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**Datasheet for the decision  
of 7 May 2015**

**Case Number:** T 1133/11 - 3.2.06  
**Application Number:** 02028260.4  
**Publication Number:** 1323398  
**IPC:** A61F13/472, A61F13/15  
**Language of the proceedings:** EN  
**Title of invention:**  
Drapable absorbent article  
**Patent Proprietor:**  
McNeil-PPC, Inc.  
**Opponent:**  
SCA Hygiene Products AB  
**Relevant legal provisions:**  
EPC Art. 54, 56, 111(1)  
**Keyword:**  
Novelty - (yes)  
Inventive step - (no)  
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**Decisions cited:**  
T 0686/96



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Case Number: T 1133/11 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 7 May 2015**

**Appellant:** McNeil-PPC, Inc.  
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**Respondent:** SCA Hygiene Products AB  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
23 March 2011 concerning maintenance of the  
European Patent No. 1323398 in amended form.**

**Composition of the Board:**

**Chairman** M. Harrison  
**Members:** G. de Crignis  
E. Kossonakou

## Summary of Facts and Submissions

- I. By way of its interlocutory decision, the opposition division found that European Patent No. 1 323 398 as amended met the requirements of the European Patent Convention (EPC).
- II. The appellant (patent proprietor) filed an appeal against this decision and in its grounds of appeal, in regard to the issue of novelty of the subject-matter of claim 1, referred to:

D1 EP-A-1 029 522 and  
D2 WO-A-99/25290.

The appellant also argued that

D9 WO-A-95/20931,

should not have been admitted into the proceedings. The appellant requested maintenance of the European patent as granted and filed auxiliary requests I, II and III. Reimbursement of the appeal fee was requested on the basis of an alleged violation of the patentee's right to be heard under Article 113 EPC.

- III. Within the time-limit of four months which was set for a response, the opponent did not reply.
- IV. In a communication annexed to the summons to oral proceedings, the Board indicated its preliminary view that claim 1 appeared to be novel at least with regard to the defined range for the flexural resistance, and that no violation of the right to be heard according to Article 113 EPC could be recognized. Concerning the admittance of D9, the Board could not establish any

incorrect exercise of discretion by the opposition division.

V. A submission dealing with substantive issues was filed by the respondent (opponent) for the first time with its letter of 31 March 2015.

VI. Oral proceedings were held before the Board on 7 May 2015.

The appellant requested that the decision under appeal be set aside and that the patent be maintained either as granted (main request) or with one of the sets of claims filed as auxiliary requests I to III with the statement setting out the grounds of appeal of 22 July 2011. It further requested remittal of the case to the opposition division for the purposes of discussing inventive step in case the subject-matter of claim 1 according to the main request were found to be novel. The request for reimbursement of the appeal fee was withdrawn.

The respondent (opponent) requested that the appeal be dismissed.

VII. Claim 1 of the main request (claim 1 as granted) reads as follows:

"An absorbent article comprising

A. a silhouette comprising

- i) a first end,
- ii) a second end, wherein the second end being in opposite relation to the first end, and
- iii) a first longitudinally extending edge opposed to a second longitudinally extending edge, the first and second longitudinally

extending edges connecting the first end and the second end;

B. a layered portion comprising

- i) a body-facing layer comprising a spunlace material including from about 10 to about 65 wt% rayon and from about 35 to about 90 wt% polyester,
- ii) a garment facing layer;

wherein the absorbent article has a flexural resistance of less than 30 g."

Claim 1 of auxiliary request I differs from claim 1 of the main request in that all the occurrences of the word "about" in feature B.(i) have been deleted..

Claim 1 of auxiliary request II differs from claim 1 of the main request in that it additionally includes the feature "and wherein the body-facing layer is absorbent, and further comprising an absorbent layer and a transfer layer".

Claim 1 of auxiliary request III differs from claim 1 of the main request in that feature B.(i) is limited to a spunlace material including ("from") about 25 wt% rayon and about 75 wt% polyester, and in that feature B.(ii) is limited to a garment facing layer comprising microporous polyethylene.

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

The subject-matter of claim 1 of the main request was novel. Claim 1 differed from the embodiment disclosed on page 36, fourth paragraph, of D2 at least with respect to the features of

- an absorbent article having a body-facing, i.e. body-contacting layer made from spunlace material;
- the spunlace material including from about 10 to about 65 wt% rayon and from about 35 to about 90 wt% polyester;
- an absorbent article having a flexural resistance of less than 30 g.

This disclosure related to a specific embodiment and was very clear and unambiguous as to the positioning of the nonwoven web. The spunlaced nonwoven web did not directly face the body of the wearer as the DRI-WEAVE topsheet was in contact with the body of the wearer and prohibited this. It was thus not a body-facing layer according to claim 1. Additionally, D2 did not disclose any rayon/polyester weight percentage ratios. Only the trade name SONTARA 8407 was disclosed. The claimed range for the composition of the spunlace material was not anticipated by this material.

D1 and D9 referred to a composition of 70%/30% rayon/polyester as constituting the SONTARA 8407 material without indicating whether the percentages would be weight% or volume%. Additionally, these percentages were distinct from the claimed percentages as the word "about" could not be considered as extending the claimed range to correspond to the composition of the SONTARA 8407 material. With regard to D1 or D9, no arguments concerning lack of novelty were provided by the respondent as there was no reply to the appeal and no such arguments were provided in its reply to the communication of the Board either. Therefore, corresponding objections based on these should not be admitted.

It was not admissible to combine the isolated disclosure of the embodiment on page 36 of D2 with any other general disclosures in D2 - in particular not with the most preferred range for the flexural resistance disclosed on page 5 or with the further different range defined in claim 20. This applied *a fortiori* as the embodiment on page 36 pointed away from low values for structural flexibility since it referred to the modification of the article with regard to the desired flexibility. This desired flexibility could only be considered to lie within or above the most preferred range but not outside of it.

If the subject-matter of claim 1 were found to be novel over the disclosure in D2, the case should be remitted to the opposition division for the assessment of inventive step in order to guarantee a fair procedure.

Concerning inventive step, D2 was primarily concerned with properties of a small article and its teaching did not address flexibility aspects; thus it was not suitable as a starting point for considering inventive step. If nonetheless D2 were to be considered as the closest prior art, the distinguishing technical features had the effect of providing a body-facing layer having a cloth-like feeling (p. 3, l. 23 - 25). Accordingly, the problem to be solved was to provide a highly flexible absorbent article with a body-facing layer having a cloth-like feel/appearance with appropriate absorbent capacity and which was discrete. When starting the assessment of inventive step from D2, the skilled person was guided towards the most preferred range for flexural resistance in D2 which was the range from 30 to 50 g. No disclosure in the direction of less flexural resistance was present. Additionally, the "SONTARA" product disclosed in D2 had

a defined rayon/polyester relationship of 70%/30% which was outside of the claimed range. Finally, there was no reason at all for the skilled person to change the material composition of the spunlace material.

Claim 1 of auxiliary request I was identical to claim 1 of the main request with the exception of the word "about" being deleted. No arguments different from the ones given for the main request were applicable.

Claim 1 of auxiliary request II was based on claims 1, 5 and 6 as granted.

Claim 1 of auxiliary request III was based on claims 1 and 13 as granted.

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

D2 disclosed the claimed subject-matter in the embodiment set out on page 36, fourth paragraph. The claimed end point for the flexure resistance of the article (less than 30 g) overlapped with the preferred range of "between about 30 g and about 50 g" as set out in D2 (page 5). The claimed body-facing layer comprised a spunlace material and the ranges for the polyester and rayon content were not defined by exact boundaries. SONTARA 8407 which was the nonwoven material referred to in the embodiment on page 36 in D2 should be considered as representing a material overlapping with the ranges defined for the claimed rayon/polyester composition. The term "about" allowed variations of the order of up to 5 to 10%. This was supported by T686/96.

Arguments concerning lack of novelty with regard to D1 and D9 had been presented during the opposition proceedings and should be taken into account.

Remittal of the case to the opposition division for the assessment of inventive step should be considered.

Concerning inventive step, no surprising or unknown effect had been demonstrated for the claimed polyester/rayon ratio, and nowhere in the specification was it stated that the desired flexural resistance was obtained due to this polyester/rayon ratio. Accordingly, the problem/solution approach had to take into account these features individually. One problem to be solved was to choose an alternative spunlace material. According to the description in the patent any material with cloth-like features was suitable. Independently from this, the further problem to be solved was to provide a highly flexible article. To this avail, the skilled person would design the whole article with the desired low flexural resistance and use appropriate materials for the further components. No inventive step was therefore present.

Auxiliary request I should not be admitted. This request had not been admitted in the first instance proceedings. Anyway, an assessment of the subject-matter of its claim 1 with respect to inventive step would not differ from the one for the main request.

Auxiliary requests II and III did not meet the requirement of at least Article 123(2) EPC.

## Reasons for the Decision

### 1. *Main Request - Novelty - claim 1*

1.1 D2 discloses a highly flexible absorbent article in that the flexural resistance of the article is disclosed as being preferably less than or equal to about 100 g, and most preferably being within the range of about 30 and about 50 g (see claim 1; page 5, lines 5 to 8 and page 10, lines 36 to page 11, line 1). An embodiment is disclosed on page 36, fourth paragraph, which includes a structure in which an absorbent element can separate from the backsheet of the article. Such an embodiment is disclosed as comprising a DRI-WEAVE apertured film topsheet; an underlying layer of material such as a nonwoven web, which is specified as a spunlaced nonwoven web having the trade mark name "SONTARA 8407"; a laminate absorbent core comprising tissue and superabsorbent material; a layer comprising a facial tissue layer; and a backsheet comprising a stretchable laminate. This embodiment is further described as follows: *"While the stretchable laminate backsheet may be quite flexible, the remainder of the absorbent article will typically have to be modified as described herein to provide it with the desired flexibility."*

1.2 When comparing this embodiment to the claimed subject-matter, the issue in dispute between the parties concerned the question as to

- (a) whether the flexural resistance of the article in D2 corresponded to that defined in claim 1, and
- (b) whether the spunlace layer in D2 corresponded to the body-facing layer in claim 1 (feature B.(i)).

1.3 Concerning item (a), i.e. the flexural resistance of the absorbent article, the following disclosure in D2 is relevant:

- Claim 1 of D2 defines an absorbent article having a "flexure resistance of less than or equal to 100 grams". This general disclosure, which appears to define the broadest scope of the invention of D2, is thus considered to apply to all absorbent articles falling within D2 and thus also has to be read into the embodiment disclosed on page 36.
- The description on pages 5 and 10 of D2 refers to a flexure resistance which shall (preferably) be less than or equal to about 100 grams. A more preferred range of "less than or equal to about 70 grams" is described, and, as a most preferred range, the range of "between about 30 and about 50 grams" is disclosed.
- Claim 20 of D2, dependent on any of the preceding claims, refers to an absorbent article having a flexure resistance of between 20 and 75 grams.

Accordingly, for the flexural resistance which is generally applicable for all embodiments in D2, only the value of less than 100 g can be said to apply unambiguously. There is however no direct and unambiguous disclosure that the most preferred range (i.e. "between about 30 and about 50 g) necessarily applies to the embodiment disclosed on page 36. Also concerning the specific sub-range set out in claim 20 (20 to 75 grams) for flexural resistance, there is no disclosure that this is linked directly to the

embodiment on page 36. Hence, at least for this reason, the subject-matter of claim 1 is novel over D2.

1.4 Concerning item (b), i.e. the body-facing layer, the appellant argued that claim 1 of the patent in suit differed from the disclosure in D2 in view of the following features:

- (a) D2 did not disclose a spunlace material which was a body-facing layer, since the spunlace layer on page 36 of D2 was itself covered by an apertured film topsheet which was the body-facing layer and which would directly face and be in contact with the body of the wearer.

The Board accepts that in D2 the spunlace layer is covered by an apertured film topsheet. However, claim 1 does not require the spunlace layer to be the uppermost sheet. It requires the body-facing layer only to comprise a spunlace material; it does not state that such material has to be on the surface which contacts or directly faces the body of the wearer. Also, the description of the patent in suit states that any material can be included in the body facing material (paragraph [0018]) and that the body facing layer can be a single layer, can have at least two layers (paragraph [0019]) or be a multiple layer construction (paragraph [0020]). Accordingly, claim 1 does not require the spunlace material to directly face the body of the wearer, nor does the description of the patent itself suggest that claim 1 should have such an interpretation. Hence, the claimed subject-matter is not distinguished from the disclosure in D2 in this respect.

- (b) The claimed body-facing layer would be specified with ranges for the rayon/polyester ratio of the spunlace material, whereas D2 only referred to a trade name (SONTARA) in combination with a given identification code (8407) for which no data concerning the material and composition could be found.

Although it is correct that in D2 no structural or material characterisation of the spunlaced nonwoven web is given, the trade name SONTARA 8407 is stated. SONTARA 8407 is specified as a material consisting of 30%/70% polyester/rayon in other documents cited in the opposition proceedings (see e.g. D1: col. 10, lines 6 to 16). No evidence for such a specific trade name being used for any other combination and relation of materials has been presented. Since exactly the same trade name is cited, the year of publication of the various cited documents is irrelevant. D1 provides a clear indication of this trade name being allocated to a material of this composition. The fact that the appellant stated that it was unable to find any further information about SONTARA 8407 is irrelevant, particularly since no supporting evidence of the alleged attempts to find such information was provided.

- (c) The spunlace material of the claimed body-facing layer is specified with weight percent ranges for the rayon/polyester ratio whereas D1 does not specify the SONTARA 8407 material with regard to whether the composition concerns weight percent or volume percent.

Unless otherwise stated, the skilled person would understand such percentages as being specified in relation to weight percentage. When manufacturing

nonwoven spunlace materials they are laid upon conveyor belts and the specification of volume percent would be a very demanding task in view of the indefinite borders of the material which depend upon further conditions like pressure, humidity/temperature. Accordingly, it is the normal practice to record only weight percentages. It also should be taken into account that consistent with the foregoing also the "Inventive Samples" according to the patent in suit and the reference to such percentages in the description of the patent in suit (paragraph [0018]) are only characterised by percentage values without indicating that it is only weight percentage which is to be considered. Moreover, a position in line with the implicit understanding of weight percentages was adopted by the appellant in its letter of 31 January 2011. Hence, despite the lack of a specific indication of weight as opposed to volume percentage of the SONTARA 8407 material in D1, the skilled person would only realistically consider weight percentages. Further, no evidence concerning use or applicability of volume percentages in relation to such spunlace materials has been provided. Accordingly, no distinguishing feature can be established by the absence of such specification in D2 or D1.

- (d) The spunlace material SONTARA 8407 disclosed in D2 would not exhibit a material composition within the claimed ranges: in other words, the claimed ranges - although specified by "about" - did not include a 30%/70% polyester/rayon material.

D1 (as well as D9 on page 37 incidentally) specify the SONTARA 8407 material as being exactly a 30%/70% polyester/rayon material. When considering the borderline values of 35% (and 90%) for polyester and (10% and) 65% for rayon, the issue in question is

whether the term "about" in claim 1 can be considered to extend these borderline values to 30% for polyester and to 70% for rayon respectively.

No evidence in the form of test results concerning the accuracy of the determination of the composition of a spunlace polyester/rayon material has been provided. Hence, there is no evidence which would allow the word "about" for the composition of a spunlace polyester/rayon material to be extended in such a way that it would include a deviation of considerable extent. In the absence of any such evidence, the Board finds that the appellant's position is correct in stating that for spunlace materials consisting of rayon and polyester, the determination of the ratio of these components can be considered as a routine method leading to relatively exact values without a high standard deviation.

Although there are decisions of the Boards of Appeal in which the word "about" has been interpreted as extending beyond the mere standard deviation of a specific test method of the related parameter, these decisions are not related to spunlace material. Decision T 686/96 - cited in this context by the respondent and also quoted in the decision under appeal - for example, concerned an amorphous precipitated silica, and besides parameters such as surface area, oil absorption and particle size, related in particular to an abrasion value. This latter value was not considered to be precisely defined by the word "about" before the respective numerical value. However, amorphous precipitated silica concerns a different technical field and the determination of an abrasion value cannot be considered comparable with regard to accuracy of the determination of the composition of a spunlace material.

Therefore, the Board does not find any justification in the present case to interpret the word "about" in a way which would extend the quoted ranges by 5% or more. Considering the lower range of polyester of 35 weight %, the difference to 30 weight % of SONTARA 8407 is anyway in the order of a 14% difference rather than merely 5%. Hence D2 does not disclose a spunlace material including from about 10 to about 65 wt% rayon and from about 35 to about 90 wt% polyester but a 30%/70% polyester/rayon material in the form of SONTARA 8407. Thus, the claimed ranges for the spunlace rayon/polyester material also distinguish the claimed subject-matter from the disclosure in D2.

2. *Novelty - claim 1 - documents D1/D9*

2.1 During the proceedings before the opposition division, objections concerning lack of novelty of the subject-matter of claim 1 had been raised in view of D1, D2 and D9. The opposition division held that the subject-matter of claim 1 lacked novelty over D2 and gave the reasons for its conclusion. Accordingly, there was no reason for the opposition division to further investigate the issue of novelty on the basis of D1 or D9.

2.2 In its grounds of appeal, the appellant gave reasons why it considered the finding of the opposition division regarding the disclosure of D2 to be incorrect.

2.3 The respondent did not reply to the grounds of appeal, but requested in its reply to the communication of the Board, that the case be remitted to the department of first instance in the event that the subject-matter of

claim 1 of the main request would be found novel or inventive in view of D2.

2.4 Accordingly, in the appeal proceedings, no objections or arguments with regard to lack of novelty concerning D1 or D9 were filed or presented at all. The respondent relied during the oral proceedings on their written submissions. The question of the Board during the oral proceedings as to whether one of these documents was more pertinent than D2 in respect of the flexural resistance of the article or with regard to the claimed ranges for the spunlace rayon/polyester material (i.e. did it disclose a value of flexural rigidity of less than 30 g or at least a value closer to 30 g than that disclosed in D2 and did it disclose a value of spunlace rayon/polyester which fell within the ranges given in claim 1), remained unanswered.

2.5 In the absence of any arguments in this regard *prima facie* an objection to lack of novelty with regard to D1 or D9 was not considered likely to succeed.

Accordingly, the Board exercised its discretion under Article 13(1) RPBA not to admit the appellant's change of case (compared to its non-response to the grounds of appeal within the applicable time limit under Article 12(1)(b) and (2) RPBA), and thus did not admit the attacks against novelty of the subject-matter of claim 1 based on D1 and D9.

### 3. *Remittal to the opposition division*

3.1 Both parties requested remittal to the opposition division for the assessment of inventive step. On the issue of inventive step, the opposition division had however provided reasons why in their view the subject-

matter of claim 1 of (then) auxiliary request 2 did not involve an inventive step and why in their view the subject-matter of claim 1 of (then) auxiliary request 3 involved an inventive step - in any case when starting from D2 as the closest prior art.

- 3.2 The appellant had no problem in identifying the relevant passages in D2 concerning the objection of lack of novelty and in arguing accordingly; the same passages are also relevant for the consideration of inventive step.
- 3.3 Although the wording of current independent claim 1 differs slightly from the wording of both claims 1 considered by the opposition division with regard to inventive step, the interpretation of D2 remains the same and the starting point to be considered for inventive step is based on the same embodiment therein. Thus, the assessment on inventive step can neither be considered complicated nor is it based upon surprising or novel arguments or previously unconsidered passages of D2. Indeed, when discussing novelty of the subject-matter of claim 1, the differences with regard to D2 and the relevant passages had already been considered. Also, in the Board's communication prior to oral proceedings, the Board (in item 2) had stated why inventive step appeared to be lacking and had made specific reference to particular passages in D2. Hence, there were no reasons which could be accepted by the Board as to why an assessment of inventive step with regard to D2 would be inappropriate. The Board thus considered that the parties could reasonably be expected to deal with this issue during the oral proceedings before the Board. Accordingly, and also in view of the need for procedural economy, the Board exercised its discretion under Article 111(1) EPC not

to remit the case to the department of first instance when considering D2, and instead elected to proceed with the assessment of inventive step with regard to D2 as the closest prior art.

4. *Document D9*

4.1 The appellant requested that D9 be disregarded, arguing that the opposition division did not properly exercise its discretionary power in admitting D9 into the proceedings. The opposition division based its admittance of D9 on the consideration of it being *prima facie* relevant as providing evidence of the composition of "SONTARA 8407" and as referring to flexure resistance. Although the Board provisionally saw no reason to find that the opposition division had incorrectly exercised its discretion when admitting D9 into proceedings, there was however no need to decide this issue since the information in D1 was found to be sufficient to establish the material composition of SONTARA 8407, it being noted also that no evidence to the contrary had been provided.

5. *Inventive step - claim 1*

5.1 D2 (see page 36, 3rd complete paragraph) discloses an embodiment of an absorbent article which differs from the claimed article by the features set out above (see point 1).

5.2 The appellant's view that D2 was not suitable as being the closest prior art in view of the absorbent article disclosed therein being of small size is not accepted. Although it is correct that D2 is also related to providing a small article (see e.g. page 4, first paragraph) and not simply to solving problems of

flexibility, it may be noted that the flexibility of the article is not in any way overshadowed by some other considerations which would lead the skilled person not to consider D2 when desiring to increase the flexibility of an article. It is also noted that the article as claimed puts no limitation on size, such that any reference to a desire to provide a sufficiently small article size in D2 is of no consequence.

- 5.3 Accordingly, the embodiment on page 36, fourth paragraph of D2 can be considered as representing the closest prior art for consideration of inventive step.
- 5.4 In view of the distinguishing features which are the range of flexural resistance of the article (i.e. "less than 30g") and the claimed ranges for the spunlace rayon/polyester material, a common objective technical problem to be solved by these two features has not been established. Thus, for these two features separate problems are involved and inventive step has to be assessed separately for each of these problems.
- 5.5 The appellant argued that the objective problem to be solved was to provide a highly flexible article with a body-facing layer having a cloth-like feel/appearance with appropriate absorbent capacity and which was discrete. As also stated during the oral proceedings by the Board, this problem is however not accepted as being an objective problem since no such body-facing layer providing these characteristics is claimed (e.g. since the spunlace material need not be on the surface) and the appellant's purported problem is not related to the distinguishing features (e.g. there is no indication or implication of "capacity" in the claim,

nor is there a feature which necessarily results in the article being "discrete").

5.6 The objective technical problem to be solved by the range defined for the flexural resistance is thus found to be simply the provision of a highly flexible article. The objective technical problem to be solved by the claimed ranges for the spunlace rayon/polyester material - in the absence of any effect of these ranges (as also confirmed in the patent) - can only be seen as the provision of an alternative material.

5.7 Concerning the problem of providing a highly flexible article, the appellant argued that D2 taught away from very low values for structural flexibility of the article in that the final phrase of the embodiment on page 36 (*"While the stretchable laminate backsheet may be quite flexible, the remainder of the absorbent article will typically have to be modified as described herein to provide it with the desired flexibility."*) would lead the skilled person to design the flexural resistance of the "remainder of the absorbent article" such that it would lie within the higher broad preferred range set out therefor in D2, due to the fact that the stretchable laminate backsheet was the highly flexible part.

5.8 However, there is no pointer to such an interpretation in D2. To the contrary, the Board finds that a skilled person would read this final phrase differently. When carrying out the teaching of D2 to produce the "desired" flexible article, the skilled person would inevitably be led in the direction of flexural resistances which lie in the most preferred range quoted on page 5 for the articles of D2, i.e. of about 30 g. This applies a *fortiori* in view of the general

frame for flexural resistance given in D2; pages 5 and 10 of the description of D2 refer to a highly flexible absorbent article and the flexure resistance shall in a most preferred range lie between about 30 and about 50 grams. From this disclosure it can be derived that the "desired" flexibility when starting from the general flexure resistance of less than 100 grams such as claimed in claim 1 of D2, goes into the direction of more flexibility and certainly not in the direction of less flexibility. The same applies when considering that claim 20 of D2 even extends the range of flexural resistance to values as low as 20 grams. Accordingly, when starting from the embodiment on page 36 of D2 and desiring to adapt the "remainder of the absorbent article" to a desired flexibility, the adaptation would be understood by a skilled person to be in the direction of more flexibility. For this reason, the skilled person would have chosen a range for the flexural resistance of less than 30 g wherever desired. Accordingly, this choice does not involve an inventive step over D2.

- 5.9 In view of the further objective technical problem to provide an alternative material for the nonwoven part of the body-facing layer, no inventive step can be recognized either.
- 5.10 The description of the patent in suit states that *"any material with cloth-like features may be used for the body-facing layer. Such material includes nonwoven materials, such as spunlace material, and woven materials. In particular, spunlace material made from the range of from 10 to 65 % rayon and 35 to 90% polyester may be used."* (paragraph [0018]).

- 5.11 In view of SONTARA 8407 being applied in the embodiment disclosed on page 36 of D2 and already representing a nonwoven spunlace material of 30%/70% polyester/rayon composition, it is evident that the claimed ranges start or end not far from this material composition. Since the description states that "any material ... may be used" (see the previous paragraph above), no inventive step can be accorded to the choice of a range for the polyester/rayon composition which is so close to the values present in the SONTARA 8407 material. Instead, this is merely an obvious choice for a skilled person wishing to provide an alternative material.
- 5.12 In this respect it is noted that the examples do not demonstrate any effect related to the claimed range for the composition of the material or to another material within or outside of the claimed range of polyester/rayon, as no comparison to another composition of these materials or any other material is disclosed. All the exemplary articles have a spunlace body-facing layer which is made from 75% polyester and 25% rayon. Hence, in the absence of any unknown or non-obvious effect, the conclusion can only be that the claimed range represents simply an alternative composition of rayon/polyester having no effect which is not predictable in advance and which can be applied by a skilled person where appropriate merely in view of desirable material considerations for any particular product.
- 5.13 Accordingly, the Board concludes that neither of the distinguishing features provides an inventive contribution, when starting from D2 as the closest prior art and taking into account the knowledge of the skilled person. The subject-matter of claim 1 of the main request therefore does not involve an inventive step, contrary to Article 56 EPC.

6. *Auxiliary request I*

6.1 Claim 1 differs from claim 1 of the main request in that the word "about", related to the percentage of rayon and to the percentage of polyester, has been deleted.

6.2 In view of the conclusion concerning inventive step set out above, the Board finds that whether or not the word "about" is inserted (with regard to the percentages of the individual material of the spunlace material) has no influence on the outcome of the examination as to inventive step of the subject-matter of claim 1. The appellant did not provide any counter argument in this regard. Accordingly, the subject-matter of claim 1 of auxiliary request I lacks an inventive step (Article 56 EPC) for the same reasons as apply to claim 1 of the main request.

7. *Auxiliary request II*

7.1 Claim 1 of auxiliary request II differs from claim 1 of the main request in that it includes additionally the feature "and wherein the body-facing layer is absorbent, and further comprising an absorbent layer and a transfer layer".

7.2 Such features are already disclosed in the embodiment disclosed on page 36 of D2. Concerning absorbency, the SONTARA 8407 material is a mixture of rayon with polyester. At least the rayon content provides a certain absorbency and hence renders the body-facing layer absorbent. Concerning the additional feature of an absorbent layer and a transfer layer, D2 discloses for this embodiment a laminate absorbent core

comprising tissue and super-absorbent material. Hence, it comprises an absorbent layer and the tissue represents a transfer layer. It may be added that neither a position nor a structural composition is specified for the absorbent layer or the transfer layer. The appellant also did not provide a counter-argument in this regard.

7.3 As a consequence, the arguments set out above concerning lack of inventive step of claim 1 of the main request apply here as well. The requirement of Article 56 EPC is therefore not fulfilled.

8. *Auxiliary request III*

8.1 Claim 1 of auxiliary request III differs from claim 1 of the main request in that feature B(i) is limited to a spunlace material including ("from") about 25 wt% rayon and about 75 wt% polyester, and in that feature B(ii) is limited to a garment facing layer comprising microporous polyethylene.

8.2 These amendments result from the combination of granted claims 1 and 13. Granted claim 13 was however dependent only on granted claim 1 and not on dependent claims 2 to 12.

8.3 Despite being asked to indicate a basis for the subject-matter of the dependent claims of this request in the application as filed (i.e. a basis including the combination of features now appearing in these claims), the appellant was only able to refer to the presence of the dependent claims as granted. No basis in the application as filed can be identified by the Board for the dependent claims being linked to such a claim 1, it being noted that in the granted claims, the dependent

claims preceding claim 13 bear no specific connection with the features of claim 13 itself. When referring to the description, this also gives only very specific examples where such a material combination has been disclosed, without a combination with the more general terminology used in dependent claims 2 to 12. Hence, due to the presence of these dependent claims with claim 1 as so-amended, the patent has been amended in a way that it contains subject-matter which extends beyond the content of the application as filed contrary to Article 123(2) EPC.

9. Since none of the appellant's requests is allowable, the appeal has to be dismissed.

## Order

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

The appeal is dismissed.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated