not met.

6.3 Although it was argued by the respondent that the skilled person would recognise that a rubber like material was not essential, this does not alter the foregoing conclusion. Whilst it may be accepted that a specific rubber like material would not be required,

(and indeed an example is quoted on page 9, line 12 to show that more than one rubber like material could be envisaged), the rubber like material itself is not disclosed as being optional in any sense and it is even explained that the rubber like material is present so as to give good wet grip, i.e. confirming the rubber like material as being that which has the structural and functional qualities to allow the mat to be wrapped around the handle in the way disclosed and for making it grip-enhancing.

6.4 As with the fifth and sixth auxiliary requests, the seventh auxiliary request was also filed with letter of 24 October 2014 after the communication of the Board. As set out under points 4.4 and 5.3 above, according to Article 13(1) RPBA it lies within the discretion of the Board to admit any amendment to a party's case after it has filed its grounds of appeal or reply. In view of also the seventh auxiliary request not being clearly allowable, the Board exercised its discretion under Article 13(1) RPBA not to admit the request into the proceedings.

7. *Eighth auxiliary request - admittance*

7.1 This request was submitted during the oral proceedings before the Board. Accordingly, also this request constitutes an amendment to the respondent's case according to Article 13(1) RPBA and it may be admitted and considered at the Board's discretion. The appellant did not object to the admittance of the request into proceedings, but maintained its previous objections under Articles 84 and 123(2) EPC.

7.2 The reason given by the respondent for filing this request was that it was only at this stage of the

proceedings that the necessity became apparent to include into claim 1 the feature concerning the grip enhancing unitary mat being made of a rubber like material. No discussion concerning this feature had taken place before.

7.3 Although the features of the embodiment disclosed on page 9 in relation to Figures 1 to 5 were always those generally under consideration in the preceding written submissions as well as in the discussions during the oral proceedings, the issue of whether the mat of rubber like material constituted an element of the disclosure which had to be included into the features of the claim had not been argued specifically by the appellant, apart from its reference to the entirety of features disclosed in relation to Figures 1 to 5. Also, the respondent had already indicated during the oral proceedings that whilst this feature was considered not essential to the invention, it would be added if this was objectionable. Hence, the Board accepted this argument.

7.4 Moreover, the subject-matter of claim 1 is worded such that any clarity objections are overcome. In particular, the grip enhancing unitary mat is defined as being arranged continuously around four adjacent surfaces of the handle. These four adjacent surfaces comprise a front surface, a back surface and respective side surfaces therebetween. Accordingly, the skilled person would have no doubt about the mat extending continuously around all sides of the toothbrush handle - irrespective of its exact shape. In view of the four surfaces being defined as the front and back surface and "respective side surfaces therebetween" it is irrelevant whether the design of the handle cross-section might be somewhat rounded or hexa- or octagonal

in shape, since anyhow the front and back surface can be identified and the side surfaces therebetween are included in the claim language. Additionally, in view of the further features of the grip enhancing unitary mat being (a) "substantially elongated along the longitudinal axis of the handle" and (b) "entwined around the handle (35) and being substantially elongated so as to wrap around the waist (37) and provide a first grip enhancing surface (42) on the shoulder (38) on a front bristle face of the handle as well as a second grip enhancing surface (43) on a back face of the shoulder of the handle and a third grip enhancing surface (44) on a back face of the palm engaging end portion (36) of the handle", the way in which the mat is understood to be elongated and the specific type of entwinement are clear. Also, the mat is clearly limited to the embodiment shown in Figures 1 to 5 and disclosed on page 9, lines 3 to 18 (Article 123(2) EPC). Hence, the wording of claim 1 requires the grip enhancing unitary mat to extend continuously along and around the handle in a somewhat spiral or helical fashion, this all the more so since the locations of the grip enhancing surfaces on the mat are specified as lying at different points along the length of the handle.

7.5 Although the appellant objected further that the various ratios of the handle portions also had to be included so as not to contravene Article 123(2) EPC, on the basis that they were an integral part of the embodiment disclosed on pages 9 and 10, the Board does not accept this. It is quite evident to a skilled person that the toothbrush disclosed in Figures 1 to 5 is generally schematic, and the ratios quoted from page 9 line 24 onwards bear no necessary structural or functional interrelationship with that embodiment in

terms of the other features thereof. The same applies to the ribs 45 described on page 9, lines 19 to 23, the omission of which was also considered to be objectionable by the appellant. Such grip enhancing surfaces are however disclosed in the application as filed on page 3, lines 1 to 4 as purely exemplary forms of the grip enhancing configurations. When carrying over this information to the embodiment shown in Figures 1 to 5, there is no reason why a skilled person would see the diagonally described and depicted ribs as being somehow limiting for that particular embodiment; the mere fact that they are both shown and described as diagonal ribs does not limit the skilled person's understanding of the more general direct and unambiguous disclosure provided by the application as filed, also in regard to the embodiment shown.

7.6 Accordingly, the amendments meet the requirement of Article 123(2) EPC and the subject-matter of claim 1 is clear (Article 84 EPC). Hence, the objections set out for claim 1 of the previous requests are overcome and the Board exercised its discretion under Article 13(1) RPBA to admit the request into the proceedings.

8. *Admittance of D12 and D13*

8.1 In order to address the issue of inventive step, the appellant relied on D8, D12 and D13. D8 was already referred to in the grounds of appeal and thus is a document which is in the appeal proceedings.

8.2 Under Article 114(2) EPC, the department of first instance as well as the Boards of Appeal have a discretion to admit late-filed submissions and documents. The exercise of this discretion depends on the facts of each case. Additionally, it is evident

from Article 12(4) RPBA that it lies within the discretion of the Board not to admit any facts, evidence or requests which could have been presented in the first instance proceedings. In particular, the relevance of a late-filed submission or document as well as the question why it had not been earlier submitted should normally be factors which are taken into account when considering how to exercise this discretion.

8.3 D12 and D13 were submitted in reply to the admittance of the eighth auxiliary request. D12 was referred to with regard to Figure 6. The appellant considered such Figure as illustrating a handle having a waist section, a belly section and selective gripping sites. D13 was referred to with regard to Figure 1 and the handle having a shoulder as well as a palm engaging end portion. The only other document cited with regard to inventive step, D8, is not as relevant as D12 or D13 in that respect, in that the handle illustrated in its Figures does not have specific portions which can be distinguished. Therefore, the only documents disclosing the relevant characteristics of such a handle, are D12 and D13.

8.4 Only after the appellant had filed the eighth auxiliary request did any necessity arise for reliance on further documentation. In view of the filing of this request only during the oral proceedings before the Board, which included a change of case in that a further feature of the description has been included into the subject-matter of claim 1, the Board can only conclude that there had been no reason for searching for or submitting other documents earlier. The fact that these documents were cited in the Search Report and thus were previously available is thus irrelevant in the

circumstances of this particular case. Thus, the Board exercised its discretion under Article 12(4) RPBA and admitted D12 and D13 into the proceedings.

8.5 The respondent requested that D12 and D13 be disregarded, arguing that these documents were already cited in the Search Report and could have been submitted earlier. However, in view of the filing of the request during the oral proceedings, it was considered procedurally only fair to give the appellant a chance to submit one or more documents which are relevant with regard to the new aspects. Moreover, it may be added that these documents did not pose any particular problem of understanding nor was there any problem for the respondent to provide a reply regarding their relevance.

9. *Eighth auxiliary request - Claim 1 - Inventive step*

9.1 The appellant did not argue that the novelty of the subject-matter of claim 1 was prejudiced by any cited prior art nor did the Board find reason to question this. Accordingly, the subject-matter of claim 1 is new (Article 54 EPC).

9.2 The appellant argued that either D8, D12 or D13 could represent the closest prior art starting point for the assessment of inventive step.

9.3 D8 discloses a tooth brush having a handle which is covered by a sleeve portion 14 which can be roughened or knurled on its outer surface in order to provide a good grip even after becoming wet during use of the brush (page 2, lines 21 - 27). The sleeve portion is preferably formed of rubber (page 1, lines 68 - 72).

- 9.4 D12 discloses a toothbrush assembly having a handle component which is contoured to have an elongated belly section which merges into an enlarged annular shoulder leading to a neck section adapted as a socket for the plug of the brush component. The handle body is contoured to define a concave fore depression at the junction of the shoulder and the neck section, and a concave depression at the junction of the shoulder and the belly section (see e.g. abstract).
- 9.5 D13 discloses a toothbrush with a handle having a waist between the thicker palm end and brush end sections (Figure 1).
- 9.6 D12 and D13 refer generally to the problem of improving the grip (D12: see col. 2, l. 31 - 42; D13: see page 3, lines 20 - 30). D8 points to providing a tooth brush handle providing good grip even after becoming wet during use of the brush (page 2, lines 23 - 26).
- 9.7 None of these documents discloses the provision of a grip enhancing unitary mat in the claimed configuration or the grip enhancing surfaces on the claimed specific locations. Hence, the objective technical problem to be solved starting from whichever document is taken as closest prior art can be considered as being to enhance the grip of the handle. The solution according to claim 1 is the provision of specific grip enhancing characteristics of the handle.
- 9.8 According to the arguments of the appellant, such a solution - when starting from D8 - would allegedly be obvious from Figure 6 and claim 1 as well as col. 5, l. 55 of D12 or from Figure 1 of D13. The solution - when starting from either D12 or D13 - would be to provide a rubber mat as set out in D8.

- 9.9 Accepting the objective technical problem to be solved as being the provision of grip enhancing characteristics to the handle, irrespective of whether D8, D12 or D13 are considered as representing the closest prior art, none of these documents refers to a grip enhancing unitary mat which is substantially elongated to be entwined around a handle - and further provides specific grip enhancing surfaces at specific locations. The concept of the unitary mat according to the claimed subject-matter of the current invention is not that it is represented by a cover, but that it is a unitary mat which has a longitudinal extension requiring it to be entwined around the handle. "Entwined around" can only be understood as meaning an elongated winding in the sense of being spirally/helically wound as it extends over the length of the handle. No such design is present in any of the cited documents. Accordingly, there is also no disclosure or suggestion leading a skilled person to such a structure in the cited documents which would provide such a mat having the defined grip enhancing surfaces.
- 9.10 Accordingly, none of the cited documents in whichever combination - even including the general knowledge of the skilled person - leads to the subject-matter of claim 1. Thus, when starting from any of the cited documents and considering the features being known from these documents, the skilled person would not arrive without exercising inventive skill at the solution defined in claim 1. As a consequence, the subject-matter of claim 1 is considered to involve an inventive step.
- 9.11 During oral proceedings the description was amended to be consistent with the claim. Neither the Board nor the

appellant had objections to these amendments, with the result that an order for maintenance of the patent could be made.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division with the order to maintain the patent on the basis of:
 - (a) Claims 1 and 2 of the eighth auxiliary request filed during the oral proceedings of 26 November 2014
 - (b) Pages numbered 2 and 3 of the amended description filed during the oral proceedings of 26 November 2014;
 - (c) Figures 1 to 5 as granted.

The Registrar:

The Chairman:



C. Spira

M. Harrison

Decision electronically authenticated