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**Datasheet for the decision
of 13 October 2020**

Case Number: T 1916/15 - 3.2.07

Application Number: 09003473.7

Publication Number: 2095723

IPC: A23K1/18, B65D21/02, B65D85/72

Language of the proceedings: EN

Title of invention:
More appealing packaged pet food products

Patent Proprietor:
Société des Produits Nestlé S.A.

Opponents:
Hill's Pet Nutrition, Inc.
Mars Incorporated

Headword:

Relevant legal provisions:
EPC Art. 54(1), 56
RPBA 2020 Art. 15(8)

Keyword:

Novelty - (yes)

Inventive step - main request (no) - auxiliary request (yes)

Abridged reasons for decision - agreement with finding of
department of first instance on two issues

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 1916/15 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 13 October 2020

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 29 July 2015
rejecting the oppositions filed against European
patent No. 2095723 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman I. Beckedorf
Members: G. Patton
 A. Beckman

Summary of Facts and Submissions

I. Opponent 2 lodged an appeal within the prescribed period and in the prescribed form against the decision of the Opposition Division rejecting the oppositions and maintaining European patent No. 2 095 723 as granted.

Two oppositions were filed, which were directed against the patent as a whole and based on Article 100(a) EPC (lack of novelty and inventive step), Article 100(b) EPC (insufficiency of disclosure) and Article 100(c) EPC (unallowable amendments).

Opponent 1 likewise lodged an appeal against the decision, which they withdrew by letter of 24 February 2020. Hence, opponent 1 no longer has the status of appellant but remains a party as of right pursuant to Article 107, second sentence, EPC.

II. By communication dated 20 January 2020 pursuant to Article 15(1) RPBA 2020, the Board provided the parties with its preliminary non-binding opinion that the subject-matter of claim 1 of the patent as granted could be seen as lacking novelty and inventive step and that, due to the lack of parties' submissions on their allowability, no preliminary opinion could be provided on the sets of claims filed by the patent proprietor as the first to seventh auxiliary requests with their letter dated 30 March 2016.

III. During the oral proceedings, which took place on 13 October 2020 in the absence of opponent 1 in accordance with Article 15(3) RPBA 2020 and Rule 115(2) EPC, the following issues *inter alia* were discussed:

- novelty of the subject-matter of claim 1 of the patent as granted over the disclosure of document D5;
- inventive step of the subject-matter of claim 1 of the patent as granted in view of the teaching of document D5, chosen as closest prior art, in combination with the skilled person's common general knowledge, as shown in documents D1 and D7;
- inventive step of the subject-matter of claim 1 of the first auxiliary request in view of the teaching of document D5, chosen as closest prior art, in combination with the common general knowledge of the person skilled in the art.

For details of the discussions, reference is made to the minutes of the oral proceedings.

The order of the present decision was announced at the end of the oral proceedings.

IV. The appellant requested

that the impugned decision be set aside and that European Patent No. 2 095 723 be revoked.

The respondent requested

that the appeal be dismissed (*i.e.* that the patent be maintained as granted - main request), or, in the alternative, when setting aside the decision under appeal, that the patent be maintained in amended form on the basis of one of the sets of claims filed as first to seventh auxiliary requests with the reply letter dated 30 March 2016.

V. The wording of claim 1 of the main request (patent as granted) reads as follows with the feature analysis used by the appellant (features (1) to (6)):

- (1) A stackable container system for pet foods,
- (2) the container system comprising an easily removable, resealable lid and
- (3) a container body defining an interior for receiving pet food,
- (4) the container body having one or more portions selected from the group consisting of translucent and transparent portions or combinations thereof,

characterised in that

- (5) the resealable lid has at least one step down groove,
- (6) which acts to hold the lid level and to take up play in the snap fit between the lid and the container body.

With respect to claim 1 of the patent as granted only feature (5) was amended in claim 1 according to auxiliary request 1 as follows (additions are in bold, deletions in strikethrough; emphasis added by the Board):

- (5') the resealable lid has ~~at least~~ **a plurality of** ~~one~~ step down grooves,

In view of the outcome of the present decision, there is no need to give the wording of claims 1 of the second to seventh auxiliary requests.

VI. The following documents of the opposition proceedings are of relevance for the present decision:

D1: CA 2 354 716 A;

D5: US 6 761 279 A;

D7: DE 34 47 558 A; and

D18: Response to non-final Office Action of USPTO on corresponding application number 12/813,187, 11 January 2011.

VII. The parties' arguments are dealt with in the reasons for the decision below.

Reasons for the Decision

1. *Main request*

1.1 Novelty

The appellant and opponent 1 contest that the subject-matter of claim 1 of the main request be novel over the disclosure of document D5.

1.1.1 Disclosure of D5

D5 (see column 2, line 15 to column 3, line 51; Figures 3 and 4) discloses a stackable container system for foodstuff, *i.e.* suitable for pet foods, the container system comprising an easily removable, resealable lid

(37) and a container body ("container" 11, "base" 36) defining an interior suitable for receiving pet food, the resealable lid (37) having at least one step down groove ("central area" 71), which acts to hold the lid level and to take up play in the snap fit between the lid (37) and the container body (11, 36).

1.1.2 Container body - lid

Contrary to the respondent's view, the Board considers, as put forward by the appellant and opponent 1, that the base (36) in D5 can be seen as being part of the container body, *i.e.* the container body of D5 being made up of two parts, the base (36) and the container (11). As a matter of fact, claim 1 of the main request does not exclude that the container body be made up of several parts, *e.g.* two parts like in D5.

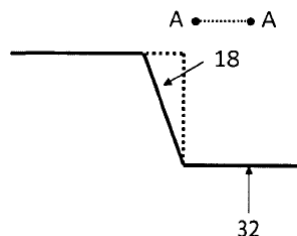
For the respondent, the container body of claim 1 must be capable of defining an interior for receiving the pet food. The base (36) of the container system of D5 is explicitly disclosed as being separate from the container (11) such that it would not be suitable for this purpose. Furthermore, since the container (11) in D5 comprises a seal membrane (31) it is impossible to use the base (36), which is located above said seal membrane (31), for containing pet food. For these reasons, the base (36) cannot be seen as forming part of the container body.

The Board cannot follow the respondent's view. As discussed at the oral proceedings claim 1 does not specify that the pet food is part of the claimed container system and does not include either any specific level up to which the container body of the claimed system has to be suitable for containing pet

food. Membranes like in D5 are also not excluded in the container body of the container system of claim 1 of the main request. Therefore, the container (11) of the container body (11, 36) of D5 unambiguously fulfills the claimed suitability for the disclosed container system.

1.1.3 Feature (5) - step down groove

The respondent argues that, in view of the disclosure of the contested patent taken as a whole, in particular Figures 1 and 4 and paragraph 41, a step down groove consists in a slanted slope or surface connecting a corner of the top of the lid to the indentation or groove, see D18, page 6. In support of their definition they provided the following drawing at the oral proceedings before the Board, see also letter dated 20 November 2013, page 7:



Cross-section of a step down groove
according to the respondent

The Board, however, concurs with the appellant and opponent 1 that the expression "step down groove" used in claim 1 of the main request is not defined in the contested patent, nor that its structural features unambiguously appear from the Figures. In particular, a cross-section of a step down groove as shown above is not provided in the contested patent. As a consequence, the Board is not convinced that the respondent's definition would be the only one derivable from the

contested patent and rather shares the view of the appellant and of opponent 1 that the one given in the impugned decision, point 3.3 of the reasons, third paragraph, is also plausible. In accordance with this definition the periphery (72) and the central area (71) in the lid (37) of D5 can be seen as forming a step down groove. Hence, feature (5) is considered to be disclosed in D5.

Notwithstanding the above, the Board considers that the same also would apply even if the respondent's definition of step down groove were to be taken. As a matter of fact, the skilled person would immediately and unambiguously derive from Figures 3 and 4 of D5 that the wall of the lid between the central area (71) and the periphery (72) is not necessarily vertical, at least to some extent. Since the respondent's definition does not provide any hint on the slope of the slanted wall, *i.e.* possibly close to the vertical, no distinction with respect to the disclosure of D5 would be derivable.

1.1.4 Feature (6) - take up play in the snap fit

In the above described configuration (point 1.1.2) that the base (36) is seen as being part of the container body, the Board considers that D5 discloses a snap fit between the lid (37) and the container (11, 36). In addition, as also held in the impugned decision, point 4.4.4 of the reasons, and contrary to the respondent's view, the presence of a step down groove implies that its functional features, in particular the take up of a play in the snap fit, are inevitably fulfilled.

For the respondent, D5 would merely disclose a snug fit of the lid (37) to the wall (52) in order to close the

lid on the base, column 3, lines 46-49. The snap action referred to in D5, column 3, lines 48-49, would only be the action of the slighty outward flare of the wall (52) during the engaging of the pocket (73) of the lid (37) with the opposite wall of the wall (52). A snap fit would require specific technical features such as a lip or a hook snapping into an undercut while having a temporary elastic deformation, which would not be the case with the snug fit of D5.

The respondent further argues that, since D5 does not disclose the presence of a play between the lid (37) and the base (36) in case the groove (71) were removed, it could not be argued that the groove would ensure the function of close fitting and taking up a play in the snap fit between the lid and the container body. For the respondent the definition of a play is to provide free motion between the two parts at stake.

The Board cannot share this view. As explicitly disclosed in D5, column 3, lines 44-51, a "*slightly outward flare of the wall 52 and a snug fit of the lid 37 to the wall assures that the lid will close on the base 36 with **a positive grip or snap action***" (emphasis by the Board). This positive grip or snap action is reflected in Figures 3 and 4 showing that the slighty outward flare of the wall (52) provides an undercut and the periphery (72) of the lid (37) provides a hook snapping into the undercut, with an inevitable temporary deformation of the hook and wall (52). Due to this snap fit and the presence of a step down groove as discussed under point 1.1.3 above, the Board holds the view that the functions as claimed in feature (6) would inevitably be obtained. The conclusion drawn by the respondent on a virtual container system of D5 without

the groove (71) cannot be followed since it remains purely hypothetical.

1.1.5 Feature (4) - translucent and transparent portions

The appellant and opponent 1 argue that the container body of D5 is formed of polyethylene terephthalate, which would be implicitly transparent or translucent, column 2, lines 3-6. Hence, feature (4) of claim 1 that the container body has one or more portions selected from the group consisting of translucent and transparent portions or combinations thereof would be disclosed in D5.

The Board cannot share this view. Firstly, the feature is in itself not explicitly disclosed in D5. Secondly, the appellant and the opponent 1 have failed to demonstrate that all polyethylene terephthalate materials would inevitably be transparent or translucent. At the oral proceedings the appellant merely stated that this would "typically" be the case.

As a consequence, the Board is of the opinion that D5 does not immediately and unambiguously disclose feature (4).

1.1.6 In view of the above, the subject-matter of claim 1 is novel over D5 (Article 54(1) EPC).

1.2 Inventive step - claim 1

The appellant considers that the subject-matter of claim 1 of the main request lacks inventive step in view of D5 taken as closest prior art in combination with the common general knowledge as illustrated by D1 or D7.

1.2.1 Closest prior art

The Board shares the appellant's view that document D5 can be considered as a suitable closest prior art for claim 1 of the main request since it lies within the same technical field, namely of stackable container systems suitable for pet foods, see column 1, lines 6-8, and column 3, lines 52-54.

1.2.2 In view of the above discussion on novelty of the claimed subject-matter over the disclosure of D5, the only distinguishing feature is that:

feature (4): the container body has one or more portions selected from the group consisting of translucent and transparent portions or combinations thereof.

1.2.3 Technical effect - Problem to be solved

The Board concurs with the appellant that, in view of the contested patent, paragraphs 4, 6, 24 and 25, the technical effect associated with distinguishing feature (4) is that the food is visible through the walls of the container system.

The problem to be solved can then be seen as to modify the container system of D5 in order to make it more attractive for the consumer.

1.2.4 Obviousness

The Board also shares the appellant's view that the skilled person faced with this objective technical problem and using his common general knowledge as illustrated in D1, page 1, lines 25-26, or D7, abstract and page 4, would immediately think of the claimed solution. In doing so, they would encounter no technical difficulties since the material used in D5, i.e. polyethylene terephthalate, is typically transparent, as confirmed by D1, page 1, lines 25-26, and would arrive at the claimed subject-matter in an obvious manner.

Hence, the subject-matter of claim 1 of the main request lacks inventive step (Article 56 EPC).

1.2.5 The respondent, on the basis of paragraphs 39 and 46 of the contested patent, argues that the technical effect associated with feature (4) would be to protect the pet food from fading or even spoiling by eliminating ultraviolet light. This would lead to the problem of reducing the risk that low quality food be consumed which is also linked with the fact that the consumer can see the food through the translucent or transparent portions of the container body.

As argued by the respondent, the goal of D5 is to keep the food as fresh as possible, e.g. avoid moisture and oxygen ingress, see column 3, lines 38-41. The skilled person in view of this goal would immediately and unambiguously derive that the container system of D5 is to be opaque. Hence, they would be led away from the claimed solution and would never think of implementing it in the disclosed container system.

Should they still think of translucent and transparent portions, they would implement such portions on the lid, i.e. not on the container body as claimed, since it is more convenient for the consumer to check the food from the lid as fading first occurs at the surface of the food.

- 1.2.6 The Board cannot share the respondent's view. There is no disclosure in the contested patent as a whole which would link feature (4) with the quality of the food. Hence, the problem to be solved derived by the respondent is not convincing. Furthermore, D5 does not disclose that the container is to be mandatorily opaque. On the contrary, there is a hint for the skilled reader that the container body (11) is made up of a typically translucent and transparent material, e.g. polyethylene terephthalate, column 2, lines 5-7.

2. *First auxiliary request*

With respect to claim 1 of the main request feature (5) has been modified in that the resealable lid has **a plurality of** step down grooves (feature (5')), see point V above).

2.1 Inventive step

- 2.1.1 Like for the main request, the appellant considers that the subject-matter of claim 1 of the first auxiliary request lacks inventive step in view of D5 taken as closest prior art in combination with the common general knowledge as illustrated by D1 or D7.

They argue that the configuration disclosed in D5 of a single circumferential step down groove amounts to the

most optimal solution for taking up the play in the snap fit between the lid and the container body and avoiding moisture and oxygen ingress in the closed container system. Hence, the claimed configuration according to claim 1 of the first auxiliary request with a plurality of step down grooves could only lead to an inferior solution with respect to these functions. For this reason, no inventive step should be acknowledged for the claimed subject-matter.

2.1.2 The Board cannot share the appellant's view.

As put forward by the respondent, the fact of having a plurality of step down grooves in the lid leads to a more reliable snap fit in ensuring that the play is taken up at the appropriate locations between the lid and the container body. This technical effect has no synergy with that of feature (4) discussed under points 1.2.2 to 1.2.6 above and, hence, feature (5') is to be considered independently for assessing inventive step of the claimed subject-matter.

The problem to be solved on the basis of distinguishing feature (5') alone can then be seen as to modify the container system of D5 so as to make the snap fit between the lid and the container body more reliable.

There is no hint in this respect in D5 or in any of the available prior art documents, nor does the claimed solution belong to the skilled person's common general knowledge. As a consequence, the skilled person faced with the above mentioned objective technical problem would not arrive at the claimed subject-matter in an obvious manner.

Therefore, an inventive step has to be recognised for the subject-matter of claim 1 of the first auxiliary request.

2.2 Further objections

2.2.1 At the oral proceedings before the Board, the appellant explicitly confirmed that the only objection raised against the first auxiliary request is that of lack of inventive starting from D5 as discussed above. As a consequence, none of the other objections which had been raised in writing by the appellant needs to be dealt with in the present decision (see also point II above).

2.2.2 With their written submissions, opponent 1 has not raised any objections of lack of novelty or inventive step against the subject-matter of claim 1 of the first auxiliary request (see again point II above).

They raised objections on the basis of the grounds for opposition according to Article 100(b) and (c) EPC against the then main request (patent as granted), which, although not explicitly directed against the first auxiliary request, could possibly apply to some extent.

However, with respect to these latter objections, the Board informed the parties in the communication dated 20 January 2020, point 4.3, that it follows the finding of the impugned decision, points 2 and 3 of the reasons. As none of the parties subsequently contested or commented on this Board's preliminary view, the Board considers in the present case that a mere reference to the reasoned findings of the impugned decision, points 2 and 3 of the reasons, on these

issues is appropriate in accordance with Article 15(8) RPBA 2020.

2.3 Description

The respondent filed at the oral proceedings an adapted description to the set of claims according to the first auxiliary request. Neither the appellant nor the Board had objections against it.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent as amended in the following version:

Description:

Pages 2 and 3 received during oral proceedings of
13 October 2020
Page 4 of the patent specification

Claims:

No. 1 to 12 according to auxiliary request 1 filed
with the letter of 30 March 2016

Drawings:

Figures 1 to 8 of the patent specification.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated