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**Datasheet for the decision
of 18 November 2009**

Case Number: T 0596/08 - 3.2.07

Application Number: 01975034.8

Publication Number: 1324920

IPC: B65B 11/42

Language of the proceedings: EN

Title of invention:

Method of packaging a food product, such as a candy, as well as a packaged candy

Patentee:

Mars Incorporated

Opponent:

THEEGARTEN-PACTEC GMBH & CO. KG
NESTEC S.A.

Headword:

-

Relevant legal provisions:

EPC Art. 54, 84, 111(1)
RPBA Art. 13(1)

Keyword:

"Novelty (main and 2nd auxiliary request - no; 3rd auxiliary request - yes)"
"Clarity (1st auxiliary request - no)"
"Remittal for further prosecution"

Decisions cited:

-

Catchword:

-



Case Number: T 0596/08 - 3.2.07

DECISION
of the Technical Board of Appeal 3.2.07
of 18 November 2009

Appellant:
(Patent Proprietor)

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Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 15 January 2008
revoking European patent No. 1324920 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: P. O'Reilly
Members: K. Poalas
I. Beckedorf

Summary of Facts and Submissions

- I. The appellant (patent proprietor) lodged an appeal against the decision of the Opposition Division revoking the European patent No. 1 324 920.
- II. Two oppositions (opponents 01 and 02) were filed against the patent as a whole based on Article 100 a) EPC on the grounds of lack of novelty (Article 54 EPC) and lack of inventive step (Article 56 EPC), and on Article 100 b) EPC (insufficient disclosure; Article 83 EPC).
- III. The Opposition Division found that the main and the auxiliary requests 1 to 3 and 8 were not admissible and that the subject-matter of claim 1 according to each of the auxiliary requests 4 to 7 was not novel over D1 (WO 92/20593 A).
- IV. Oral proceedings before the Board of Appeal took place on 18 November 2009.

The appellant requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the set of claims according to the main request, or, alternatively, on the basis of one of the sets of claims according to the first to third auxiliary requests, all filed with letter of 16 October 2009.

The respondent 01 (opponent 01) requested that the appeal be dismissed.

The respondent 02 (opponent 02), not being represented

at the oral proceedings as announced with letter dated 9 September 2009, did not submit any request or argument in the appeal proceedings.

V. Independent claim 4 according to the main request, reads as follows (amendments over the independent claim 5 as granted are struck through or in bold):

"4. A packaged ~~food product, such as a~~ candy (30), wherein a film formed into a substantially tubular envelope (16) extends beyond the product (12) at both ends, **wherein the longitudinal edges of the film are bonded together so as to form the tubular envelope (16),** wherein the envelope (16) has been squeezed together in substantially radially inward direction at some distance from the ends (34) of the envelope (16), and wherein the tubular envelope (12) is not twisted about its longitudinal axis at the location (33) where the envelope is squeezed together, characterised in that the film is bonded together at the location (33) where the envelope is squeezed together".

Independent claim 4 according to the 1st auxiliary request, reads as follows (amendments over the independent claim 5 as granted are struck through or in bold):

"4. A packaged ~~food product, such as a~~ candy (30), wherein a film formed into a substantially tubular envelope (16) extends beyond the product (12) at both ends, **wherein the longitudinal edges of the film are bonded together so as to form the tubular envelope (16),** wherein the envelope (16) has been squeezed together in substantially radially inward direction at some

distance from the ends (34) of the envelope (16), **and the closing means thereby exert forces on the tubular envelope, such that the circumference thereof is constricted in the direction of the central axis of the tube, with the envelope necessarily crumpling up,** and wherein the tubular envelope (12) is not twisted about its longitudinal axis at the location (33) where the envelope is squeezed together, characterised in that the film is bonded together at the location (33) where the envelope is squeezed together".

Independent claim 3 according to the 2nd auxiliary request, reads as follows (amendments over the independent claim 5 as granted are struck through or in bold):

"3. A packaged ~~food product, such as a~~ candy (30), wherein a film formed into a substantially tubular envelope (16) extends beyond the product (12) at both ends, **wherein the longitudinal edges of the film are bonded together so as to form the tubular envelope (16),** wherein the envelope (16) has been squeezed together in substantially radially inward direction at some distance from the ends (34) of the envelope (16), and wherein the tubular envelope (12) is not twisted about its longitudinal axis at the location (33) where the envelope is squeezed together, characterised in that **the film is plastically deformed upon being squeezed together, so that a durable closure is obtained through which aroma cannot permeate and the squeezing together by itself already suffices to close the wrapper and to give the candy the familiar appearance of a "twist wrap", and** the film is bonded together at the location (33) where the envelope is squeezed together".

Independent claims 1 and 2 according to the 3rd auxiliary request, read as follows (amendments over the independent claims 1 and 5 as granted are struck through or in bold):

"1. A method of packaging a ~~food product, such as a~~ candy (12), wherein a film is formed into a substantially tubular envelope (16) around the product, which envelope extends beyond the product (12) at both ends, **wherein the longitudinal edges of the film are bonded together so as to form the tubular envelope (16)**, wherein closing means (119) squeeze the envelope (16) together in substantially radially inward direction at some distance from the ends (34) of the envelope (160), and wherein the tubular envelope (12) is being squeezed together without being twisted about its longitudinal axis at the location (33) where said squeezing together takes place, characterised in that **the film is plastically deformed upon being squeezed together**, the film is bonded together at the location (33) where said squeezing together takes place, **and wherein said bond is a cold seal**".

"2. A packaged food product, such as a candy (30), wherein a film formed into a substantially tubular envelope (16) extends beyond the product (12) at both ends, **wherein the longitudinal edges of the film are bonded together so as to form the tubular envelope (16)**, wherein the envelope (16) has been squeezed together in substantially radially inward direction at some distance from the ends (34) of the envelope (16), and wherein the tubular envelope (12) is not twisted about its longitudinal axis at the location (33) where the

envelope is squeezed together, characterised in that **the film is plastically deformed upon being squeezed together**, the film is bonded together at the location (33) where the envelope is squeezed together, **and wherein said bond is a cold seal**".

VI. The appellant argued essentially as follows:

Admittance of the main and 1st to 3rd auxiliary requests into the appeal proceedings

The main and 1st to 3rd auxiliary requests have been filed with the letter dated 16 October 2009 as a reaction to the Board's communication dated 27 August 2009. These requests have been filed within the time limit defined under point 6 of said communication and present a converging development of the claimed subject-matter from the main towards the 3rd auxiliary request. Since the amendments to the independent claims of these requests are based on the granted dependent claims 2, 3 and 4 and on passages of the originally filed description the claims of each of these requests clearly comply with the formal requirements and can easily be dealt with by the respondents and the Board.

Main request - Novelty, Article 54 EPC: Claim 4

Candy is a product of confectionery which includes sugar and/or chocolate usually packaged as a single piece. Biscuits are generally baked food products usually packaged in multiple pieces. There is a certain overlap between the terms "candy" and "biscuit". Normally there is no need to reclose a biscuit packaging. A packaging for candy, however, has to be

re-closable at both ends and there is no unambiguous disclosure for that in D1. In D1 it is only the middle and not the whole cross-section that is squeezed in "substantially radially inward direction".

Figure 10 shows the sealing arrangement only at one end. The reference on page 14, lines 9 to 13 refers to the embodiments described before this passage and is not applicable to the embodiment of figure 10 described later on page 21 of D1.

1st auxiliary request - Novelty, Article 54 EPC: Claim 4

Since no closing means are described in D1 automatically also closing means providing the effect described in claim 1 of the 1st auxiliary request are not known from said document.

2nd auxiliary request - Clarity, Article 84 EPC: Claim 3

Although different persons may well have different perceptions of what a "**familiar appearance** of a "twist wrap" is, the expression itself is clear and claim 3, which includes this expression, meets the requirements of Article 84 EPC.

3rd auxiliary request - Novelty, Article 54 EPC: Claims 1 and 2

The feature of the independent claims of the 3rd auxiliary request that "the film is plastically deformed upon being squeezed together" is not known from D1.

Remittal

Since the opposition division did not consider inventive step it would be appropriate to remit the case for examination of this ground.

VII. Respondent 01 argued essentially as follows:

Admittance of the main and 1st to 3rd auxiliary requests into the appeal proceedings

The main and 1st to 3rd auxiliary requests could have been filed with the grounds of appeal since there was no need for the appellant to wait for the preliminary opinion of the Board. By filing these requests at such late stage of the appeal proceedings the appellant misuses said proceedings. Furthermore, said requests deviate from the requests filed by the appellant at the start of the appeal proceedings and during the opposition proceedings.

Main request - Novelty, Article 54 EPC: Claim 4

The subject-matter of claim 4 lacks novelty over the disclosure of D1. "Biscuit" is a particular sweet article which falls within the meaning of the broad generic term "candy" for sweet articles.

The film of the embodiment of figure 10 of D1 cannot be closed if the outer diameter is not reduced. This means that the film is a squeezed together in a substantially radially inward direction.

The passage on page 14, lines 9 to 13 refers to the general technical description and automatically also to the corresponding specific embodiments, like the one of figure 10, mentioned after said passage. The squeezing at some distance from the ends of the film tube is known from the embodiment of figure 10 in combination with the information on page 14, lines 9 to 13 and on page 9, lines 6 to 22.

1st auxiliary request - Novelty, Article 54 EPC: Claim 4

The additional feature over claim 4 of the main request describes only the effect to be achieved. Given the fact that this effect is known from D1 it is evident that the closing means mentioned in the claim are inherently known from D1.

2nd auxiliary request - Clarity, Article 84 EPC: Claim 3

The incorporation of the expression "familiar appearance of a "twist wrap"" into claim 3 of the 2nd auxiliary request violates the requirements of Article 84 EPC since this expression is not clear.

3rd auxiliary request - Novelty, Article 54 EPC: Claims 1 and 2

Although plastic deformation of the film used for packaging in D1 is not explicitly mentioned in the document the squeezed part of the film of the embodiment according to figure 10 of D1 has implicitly undergone a plastic deformation. Otherwise, the film would not stay in the squeezed position after opening

and reclosing the packaging since the material's rebound effect would not allow the film material to remain in a squeezed position. Furthermore, a cold-seal adhesive 18 is used in the embodiment of figure 10 of D1, see page 22, lines 9 to 13.

The subject-matter of claims 1 and 2 of the 3rd auxiliary request is therefore not novel over D1.

Remittal

Since the opposition division did not consider inventive step it would be appropriate to remit the case for examination of this ground.

Reasons for the Decision

1. *Admittance of the main and 1st to 3rd auxiliary requests into the appeal proceedings*

The Board regards the filing of the main and 1st to 3rd auxiliary requests as a reaction of the appellant to the preliminary opinion of the Board communicated to the parties with the annex to the summons to the oral proceedings, whereby said requests have been filed within the time limit set by the Board under point 6 of its communication. Each of the requests includes amendments based on granted dependent claims and on verbatim parts of the description as originally filed so that the Board considers that the case does not cause any difficulty for the respondents or for the Board to deal with it. The Board considers further that the requests do not have any complexity which would

have put an unfair burden on the respondents when preparing themselves to deal with the filed requests. These requests are filed as a reaction to the Board's communication and so do not have to be similar to the ones filed during the opposition proceedings or at the start of the appeal proceedings, as argued by respondent 01.

Therefore, the Board exercising its discretion under Article 13(1) of the Rules of Procedure of the Boards of Appeal admits said requests into the present proceedings.

2. *Main request - Novelty, Article 54 EPC: Claim 4*

The appellant argued that the subject-matter claim 4 differs from the packaged biscuits shown in figure 10 of D1 through the three following features:

- a) it is a candy that is packaged,
- b) the envelope has been squeezed together in substantially radially inward direction, and
- c) the envelope has been squeezed together at some distance from the ends of the envelope.

The Board cannot follow the appellant's arguments for the following reasons:

- a) The appellant stated that candy is a product of confectionery in the sense of a food product containing sugar and/or chocolate, and that candy is usually packaged as single piece, whereby biscuits are normally baked food products packaged in multiple pieces.

According to the Board's conviction "candy" is a generic term describing food products containing sugar and/or chocolate, whereby these products may or may not be baked. Since biscuits are normally baked food products containing sugar and/or chocolate they fall within the scope of the term "candy". Furthermore, the Board notes that according to column 1, lines 12 to 14 of the patent description the term "candy" as used in the patent in suit is "to be interpreted as "one or more candies", since it is also possible for more than one candy to be contained in one package". Accordingly, the fact that in D1 more than one biscuit is packaged does not itself define a differentiating feature over the subject-matter of claim 1.

The appellant argued that candy packages are normally reclosable, which is not the case for biscuit packages. However, the Board notes that a reclosability of the package is not claimed in claim 1.

b) The Board is persuaded that starting from a tubular envelope as shown in figure 2 of D1 and arriving at the packaged product shown in figure 10 of D1 it is clear that at the position of the cold-seal adhesive 18 the substantially round cross-section of the film at this point has been reduced from a cross-section with a larger diameter to a cross-section with a smaller diameter. All its parts have thereby moved inwards with reference to the original cross-section and have undergone thereby a squeezing in a "substantially radially inward direction". Thus, the appellant's argument that in D1 it is only the middle part and not the whole cross-section of the tubular film which is squeezed in "substantially radially inward direction"

cannot be followed by the Board.

c) In the packaged product of figure 10 of D1 the tubular film has been squeezed together at the position of the cold-seal adhesive 18, whereby this position lies at some distance from both ends of the envelope. The appellant argues that feature c) is to be interpreted as requiring that there are two such squeezing positions at both longitudinal ends of the packaged product. The Board, following the arguments of respondent 01, notes that the passage on page 14, lines 9 to 13 of D1 refers to "the arrangements described above" and that the description of packaged products as set out on page 9, lines 6 to 22, i.e. preceding the passage on page 14, corresponds to the embodiment of figure 10.

For the above mentioned reasons, the subject-matter of claim 1 is not novel over D1 and the requirements of Article 54 EPC are not met.

3. *1st auxiliary request - Novelty, Article 54 EPC*

The additional feature over claim 4 of the main request is the feature:

"the closing means thereby exert forces on the tubular envelope, such that the circumference thereof is constricted in the direction of the central axis of the tube, with the envelope necessarily crumpling up".

Since the packaged product according to figure 10 of D1 has been squeezed together in a substantially radially inward direction at the position of the cold-seal adhesive 18, see point 2b) above, it is clear for the

skilled person that the additional feature of this request describes the result of the squeezing action of the closing means when they squeeze the packaging film together in substantially radially inward direction.

Therefore, it is inherent that in D1 the packaged product is closed by closing means which produce the effect specified in claim 4 of this request. Accordingly, the subject-matter of this claim is disclosed in D1.

4. *2nd auxiliary request - Clarity, Article 84 EPC*

Claim 3 of this request includes the feature that the squeezing together of the envelope gives the candy the "familiar appearance of a "twist wrap"". The Board follows the argumentation of respondent 01 that the incorporation of this expression into the claim introduces an unclear expression which violates the requirements of Article 84 EPC. The Board notes that the expression "familiar appearance of a "twist wrap"" was mentioned only once in the originally filed application, see page 2, lines 31 to 32 of the originally filed description, without any further explanation or reference to a specific embodiment disclosed in the originally application and without an indication of what this appearance might be. When questioned by the Board the appellant agreed that different persons may well have different perceptions of what is a "**familiar appearance** of a "twist wrap"" (emphasis added by the Board). This expression defines an ambiguous feature, which depending on the subjective individual perception of the viewer, may cover different products so that the introduction of the

expression into the claim renders it unclear, violating thereby the requirements of Article 84 EPC.

Thus, the patent as amended in accordance with this request does not fulfil the requirements of the European Patent Convention as required by Article 101(3) EPC so that the 2nd auxiliary request is not allowable.

5. *3rd auxiliary request - Novelty, Article 54 EPC: Claims 1 and 2*

5.1 Claim 1 is based on a combination of claims contained in the patent as granted that were dependent upon each other so that the claim may only be considered under the grounds of opposition that are in the proceedings, i.e. novelty and inventive step. Claim 2 is a combination of claims contained in the patent as granted which, however, were not dependent upon each other.

Neither the respondent 01 nor the Board raise any formal objections to the amendments.

5.2 Claims 1 and 2 of this request include the feature that the film is "plastically deformed upon being squeezed together" as well as the feature that the "bond is a cold seal".

The use of a cold seal at the location where the envelope is squeezed together is known from the embodiment of figure 10 of D1, see page 22, lines 9 to 13.

The Board, however, considers that the feature that "the film is plastically deformed upon being squeezed together" is not known from D1.

Respondent 01 argued that although plastic deformation of the film used for packaging in D1 is not explicitly mentioned in said document the squeezed together part of the film of the embodiment according to figure 10 of D1 has implicitly undergone a plastic deformation. Otherwise the film would not stay in the squeezed position after opening and reclosing the packaging since the material's rebound effect would not allow the film material to remain by its one in a squeezed position.

The Board notes that in the embodiment of figure 10 of D1 it is the cold-seal adhesive 18 which keeps the film squeezed together. There is no explicit disclosure of the presence of a plastic deformation of the film used in D1, nor is there any support for the assumption of respondent 01 that the film of the embodiment according to figure 10 of D1 has undergone a plastic deformation. Furthermore, the Board observes, that neither a specific film material nor a rebound effect of such a film material has been mentioned at all in D1.

For the above-mentioned reasons, the subject-matter of claims 1 and 2 of the 3rd auxiliary request is novel over D1 and the requirements of Article 54 EPC are met.

6. *Remittal to the department of first instance*

The opposition division took its decision to revoke the patent based only on lack of novelty. The Board has

found that the subject-matter of claims 1 and 2 of the third auxiliary request is novel. The Board therefore considers it appropriate to exercise its powers under Article 111(1) EPC to remit the case to the department of first instance in order that it may carry out an examination as to whether or not an inventive step is present in the subject-matter of the claims.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.

The Registrar:

The Chairman:

V. Commare

P. O'Reilly