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**Datasheet for the decision  
of 3 June 2014**

**Case Number:** T 0918/11 - 3.2.07

**Application Number:** 03707309.5

**Publication Number:** 1480891

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B65D1/09

**Language of the proceedings:** EN

**Title of invention:**  
HERMETICALLY SEALED CONTAINER WITH UNITARY DROP-DISPENSER

**Patent Proprietor:**  
Weiler Engineering, Inc.

**Opponent:**  
kocher-plastik Maschinenbau GmbH

**Headword:**

**Relevant legal provisions:**  
EPC Art. 54, 113(1), 123(2)  
RPBA Art. 13(1), 13(3)

**Keyword:**  
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Public prior use - proven  
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Late-filed request - admitted (no)

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T 0782/92, T 0097/94, T 0738/04, T 0472/92, T 0750/94,  
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**Catchword:**



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Case Number: T 0918/11 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 3 June 2014**

**Appellant:** kocher-plastik Maschinenbau GmbH  
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**Decision under appeal:** **Decision of the Opposition Division of the European Patent Office posted on 25 February 2011 rejecting the opposition filed against European patent No. 1480891 pursuant to Article 101(2) EPC.**

**Composition of the Board:**

**Chairman** H. Meinders  
**Members:** H.-P. Felgenhauer  
I. Beckedorf  
G. Patton  
E. Kossonakou

## **Summary of Facts and Submissions**

- I. The appellant (opponent) filed an appeal against the decision of the opposition division rejecting the opposition against European patent No. 1 480 891.

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

The respondent (proprietor) requested that the appeal be dismissed or, alternatively, that in setting aside the decision under appeal the patent be maintained in amended form on the basis of one of the sets of claims filed as first and second auxiliary requests with letter of 22 November 2011 and filed as third to fifth requests during the oral proceedings.

- II. These claims 1 according to the requests of the respondent read as follows:

Claim 1 according to the **main request**

A unitary, hermetically sealed container of a thermoplastic material, suitable for dropwise dispensing of a liquid contained therein, and comprising:

a hollow container body (12) defining a liquid enclosure and provided with a dispensing nozzle (18) unitary with the container body (12) at a proximal end and having a distal end; and

a hollow, campanulate chamber (20) at the distal end of the nozzle (18) defined at least in part by a diverging frustoconical wall (54);

said dispensing nozzle (18) defining a liquid flow passageway (52) in communication with the liquid

enclosure and with said chamber (20), and having a substantially uniform inside diameter; and said hollow, campanulate chamber (20) having a maximum inside diameter that is larger than the inside diameter of the liquid flow passageway, defining by an annular flange (56) a drop dispensing aperture (22) sealed by a closure cap (24) at a frangible web (64) that surrounds the dispensing aperture (22), the dispensing aperture (22) having an inside diameter that is smaller than the inside diameter of the liquid flow passageway (52), and said frustoconical wall (54) diverging in a direction toward the drop dispensing aperture (22).

Claim 1 according to the **first auxiliary request**

A unitary, hermetically sealed container of a thermoplastic material, suitable for dropwise dispensing of a liquid contained therein, and comprising:

a hollow container body (12) defining a liquid enclosure and provided with a dispensing nozzle (18) unitary with the container body (12) at a proximal end and having a distal end; and a hollow, campanulate chamber (20) at the distal end of the nozzle (18) defined at least in part by a diverging frustoconical wall (54); said dispensing nozzle (18) defining a liquid flow passageway (52) in communication with the liquid enclosure and with said chamber (20), and having a substantially uniform inside diameter; and said hollow, campanulate chamber (20) having a maximum inside diameter that is larger than the inside diameter of the liquid flow passageway, defining by an annular flange (56) a drop dispensing aperture (22), wherein said frustoconical wall (54) is followed by said annular flange, said annular flange (56) terminates at

said drop dispensing aperture and said drop dispensing aperture is sealed by a closure cap (24) at a frangible web (64) that surrounds the dispensing aperture (22), the dispensing aperture (22) having an inside diameter that is smaller than the inside diameter of the liquid flow passageway (52), and said frustoconical wall (54) diverging in a direction toward the drop dispensing aperture (22).

Claim 1 according the **second auxiliary request**

A unitary, hermetically sealed container of a thermoplastic material, suitable for dropwise dispensing of a liquid contained therein, and comprising:

a hollow container body (12) defining a liquid enclosure and provided with a dispensing nozzle (18) unitary with the container body (12) at a proximal end and having a distal end; and  
a hollow, campanulate chamber (20) at the distal end of the nozzle (18) defined at least in part by a diverging frustoconical wall (54);  
said dispensing nozzle (18) defining a liquid flow passageway (52) in communication with the liquid enclosure and with said chamber (20), and having a substantially uniform inside diameter; and  
said hollow, campanulate chamber (20) having a maximum inside diameter that is larger than the inside diameter of the liquid flow passageway, defining by an annular peripheral inwardly extending unitary flange (56) following said frustoconical wall (54) a drop dispensing aperture (22) sealed by a closure cap (24) at a frangible web (64) that surrounds the dispensing aperture (22), the dispensing aperture (22) having an inside diameter that is smaller than the inside diameter of the liquid flow passageway(52), and

said frustoconical wall (54) diverging in a direction toward the drop dispensing aperture (22) and said flange (56) converging in the same direction.

Claim 1 according to the **third auxiliary request**

A unitary, hermetically sealed container of a thermoplastic material, suitable for dropwise dispensing of a liquid contained therein, and comprising:

a hollow container body (12) defining a liquid enclosure and provided with a dispensing nozzle (18) unitary with the container body (12) at a proximal end and having a distal end; and  
a hollow, campanulate chamber (20) at the distal end of the nozzle (18) defined at least in part by a diverging frustoconical wall (54);  
said dispensing nozzle (18) defining a liquid flow passageway (52) in communication with the liquid enclosure and with said chamber (20), and having a substantially uniform inside diameter; and  
said hollow, campanulate chamber (20) having a maximum inside diameter that is larger than the inside diameter of the liquid flow passageway, defining by an annular peripheral inwardly extending unitary flange (56) following said frustoconical wall (54) a drop dispensing aperture (22) sealed by a closure cap (24) at a frangible web (64) that surrounds the dispensing aperture (22); wherein the closure cap (24) merges with said flange (56) at said drop dispensing aperture (22), the dispensing aperture (22) having an inside diameter that is smaller than the inside diameter of the liquid flow passageway (52), and  
said frustoconical wall (54) diverging in a direction toward the drop dispensing aperture (22) and said flange (56) converging in the same direction.

Claim 1 according to the **fourth auxiliary request**

A unitary, hermetically sealed container of a thermoplastic material, suitable for dropwise dispensing of a liquid contained therein, and comprising:

a hollow container body (12) defining a liquid enclosure and provided with a dispensing nozzle (18) unitary with the container body (12) at a proximal end and having a distal end; and

a hollow, campanulate chamber (20) at the distal end of the nozzle (18) defined at least in part by a diverging frustoconical wall (54);

said dispensing nozzle (18) defining a liquid flow passageway (52) in communication with the liquid enclosure and with said chamber (20), and having a substantially uniform inside diameter; and

said hollow, campanulate chamber (20) having a maximum inside diameter that is larger than the inside diameter of the liquid flow passageway, defining by an annular peripheral inwardly extending unitary flange (56)

following said frustoconical wall (54) a drop dispensing aperture (22) sealed by a closure cap (24) at a frangible web (64) that surrounds the dispensing aperture (22), wherein the closure cap (24) merges with said flange (56) at drop dispensing aperture (22), the dispensing aperture (22) having an inside diameter that is smaller than the inside diameter of the liquid flow passageway (52), and

said frustoconical wall (54) diverging in a direction toward the drop dispensing aperture (22) and said flange (56) converging in the same direction, wherein the flange extends away from said diverging frustoconical wall (54) of the campanulate chamber (20) at about a right angle.



claim 1 according to the **fifth auxiliary request**

A unitary, hermetically sealed container of a thermoplastic material, suitable for dropwise dispensing of a liquid contained therein, and comprising:

a hollow container body (12) defining a liquid enclosure and provided with a dispensing nozzle (18) unitary with the container body (12) at a proximal end and having a distal end; and

a hollow, campanulate chamber (20) at the distal end of the nozzle (18) defined at least in part by a diverging frustoconical wall (54);

said dispensing nozzle (18) defining a liquid flow passageway (52) in communication with the liquid enclosure and with said chamber (20), and having a substantially uniform inside diameter; and

said hollow, campanulate chamber (20) having a maximum inside diameter that is larger than the inside diameter of the liquid flow passageway, defining by an annular flange (56) a drop dispensing aperture (22) sealed by a closure cap (24) at a frangible web (64) that surrounds the dispensing aperture (22), the dispensing aperture (22) having an inside diameter that is smaller than the inside diameter of the liquid flow passageway (52), and said frustoconical wall (54) diverging in a direction toward the drop dispensing aperture (22)

wherein the inside diameter of the drop dispensing aperture (22) is about 5 to about 10 percent less than the inside diameter of the liquid flow passageway (52).

III. The following means of evidence considered in the impugned decision and referred to by the parties in the appeal proceedings are taken into consideration:

Documents:

- A1 Flyer concerning the "bottelpack 305" "bottelpack installation with two moulds for the production of single containers in PE" by the Rommelag Vertriebsgesellschaft mbH
- A3 Part of an undated, not further defined technical drawing concerning a mould for containers, with handwritten reference to "1992 / Maschine 3521 130, V.Nr. 1958h, Form. Det. 335018-001-0010", as well as handwritten reference numbers for different parts in the drawing
- A6 Confirmation of order by Rommelag Vertriebsgesellschaft mbH to Dr. Mann Pharma dated 24 July 1991 "Auftragsbestätigung Nr. 766.91" concerning "order 20.159 Kat. 037 Inv. 92/91" with respect to delivery of one machine "Kompaktautomat "bottelpack" Typ 305 M - 40 fach" for the fully automated production of containers according to "Vorschlag-Nr. 1958h" for which it is indicated that the drawing will be forwarded for approval shortly; see page 1: "Verpackungsdesign: gem. unserer Vorschlagszeichnung Nr. 1958h (Die Zeichnung wird in Kürze zur Genehmigung vorgelegt)"; according to page 4 the blow moulding form is conform with proposal drawing (Vorschlagszeichnung) 1958h
- A8 Technical drawing "bottelpack-Ampullen "Vorschlag-Nr. 1958h" dated 26 July 1991, with the release for production of the corresponding blow mould, signed and dated 19 August 1991 for Dr. Gerhard Mann Chem. Pharm. Fabrik GmbH

Testimonies of witnesses according to the minutes of the oral proceedings before the opposition division

B1 minutes of the hearing of Mr. H. Appenzeller (pages 1 - 10) and

B2 minutes of the hearing of Mr. W. Gesang (pages 11 - 18).

*IV. Impugned decision*

According to the impugned decision the opposition is admissible. With respect to a first alleged public prior use, the opposition has been sufficiently substantiated (reasons, nos. 1.2 - 1.3). This concerns the sale and delivery to Dr. Mann Pharma of a machine "bottelpack" "Typenbezeichnung 305" for manufacturing of containers according to "Vorschlag-Nr. 1958h" with a mould according to A3 and use of the machine and mould by Dr. Mann Pharma to produce a container according to "Vorschlag-Nr. 1958h". It was argued by the opponent that this alleged public prior use is novelty destroying for the subject-matter of claim 1 of the patent as granted

Concerning the first and a further prior use witnesses have been heard. As a result of the evaluation of the evidence neither prior use was considered proven.

The following criteria have been referred to:

the standard of proof according to which facts have to be proven beyond reasonable doubt ("up to the hilt") in case all evidence is considered to lie entirely in the hands of the opponent, and

a complete chain of evidence should be submitted when only the opponent has access to the information concerning the alleged public prior use.

Applying these criteria to the first alleged public prior use the opposition division considered it as sufficiently proven that a machine of the type "bottlepack 305" was delivered to Dr. Mann Pharma in 1991/92.

The opposition division considered it as insufficiently proven that, before the priority date of the patent in suit, the machine has actually produced the alleged containers and that these containers have been made available to the public (reasons, no. 2.1).

Concerning the allegation that the mould according to A3 was sold to Dr. Mann Pharma before the priority date, and that this mould allowed the production of containers falling under the claims of the patent the opposition division was of the opinion that doubts remained, firstly as to whether the use of the mould in the machine necessarily led to products having all the technical features of claim 1. It expressed in this respect the opinion that other parameters, such as the wall thickness of the container, would have an influence on the contour of the inside of the container.

Secondly, there were doubts that this mould has been used at all by Dr. Mann Pharma before the priority date of the patent in suit (it noted that the testimony of the witnesses was not conclusive in this respect).

Thirdly, there were doubts whether the containers allegedly manufactured by means of the machine and the mould were sold to third parties (reasons, no. 2.3).

V. The submissions of the appellant can be summarised as follows:

The opposition is admissible since in the notice of opposition the grounds on which the opposition is based and the facts and evidence in support of these grounds have been sufficiently presented.

The subject-matter of the first public prior use to be considered is disclosed by the product specification according to A8, the disclosure of which has to be seen in connection with the blow moulding machine according to A1 and the mould according to A3 for the production of these products and the relevant parts of the testimonies B1 and B2, relating to A8.

The conclusion of the decision under appeal that for this first public prior use the public availability of the products according to A8 has not been proven is not correct, since it does not take due account of the circumstances of the present case. It has to be taken as a proven fact that the offer, sale, delivery and use of the blow moulding machine with the corresponding mould was under no secrecy agreement, which is clearly derivable from the testimonies B1 and B2. Moreover, under these circumstances, namely the delivery of the blow moulding machine in combination with the mould well before the priority date of the patent in suit it also has to be taken as proven that this machine was used to produce such products, which by their very nature are mass products, and that these products were sold and thus made publicly available.

It is evident that the public prior used product has all features of the product of claim 1 which thus lacks novelty.

The additional features added to the claims 1 according to the first and the second auxiliary requests do not distinguish the container of each of these claims from the one according to the public prior use. The subject-matters of these claims are thus not novel; in case they are considered as novel they at least do not involve an inventive step.

The third and fourth auxiliary requests should not be admitted. There is no justification for their filing as late as during the oral proceedings before the Board. Moreover, since features from the description have been introduced into these claims the examination of this amendment would place an undue burden on the appellant. One cannot expect a reaction to such amendments within the time constraints of an oral proceedings.

Claim 1 according to the fifth auxiliary request has been amended in a direction which completely deviates from the one pursued by the claims 1 of the previous requests. Such a change in direction cannot be justified as a reaction to a change in the factual situation with respect to the prior art. The fifth auxiliary request should therefore not be admitted.

VI. The submissions of the respondent can be summarised as follows:

The opposition is inadmissible since in the notice of opposition the facts and evidence concerning the alleged public prior uses on which the opposition is

entirely based, have not been sufficiently substantiated.

Concerning the subject-matter of the first public prior use the product specification according to A8 does not disclose the container in sufficient detail. Such details are also not disclosed via the mould according to A3 since without knowing the moulding conditions like the shape and thickness of the preform, the temperature and pressure and the distribution of the material of the preform during moulding, one cannot derive the interior shape of the container from the shape of the mould in which it has been allegedly formed. Moreover, there is no evidence that proves that the container according to A8 truly relates in all details to the mould according to A3. The testimonies according to B1 and B2 do not prove that the container according to A8 has been produced using the mould according to A3.

The conclusion of the decision under appeal that for the first public prior use the public availability of the products according to A8 has not been proven is correctly based on the available facts and evidence. Even if it is assumed that a moulding machine and a mould has been offered, sold, delivered and used it remains unproven at which date containers have actually been produced with this machine and where these were made available to the public. This applies even more for containers corresponding to the product specification A8. Because of the long time between the actual production of the containers and the date at which the testimonies B1 and B2 were taken it is evident that even if containers have been produced before the priority date the witnesses cannot be

expected to remember every detail of the container actually produced.

Thus, even if it is considered that containers have been produced before the priority date the interior shape of these containers remains highly uncertain. The subject-matter of claim 1 is thus novel even in case a public prior use is considered proven.

The additional features added to the claims 1 according to the first and second auxiliary requests further distinguish the container of each of these claims from the one according to the alleged public prior use. They are thus novel and since the available prior art provides no indication towards the solution according to claim 1 they also involve an inventive step.

The third and fourth auxiliary requests should be admitted. The features taken from the description concern the very core of the invention. They thus cannot be a surprise. Since they relate to features already addressed in the written and oral proceedings they can easily be taken into account and do not complicate the proceedings.

Claim 1 according to the fifth auxiliary request has been amended by combining the features of claims 1 and 2 as granted. It is evident that such an amendment is to be expected by an opponent. This amendment does not add to the complexity of the proceedings and should thus be admitted

VII. In the annex to the summons for oral proceedings (in the following: the annex) the Board has given its preliminary opinion concerning i.a. the admissibility of the opposition, the consideration of the alleged



public prior uses and, in general terms, novelty and inventive step.

VIII. Oral proceedings before the Board, at the end of which the decision was announced, took place on 3 June 2014.

### **Reasons for the Decision**

#### 1. *Admissibility of the opposition*

According to the preliminary opinion given in the annex (cf. point 6.1.) the Board did not see a reason to deviate from the decision under appeal in this respect (cf. reasons, point 1.2).

In its response to the annex and during the oral proceedings the respondent essentially repeated its previous arguments. As indicated during the oral proceedings for an opposition based on an alleged public prior use to be admissible, the notice need only indicate which facts and evidence thereof support the grounds of opposition. Only after it is established that the opposition is admissible the question needs to be examined whether the alleged public prior use is proven.

In view of the fact that no new arguments concerning any lack of such facts and evidence have been submitted, the Board does not see any reason to deviate from its preliminary opinion given in the annex and concludes for this reason that the opposition is admissible.

2. *Subject-matter of claim 1 according to the main request*

2.1 Claim 1 concerns a unitary, hermetically sealed container of a thermoplastic material, suitable for dropwise dispensing of a liquid contained therein. The container comprises:

- (a) a hollow container body 12 defining a liquid enclosure and provided with a dispensing nozzle 18 unitary with the container body 12 at a proximal end and having a distal end; and
- (b) a hollow, campanulate chamber 20 at the distal end of the nozzle 18 defined at least in part by a diverging frustoconical wall 54;
- (c) said dispensing nozzle 18 defining a liquid flow passageway 52 in communication with the liquid enclosure and with said chamber 20, and having a substantially uniform inside diameter.
- (d) **The hollow, campanulate chamber 20 defining by an annular flange 56 a drop dispensing aperture 22 sealed by a closure cap 22 at a frangible web 64 that surrounds the dispensing aperture 22.**
- (e) Moreover the hollow, campanulate chamber 20 has a maximum inside diameter that is larger than the inside diameter of the liquid flow passageway and the dispensing aperture 22 has an inside diameter that is smaller than the inside diameter of the liquid flow passageway 52, and
- (f) the frustoconical wall 54 diverges in a direction towards the drop dispensing aperture 22.

- 2.2 Consequently, according to feature (d) an annular flange defines a drop dispensing aperture. The drop dispensing aperture is sealed by a closure cap at a frangible web that surrounds the dispensing aperture.
- 2.2.1 The flange referred to in feature (d) is not further defined in claim 1 with respect to its shape. According to an explanation given by the respondent during the oral proceedings the expression "**flange**" in the context of claim 1 has to be understood as referring to an **element which extends radially inwardly**.
- 2.2.2 As indicated in the description, to dispense container contents the cap is severed and removed from the container body by breaking the frangible web (paragraph [0031]).
- 2.2.3 According to the respondent the manner in which the dispensing aperture is provided and its position relative to the frangible web according to feature (d) constitute the **core of the invention** as defined by claim 1 of the main request. The respondent referred in this respect to the description of the patent in suit, paragraph [0007], according to which a disadvantage of prior art containers is to be seen in the following "When the closure is removed from the container by tearing or twisting the closure along the connecting frangible web, the exposed dispensing orifice or aperture on the container may be surrounded by a relatively rough, uneven, or jagged region which defines the surface at the broken frangible web. Such uneven orifices may interfere with the formation of uniformly repeatable drops from a given container and may contribute to a variation in drop size from one container to another depending on the vagaries of the broken frangible web. Furthermore, the geometry of the

neck of the container adjacent the drop dispensing orifice or aperture may not be conducive to the formation of stable, controllable drops of predictable and repeatable size".

- 2.2.4 The Board considered to the advantage of the respondent that irrespective of the broad definition of the relationship between the dispensing aperture and the frangible web due to the term "surrounds" in feature (d) this feature has the effect that the above mentioned disadvantage is avoided.

### 3. *Public prior use*

#### 3.1 One alleged public prior use concerns

- 1) the offer and sale of a machine according to A1 together with a mould to produce containers according to A8 by "Rommelag Kunststoff-Maschinen Vertriebsgesellschaft mbH" to "Dr. Mann Pharma", the machine and mould originating from "Kocherplastik Maschinenbau GmbH"
- 2) the delivery of this machine and mould,
- 3) the use of this machine and mould to produce containers according to A8 by "Dr. Mann Pharma" and
- 4) the selling of these containers by "Dr. Mann Pharma" to the public,

all of these transactions not being under any secrecy agreement.

- #### 3.2
- As a result of the assessment of the documentary evidence according to A1, A6 and A8 as well as the testimonies of the witnesses according to B1 and B2 the Board considered, as indicated during the oral proceedings, this public prior use to be proven.

Concerning the subject-matter disclosed by the proven public prior use (in the following referred to as: prior used container) reference is made to point 4 below.

- 3.3 Concerning the **standard of proof** to be applied, the impugned decision (reasons, point 2) refers to the criterion "of "absolute conviction" ("up to the hilt" or "beyond any reasonable doubt") rather than the balance of probabilities. The former would apply in cases of prior use for which the **evidence lies entirely within the sphere of the opponent** (see e.g. T 782/92; T 97/94, OJ 1998, 467; T 738/04). Furthermore, a complete chain of proof should be submitted in such a case (T 472/92, OJ 1998, 161). As the board of appeal held in T 750/94 (OJ 1998, 32), if the board's decision on whether to revoke the patent depended on that issue, "the available evidence would have to be examined very critically and strictly".

Concerning the **sale of the containers** the impugned decision refers to a different standard of proof stating: "However, in cases where mass-produced goods which are widely advertised and offered for sale to customers who often remained anonymous, might a different treatment be appropriate (T 241/99 and T 55/01)".

According to the impugned decision it is then concluded: "Since the facts in the present case are different to those underlying the decisions T 241/99 and T 55/01, in particular the containers have allegedly been sold to pharmacies, the opposition division sees no ground to apply other standards than a strict one. In this case, to demand a complete chain of

evidence does not make it unreasonably complicated for the opponent to successfully rely on a sale to prove public availability".

- 3.4 Applying this standard of proof the opposition division considered as sufficiently proven that a machine "bottlepack Type 305" was delivered to Dr. Mann Pharma in 1991/92 (impugned decision, reasons, point 2).
- 3.5 The Board, as indicated already in the annex (cf. point 6.2.5), considered this assessment to be correct.
- 3.5.1 In particular and as indicated during the oral proceedings, the Board concludes that when applying the standard of proof according to which facts lying in the sphere of the appellant have to be proven beyond reasonable doubt, A6 suffices as proof for the offer and sale of the machine according to point 1) above (see 3.1 *supra*).

The Board considered in this respect that the order confirmation A6, carrying the date 24 July 1991 (cf. page 1) clearly refers to the machine according to A1 (cf. A6, page 1: "A) 1 Kompaktautomat "bottelpack" Typ 305M - 40 fach"). Evidence for the fact that the order also involved a mould for the blow moulding of containers according to A8 is given by pages 3 and 4 of A6 in which it is referred to a blow mould to manufacture containers according to A8 (cf. page 4, first line: "Blasform nach unserer Vorschlagszeichng. 1958h". According to page 1 of A6 hollow containers are to be manufactured fully automatically from a plastic granulate; the containers are to be filled in the mould and hermetically sealed. As plastic material Lupolen ("Kunststoff: Lupolen 1810H/3020D or 3040D") is referred to. Concerning the design of the containers

there is reference to A8 ("Verpackungsdesign: gem. unserer Vorschlagszeichnung Nr. 1958h). The production capacity of the machine is mentioned as approx. 10.000 pieces per hour in connected blocks of 5 and 10 units ("Kapazität mit Effektivleistungsvorbehalt von +/- 10%: ca. 10.000 St./h in zusammenhängenden Multiblocks als 5er Riegel und 10er Riegel").

Corroborating evidence for the facts referred to above is available from B1 (cf. page 3, lines 6 - 8) and B2 (cf. page 13, lines 1 - 19).

3.5.2 Evidence for the fact that the machine and mould referred to were delivered corresponding to point 2) above (see 3.1 *supra*), is contained in B1 (cf. page 3, lines 11 - 20) and B2 (cf. page 13, lines 1 - 19; page 14, lines 1 - 6).

3.5.3 Evidence for the fact that the offer, sale and delivery of the machine and mould occurred under no secrecy agreement is given by the testimonies B1 and B2 (cf. B1, page 6, last five lines, page 7, lines 1 - 3; B2, page 14, last two lines, page 15, first line).

According to B1 the witness declared that he does not know whether a secrecy agreement existed, but indicated that on the side of the vendor there was no secrecy concerning the sale of the machine and the mould.

According to B2 there was no intention to keep (the sale of) the machine and the mould secret (see pages 14, 15: "EA: Gab es Interesse an einer Geheimhaltung in Bezug auf den Verkauf der Maschine "bottelpack" oder in Bezug auf diese Form, die benutzt werden? Z: Nein") and the container (according to B2, cf. page 17, lines 21, 22) was not new ("Nein, es war keine Neuerung, diese Produkte haben sich schon jahrelang auf dem Markt

befunden, nur für uns war's neu, die im eigenen Haus herzustellen.")

3.5.4 Evidence for the fact that according to point 3) above (see 3.1 *supra*) the machine and mould delivered have been used by Dr. Mann Pharma is given by B1 (cf. page 7, lines 8 - 14 from the bottom).

3.5.5 Evidence for the fact that corresponding to point 4) above (see 3.1 *supra*) produced containers have been sold by "Dr. Mann Pharma" to the public is given by B2 (cf. page 14, lines 8 - 18)

That the sale of the containers has been under no confidentiality agreement is confirmed in B2 (cf. page 17, lines 16, 17).

Furthermore, considering the circumstances of the present case it is very unlikely that the machine and mould delivered according to A6 have not been used to produce containers, or that these containers have not been sold to the public in the time span between the delivery of the machine and mould and the priority date of the patent in suit.

In that respect it also needs to be taken into consideration that the application of the strict standard of proof referred to in the impugned decision is not justified in view of the fact that the actual production and the selling of the containers is clearly outside the sphere of the appellant.

Thus weighing that on the one hand the machine and mould are for the mass production of containers, that considerable time passed between their date of delivery and the priority date of the patent in suit, that



similar containers have been sold before by Dr. Mann Pharma and that it goes beyond common sense to assume that such a machine and mould is bought and delivered, but not used to produce containers with such a mould, and that on the other hand no documentary evidence in that respect has been provided by the appellant, the Board considers it as proven that the machine and mould were used to produce containers according to A8 and that these containers have been sold to the public without any confidentiality to be observed.

In that respect the Board considers the reasoning of the impugned decision (reasons, point 2.1) that "... the mere declaration of one witness in connection with facts occurred between 1992 and 1997, i.e. at least 14 years ago, is not sufficient to prove the details of prior use" as not well founded.

In view of the documentary evidence given according to A1, A6 and A8, a mere reference to the fact that the testimonies B1 and B2 concern facts which occurred at least 14 years ago and that possibly other documentary evidence may exist is not sufficient in the present case to dismiss the testimonies as insufficient. It goes even against the general rules concerning consideration of evidence to distinguish dogmatically between the evidentiary value of a witness testimony on the one hand and a document on the other hand. The opposition division apparently considered documents as being of a more conclusive evidentiary value than witnesses. Such an approach has no basis in the EPC, Article 117 containing no ranking of the therein listed means of evidence.

It is in particular noted that the hearing of witnesses is one of the various but principally equal means of

taking evidence listed in Article 117 EPC to establish as much as possible of the circumstances of the alleged prior use. Nowhere in the impugned decision are doubts raised as to the validity of the testimonies.

Finally, the Board is of the opinion that the application of the standard of proof "beyond reasonable doubt" also does not justify disregarding the testimonies B1 and B2.

3.5.6 Concluding, the Board holds that consideration of every single piece of evidence as referred to above serves to prove the facts in support of which it was submitted, namely A6 concerning the sale of a machine and mould, A1 concerning the machine referred to in A6 and A8 concerning the containers to be produced with the mould sold in combination with the machine according to A6. Corroborating evidence is given by B1 and B2. Additionally, B2 gives evidence for the fact that the machine and mould according to A6 have been used to manufacture containers as specified by A8 and which were sold to the public.

The Board further holds that besides individual consideration of the pieces of evidence, their combined consideration contributes even more to the public prior use referred to above (cf. point 3.1) being proven.

Finally, the Board considers that, although not required as indicated above (cf. point 3.5.5), the above assessment of the available evidence in any case satisfies in its entirety the standard of proof "beyond reasonable doubt" applied according to the impugned decision.

3.6 As far as the counterarguments of the respondent rely on the assessment of the evidence according to the impugned decision to be correct, they are moot considering the above reasoning.

3.6.1 Going beyond that the respondent argued that the witnesses cannot be expected to produce detailed information for facts which have occurred a long time ago. In this respect the Board considers the argument of the appellant to be more convincing that the containers do not have an overly complex structure which cannot be remembered by persons involved in the selling of the machine and the mould for producing them and the production and the selling of these containers.

The Board in that respect also refers, as indicated during the oral proceedings, to the minutes of the hearing of witnesses according to B1 and B2. As can be concluded from them, the respondent not only had the possibility to raise questions but also did so. None of the questions, however, was directed to the faculty of recollection of the witnesses.

3.6.2 As far as the respondent objected to the witnesses having been confronted with the drawing of the containers according to A8 the Board concludes, as indicated during the oral proceedings, that the respondent who had the possibility to argue against this presentation of the drawing by the opposition division but did not do so, cannot raise that argument during the appeal proceedings. Moreover, it was not argued nor is it otherwise apparent that the credibility of the witnesses is in doubt.

3.6.3 It has been disputed whether A3, which is a portion of an undated, not further defined technical drawing

concerning a mould for containers, can be considered as further evidence concerning the public prior use of the container and in particular the interior shape of the container according to A8.

As can be derived from the above and as indicated by the Board during the oral proceedings, the disclosure of the technical drawing A8 suffices with the information given by A6, B1 and B2 to give a complete disclosure concerning the container according to A8 that was to be produced with the mould sold with the machine, so that there was no need in this respect to further rely on information derivable from A3 with respect to the structure of the container.

The arguments of the respondent concerning a missing link between the mould according to A3 and the containers according to A8 and missing information with regard to e.g. the moulded material and the moulding conditions which would be required such that from the shape of the mould a conclusion could be reached with respect to the interior shape of the container, which is important in view of the subject-matter of claim 1, are thus moot.

It is, however, established by the board that A3, although no direct link to A8 is established, is neither incompatible to nor in contradiction with A8 or any other piece of evidence.

In fact, as indicated by the Board during the oral proceedings, taking the shapes of the containers of A8 and the shape of the mould according to A3 as well as the corresponding statements in B1 (cf. page 7, lines 1 - 10) or B2 (cf. page 17, lines 1 - 3 from the bottom) into account, it appears to be highly probable that the

container according to A8 has been blow moulded using the mould according to A3 on the machine according to A1.

4. *Subject-matter of the prior used container*

4.1 The subject-matter made available by the offer, sale and delivery of a machine according to A1 together with a mould to produce containers according to A8 and the use of the machine and the mould to produce containers according to A8 and the selling of the containers to the public is as follows:

4.1.1 The technical drawing A8 scaled to a 1:1 ratio ("M1:1") shows in a front, side and top view an arrangement of ten containers. It is apparent that the containers are shown in A8 in a state after they have been moulded.

According to the text of A8 this drawing is to form the basis for the manufacture of a mould for the blow moulding of the arrangement of containers shown in A8; cf. the statements: bottelpack-containers 2x10-fold (block) 0.5ml on 305, total volume approx. 0.8ml proposal no. 1958h - "bottelpack-Ampullen 2x10-fach (Block) 0,5ml auf 305 Ges. Vol. ca. 0.8ml M1:1 Vorschlag-Nr. 1958h"; We thereby agree to the drawing to be used for the manufacture of the blow mould for order no. 766.91 - "Wir geben hiermit die Zeichnung zur Fertigung der Blasform für Auftr. Nr. 766.91 frei" and the indication: separation head form - "Trennung Kopfb. Form".

Besides the statement concerning the total volume, A8 contains text concerning the filling height up to 0.5ml - "Fuellh. b. 0.5ml).

From the dimensions given in the front view it is apparent that each of the containers has a circular dispensing aperture (cf. the statement opening approx. diameter 1.5mm - "Oeffng. ca. dia 1.5mm) within a section which has been referred to by the respondent as "head section". This head section comprises, in the wording of the features of claim 1 of the main request, a dispensing nozzle, a hollow campanulate chamber and a closure cap as referred to in the following.

4.1.2 The container according to A8 is, in the terminology of the features of claim 1,

a unitary, hermetically sealed container of a thermoplastic material, suitable for dropwise dispensing of a liquid contained therein (A8; A6, page 1, point A)1; B2: see e.g. page 12, fourth and sixth statement from the bottom).

This container comprises corresponding to the features (a) - (c) of claim 1 (cf. point 2.1 above):

a hollow container body defining a liquid enclosure and provided with a dispensing nozzle unitary with the container body at a proximal end and having a distal end (cf. the head section(s) of the container(s) in the front and side view each having a dispensing aperture of 1.5mm diameter); and a hollow, campanulate chamber at the distal end of the nozzle defined at least in part by a diverging frustoconical wall, and

said dispensing nozzle defining a liquid flow passageway in communication with the liquid enclosure and with said chamber, and having a substantially uniform inside diameter.

- 4.1.3 Corresponding to feature (d) the hollow campanulate chamber defines by an annular flange (cf. the section extending radially inwardly at the end of the campanulate chamber adjacent the ball shaped closure cap which ends at the circular dispensing aperture referred to as an opening of approx. 1.5mm diameter - "Oeffng. ca. dia 1.5mm") a drop dispensing aperture sealed by a closure cap at a frangible web that surrounds the dispensing aperture (cf. B2, page 15, fifth statement and lines 23 - 26 from the bottom). The term "surrounds" encompasses a broad meaning, i.e. the closure cap need not be at the dispensing aperture.
- 4.1.4 Corresponding to features (e) and (f) the hollow, campanulate chamber has a maximum inside diameter that is larger than the inside diameter of the liquid flow passageway (cf. A8: head section(s) of the front and side view), the dispensing aperture has an inside diameter that is smaller than the inside diameter of the liquid flow passageway and the frustoconical wall diverges in a direction towards the drop dispensing aperture (cf. the proportions of the corresponding sections measurable from the front and side view of the technical drawing A8).

5. *Novelty*

Comparing the subject-matter of claim 1 according to the main request (cf. point II above) and the established disclosure of the public prior use container according to A8 (cf. point 4.1.2 above) it is evident that all features of the container of claim 1 are directly and unambiguously disclosed by the prior used container.

Consequently the subject-matter of claim 1 lacks novelty over the prior used container (Article 54 EPC).

6. *Claim 1 according to the first auxiliary request*

Claim 1 according to the first auxiliary request differs from claim 1 according to the main request in that it comprises instead of feature (d) feature:

(d') said hollow, campanulate chamber (20) ... defining by an annular flange (56) a drop dispensing aperture (22) wherein said frustoconical wall (54) is followed by said annular flange, said annular flange (56) terminates at said drop dispensing aperture and said drop dispensing aperture is sealed by a closure cap (24) at a frangible web (64) that surrounds the dispensing aperture (22).

Feature (d') thus defines that the drop dispensing aperture is defined by the radial inward end of the annular flange. It further defines a spatial sequential relationship according to which the frustoconical wall is followed by the annular flange.

As it is the case for feature (d) as indicated above (point 2.2.1) feature (d') likewise does not define the shape of the flange.

Feature (d'), when compared to the prior used container as referred to above (point 4.1.3), cannot be considered as a distinguishing feature in view of the fact that within the known container likewise a frustoconical wall (of the campanulate chamber) is followed by an annular radially inwardly extending element which thus can be considered as constituting an annular flange of the kind referred to by feature (d').



The known flange terminates, corresponding to feature (d'), at the drop dispensing aperture.

The subject-matter of this claim 1 thus also lacks novelty with respect to the prior used container since amended feature (d') is likewise known from this container.

In view of this result the objection of the appellant that claim 1 does not fulfil the requirement of Article 123(2) EPC need not be further pursued.

7. *Claim 1 according to the second auxiliary request*

Claim 1 according to the second auxiliary request differs from claim 1 according to the main request in that it comprises instead of feature (d) feature:

(d'') said hollow, campanulate chamber (20) ... defining by an annular peripheral inwardly extending unitary flange (56) following said frustoconical wall (54) a drop dispensing aperture (22) sealed by a closure cap (24) at a frangible web (64) that surrounds the dispensing aperture (22)

and in that it comprises instead of feature (f) feature:

(f') said frustoconical wall (54) diverging in a direction toward the drop dispensing aperture(22) and said flange (56) converging in the same direction.

Feature (d'') thus further defines the relationship between the frustoconical wall and the annular flange in that the flange is unitary and extends inwardly.

Feature (d'') like, as indicated above (point 2.2.1) feature (d), does not define the actual shape of the annular flange.

Feature (f') defines, as indicated during the oral proceedings, the direction of the annular flange only in general terms ("in the same direction").

The annular flange according to the prior used container (cf. point 4.1.3 above) follows on the frustoconical wall, it is unitary and it extends inwardly. The known flange thus corresponds to the one defined by feature (d'').

Since the known flange defines, like the one according to claim 1, by its inward end the drop dispensing aperture and converges with an acute angle towards the axis of the container, just like the frustoconical wall diverges also with an acute angle away from that same axis, both are "in the same direction". Therefore the further qualification of the extension of the flange according to feature (f') cannot be seen as constituting a distinguishing feature.

The container according to claim 1 of the second auxiliary request thus also lacks novelty (Article 54 EPC) with respect to the prior used container since amended features (d'') and (f') are likewise known from the prior used container.

In view of this result the objection of the appellant that claim 1 does not fulfil the requirement of Article 123(2) EPC need not be further pursued.

8. *Claims 1 according to the third and fourth auxiliary request, filed at the oral proceedings*

8.1 The claims 1 according to the third and fourth auxiliary requests comprise the additional feature

wherein the closure cap (24) merges with said flange (56) at said drop dispensing aperture (22).

This feature is taken from the description, and the respondent has referred to paragraph [0028] as basis for this amendment.

No justification for the late filing of these requests in the oral proceedings has been given, other than that it should be possible to further defend the patent in suit in view of the fact that the requests filed in the written procedure have been found, at the oral proceedings, as not being allowable.

8.2 According to the appellant the introduction of this feature into claim 1 does not comply with the requirement of Article 123(2) EPC. The reason is that it has been taken in isolation from the relevant part of the description, where these features were disclosed in connection with a particular structure of the cap and the annular flange.

The appellant also objected to the admittance of these two requests since to adequately reply to the amended claims a thorough comparison of the subject-matters of the amended claims with the available prior art would be required. The oral proceedings would not suffice for that purpose and the right to be heard of the appellant would be infringed, if these proceedings were not adjourned for that purpose.

8.3 The Board, considering that the claims 1 of the third and fourth requests contain subject-matter taken from the description and that therefore the filing of such requests could not be expected by the appellant, decided not to admit these requests.

In this respect the argument of the appellant is correct that dealing properly and in substance with these requests would require an adjournment of the oral proceedings. In view of Article 13(3) RPBA the Board therefore had no choice but to not admit these requests.

9. *Claim 1 according to the fifth auxiliary request*

This claim 1 does not comprise the features added to the claims 1 of the previous requests.

Instead, it comprises the features of claim 2 as granted introducing a quantitative relationship between the inside diameter of the drop dispensing aperture and the inside diameter of the liquid flow passageway.

This amendment, directed to the liquid flow passageway leads in a direction different from the amendments of the claims 1 of the previous main and auxiliary requests, which were all directed to the form of the flange of the dispensing aperture. This is diverging subject-matter (see e.g. T 1685/07, not published in OJ EPO, and its references).

Since there is no justification for such a shift in the subject-matter to be examined, the Board, exercising its discretionary power according to Article 13(1) RPBA, decided not to admit this request at such a late stage of the proceedings (towards the end of the oral

proceedings before the Board). It would run counter to the requirement to conduct the appeal proceedings, and thus also oral proceedings, in an efficient manner.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



G. Nachtigall

H. Meinders

Decision electronically authenticated