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**Datasheet for the decision
of 9 February 2021**

Case Number: T 0871/17 - 3.2.07

Application Number: 10007352.7

Publication Number: 2243716

IPC: B65D75/58, B65D77/20, B32B27/08

Language of the proceedings: EN

Title of invention:

Flexible packaging structure with a built-in opening and
reclose feature, and method for making same

Patent Proprietor:

Sonoco Development, Inc.

Opponents:

Amcor Flexibles Burgdorf GmbH
MACLEAN Mr. Martin

Headword:

Relevant legal provisions:

EPC Art. 100(b), 111(1), 113(1), 116(1)
EPC R. 103(4)(c), 103(6)
RPBA 2020 Art. 11, 12(8), 15(1)

Keyword:

Grounds for opposition - insufficiency of disclosure (no)
Remittal to the department of first instance - (yes)
Reimbursement of the appeal at 25% - (yes)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 0871/17 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 9 February 2021

Appellant: Sonoco Development, Inc.
(Patent Proprietor) 1 North Second Street,
Hartsville,
South Carolina 29550 (US)

Representative: Hoffmann Eitle
Patent- und Rechtsanwälte PartmbB
Arabellastraße 30
81925 München (DE)

Previous party as of right Amcor Flexibles Burgdorf GmbH
(Opponent 1) Kirchbergstrasse 168-170b
3401 Burgdorf (CH)

Representative: Pronovem
Office Van Malderen
Parc d'affaires Zénobe Gramme- bâtiment K
Square des Conduites d'Eau 1-2
4020 Liège (BE)

Respondent: MACLEAN Mr. Martin
(Opponent 2) Mathys & Squire LLP
The Shard
32 London Bridge Street
London SE1 9SG (GB)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 3 February 2017
revoking European patent No. 2243716 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman I. Beckedorf
Members: K. Poalas
 V. Bevilacqua

Summary of Facts and Submissions

- I. The patent proprietor (appellant) lodged an appeal in the prescribed form and within the prescribed time limit against the decision of the opposition division revoking European patent No. 2 243 716.
- II. Two oppositions had been filed by opponents 1 and 2 against the patent as a whole based on all grounds for opposition pursuant to Article 100(a), (b) and (c) EPC (lack of novelty, lack of inventive step, insufficient disclosure and unallowable amendment).
- III. The opposition division held in the decision under appeal that the ground for opposition according to Article 100(b) EPC holds against the patent as granted and that auxiliary requests 1 to 3 filed on 23 December 2016 violate the requirements of Article 83 EPC.
- IV. Opponent 1 withdrew with its letter filed on 5 June 2018 its opposition. Opponent 2 remained as the sole respondent in the present appeal proceedings.
- V. The appellant requested
 - that the decision under appeal be set aside
 - and
 - that the patent be maintained as granted,
 - or, in the alternative,
 - when setting aside the decision under appeal,
 - that the patent be maintained in amended form
 - according to one of the sets of claims re-filed as

auxiliary requests 1 to 3 with the statement setting out the grounds of appeal.

VI. The respondent (opponent 2) requested

that the appeal be dismissed.

In the event that the Board decides that the main request, or any of auxiliary requests 1 to 3, meet the requirements of Article 83 EPC, the respondent requested

that the case be remitted to the opposition division for examination of fulfillment of the requirements of Articles 100(a) and 100(c) EPC.

VII. Oral proceedings had been requested by both parties as a precautionary measure.

VIII. In order to prepare the oral proceedings scheduled upon both parties' requests for 15 April 2021, the Board informed the parties of its preliminary assessment of the case by means of a communication pursuant to Article 15(1) RPBA 2020 dated 7 December 2020.

The Board considered therein *inter alia*

- a) that the ground for opposition pursuant to Article 100(b) EPC does not hold against the patent as granted (see points III.1.1 to III.1.13),
- b) that the appealed decision should be set aside (see point IV.2),
- c) that it is appropriate to remit the present case to the opposition division for further prosecution and examination of the further patentability requirements (see point IV.7),
- d) that, in the event that both the appellant and the

respondent, agreed to a decision in the written procedure on the basis of their mutual written submissions and withdrew their requests for oral proceedings, a final decision on the appeal could soon be issued under Article 12(8) RPBA 2020 (see point IV.8).

- IX. With letter dated 30 December 2020 the appellant withdrew the request for oral proceedings and agreed to a decision in the written procedure on the basis of its written submissions, on the condition that the Board decides to set aside the decision under appeal and to remit the case to the opposition division for further prosecution. In said letter the appellant refrained from presenting any comments or arguments regarding the Board's communication.

For the event that no oral proceedings take place, it requested reimbursement of the appeal fee at 25 % under Rule 103(4)(c) EPC.

- X. With letter dated 6 January 2021 the respondent agreed to holding the oral proceedings by videoconference, and with letter dated 18 January 2021 the respondent withdrew the request for oral proceedings and requested the remittal of the case to the opposition division. The respondent did not submit any comments or arguments regarding the Board's communication in any of said letters.

- XI. Claim 1 of the patent as granted reads as follows:

"A method for making a flexible packaging laminate having a built-in opening and reclose feature, comprising the steps of:
applying a pressure-sensitive adhesive (20) onto one

surface of a first structure (10) comprising at least one layer of flexible material (80); adhesively joining the first structure (10) to a second structure (42) via the pressure-sensitive adhesive (20) so as to form a laminate (46), there being no permanent laminating adhesive in the laminate (46), the second structure (42) being coextensive with the first structure (10) and comprising at least one layer of flexible material (82, 84), wherein one of the first and second structures (10, 42) comprises an outer structure and the other comprises an inner structure, and the pressure-sensitive adhesive (20) serves to join the outer structure to the inner structure over their entire surfaces;

advancing the laminate to a scoring station (50, 60) at which a U-shaped outerscore line (52) is formed through the thickness of the outer structure and a U-shaped inner score line (62) is formed through the thickness of the inner structure, the outer score line (52) delineating an outer opening portion (86) of the outer structure that is separable from the outer structure along the outer score line (52), the inner score line (62) delineating an inner opening portion (88) of the inner structure that is separable from the inner structure along the inner score line (62), wherein there is a region of the outer opening portion (86) between the outer and inner score lines (52, 62) that is attached to an underlying surface (92) of the inner structure via the pressure-sensitive adhesive (20), the outer opening portion (86) being peelable from the underlying surface (92) of the inner structure so as to cause the inner opening portion (88) to also be peeled back to create an opening in the laminate (46), and the outer opening portion (86) being re-attachable to the underlying surface (92) of the inner structure via the pressure-sensitive adhesive (20) for reclosing the

opening".

- XII. Since the present decision is taken on the basis of the main request, there is no need to reproduce the auxiliary requests.

Reasons for the Decision

1. *Procedural matters*

1.1 The case is ready for decision on the basis of the extensive parties' written submissions and the decision under appeal. The Board's decision is taken in written proceedings without holding oral proceedings in accordance with Article 12(8) RPBA 2020 and with Articles 113 and 116 EPC.

1.2 The principle of the right to be heard pursuant to Article 113(1) EPC is however observed since that provision only affords the opportunity to be heard and the parties' submissions are fully taken into account.

1.3 The appellant's request for oral proceedings under Article 116(1) EPC is auxiliary to its request that the decision under appeal be set aside and that the case be remitted to the opposition division for further prosecution, see point IX above.

1.4 Since the decision under appeal is set aside and the case is remitted to the opposition division for further prosecution, see the order of the present decision, the appellant's auxiliary request for oral proceedings remains procedurally inactive.

1.5 By withdrawing its request for oral proceedings, see point X above, the respondent effectively has chosen not to avail of the opportunity to present its observations and counter-arguments orally but instead to rely on its written case.

1.6 As a consequence, the oral proceedings arranged for 15 April 2021 are cancelled and the present decision is taken in the written proceedings on the basis of the parties' requests and their submissions on file.

2. *Main request - Insufficiency of disclosure (Article 100(b) EPC)*

2.1 Under sections III.1.1 to III.1.13 of the Board's communication pursuant to Article 15(1) RPBA 2020 the following is stated:

"1.1 In the impugned decision the opposition division found that the invention claimed in claim 1 of the patent as granted is not disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

*1.2 The opposition division and the respondent argue that in the opposed patent a person skilled in the art was neither taught **where** to make the score lines, nor taught **how** to make these score lines in an embodiment that does not include any permanent adhesive.*

1.3 The opposition division's and the respondent's arguments are based on the fact that large parts of the specification of the opposed patent relate to an embodiment in which the two structures 10 and 42 are joined to each other by means of the permanent adhesive 34, and the pressure-sensitive adhesive 20 is only

applied in the area between the outer and inner score lines 52, 62 so as to allow for the reclosing of the package. Claim 1, in contrast, specifies a method in which the pressure-sensitive adhesive 20 serves to join the two structures 10, 42 over their entire surfaces, and there is no permanent laminating adhesive in the resulting laminate 46.

where to make the score lines

1.4 The Board follows in this respect the appellant's arguments presented under chapter 3 of the grounds of appeal and under chapter 2.3 of the letter dated 27 June 2019 and considers that claim 1 itself already provides a clear guidance for a person skilled in the art. According to claim 1, the outer score line 52 delineates an outer opening portion 86 of the outer structure that is separable from the outer structure along the outer score line 52; the inner score line 62 delineates an inner opening portion 88 of the inner structure that is separable from the inner structure along the inner score line 62; and there is a region of the outer opening portion 86 between the outer and inner score lines 52, 62 that is attached to an underlying surface 92 of the inner structure via the pressure-sensitive adhesive 20.

1.5 Furthermore, a person skilled in the art aiming at putting the claimed method into practice can find a clear teaching where to put the score lines 52, 62 in any one of the figures 4, 5, 8 and 9 of the opposed patent.

1.6 The fact that in the claimed embodiment there is no pressure-sensitive adhesive strip does not result in an undue burden being placed on a person skilled in the

art in order to carry out the claimed invention.

1.7 In the opposed patent the strips of pressure-sensitive adhesive are not required to determine the location of the score lines 52, 62. The opposite is the case: it is the intended location of the score lines 52, 62, in view of the desired location of the opening in the package, which determines where the strips of pressure-sensitive adhesive are applied. Being faced with the task of putting the claimed method into practice instead, in which the pressure-sensitive adhesive is applied over the entire surfaces of the two structures 10, 42, a person skilled in the art would still choose the location of the score lines 52, 62 to be where the resulting package is supposed to have its opening - as illustrated in Figures 4, 5, 8 and 9 of the patent. No strips of pressure-sensitive adhesive are required to determine where the score lines 52, 62 are suitably placed in order to create this opening.

how to make the score lines

1.8 The Board follows also in this respect the appellant's arguments presented under chapter 4 of the grounds of appeal and under chapter 2.4 of the letter dated 27 June 2019 and considers that the opposed patent includes at least in its paragraphs [0033] and [0053] a clear teaching that the score lines could be formed by completely cutting through one or more layers of the laminate.

1.9 There is no reason for the skilled reader of the patent to assume that, other than the outer score line 52, the inner score line 62 would/should not be a continuous line, see hereto figures 4, 8 and 9.

1.10 *The respondent argues that the patent in suit teaches a person skilled in the art that it is essential to provide a region of permanent adhesive and to pattern apply the pressure-sensitive adhesive, whereby it does not provides any suggestion or teaching of the claimed alternative.*

1.11 *The Board does not agree. Paragraph [0009] of the patent in suit states that "it is within the scope of the invention to use only pressure-sensitive adhesive with no permanent laminating adhesive", and that "in this case the pressure-sensitive adhesive serves to join the outer structure to the inner structure over their entire surfaces". How to do this is so apparent to a person skilled in the art that in light of its common general technical knowledge a detailed description thereof is superfluous. This is also in accordance with T 721/89, said decision being referred to by the respondent.*

1.12 *Furthermore, an emphasis on a non-claimed embodiment in the description of the patent in suit, as detailed as it may be, does not automatically mean that the claimed subject-matter is insufficiently disclosed.*

1.13 *In view of the above, the Board considers that the invention as claimed in claim 1 is disclosed in the patent in suit in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art."*

2.2 The above-mentioned preliminary finding of the Board has not subsequently been commented on nor has it been contested by the respondent, see point X above. Also the appellant did not responded to the Board's

communication, see point IX above.

2.3 Under these circumstances, the Board - having once again taken into consideration all the relevant aspects concerning said issues - sees no reason to deviate from its above-mentioned finding.

2.4 As a consequence, the ground for opposition pursuant to Article 100(b) EPC does not hold against the patent as granted.

3. *Remittal of the case to the opposition division*

3.1 Under sections IV.3 to IV.7 of the Board's communication pursuant to Article 15(1) RPBA 2020 the following is stated:

"3. The Board notes

- that no further requirements for patentability were mentioned or examined in the contested decision;*
- that the appellant has not presented any arguments relating to the further requirements for patentability;*
- and*
- that the respondent explicitly requested that the case be remitted to the opposition division for examination of the grounds for opposition according to Articles 100(a) and (c) EPC in case would find that the ground for opposition according to Article 100(b) EPC does not hold against the main request (see letter 12 October 2017, chapter 1, third paragraph).*

4. As there are no substantive arguments present in the appeal proceedings relating to any patentability issues other than the issue of sufficiency of disclosure, the Board cannot come to a decision regarding further patentability requirements on the basis of the current

appeal case alone.

5. The Board is aware that, according to Article 11, first sentence, RPBA 2020, a remittal for further prosecution should only be undertaken, exceptionally, when special reasons apply.

6. Against this background, after considering all the relevant circumstances of the case at hand, the Board comes to the conclusion that the issues relevant to patentability in the present case, including but not limited to, the examination of novelty, inventive step and unallowable amendment, could not be decided upon without undue burden (cf. explanatory notes to Article 11 RPBA 2020, Supplementary publication 2 - OJ EPO 2020, 46, 54).

7. Consequently, the Board is convinced that there are special reasons within the meaning of Article 11, first sentence, RPBA 2020 that apply, and that it is appropriate to remit the present case to the opposition division for further prosecution and examination of the further patentability requirements, in accordance with Article 111 (1) EPC."

- 3.2 The above-mentioned preliminary finding of the Board has not subsequently been commented on nor has it been contested by the parties, see points IX and X above.
- 3.3 Under these circumstances, the Board - having once again taken into consideration all the relevant aspects concerning said issues - sees no reason to deviate from its above-mentioned finding.
- 3.4 As a consequence, the present case is to be remitted to the opposition division for further prosecution on the

basis of the main request (patent as granted) underlying the decision under appeal.

4. *Reimbursement of the appeal fee at 25%*

4.1 With letter dated 30 December 2020 the appellant withdrew its request for oral proceedings within one month time period from the Board's communication according to Article 15(1) RPBA 2020 dated 7 December 2020.

4.2 With letter dated 18 January 2021 the respondent withdrew also its request for oral proceedings so that according to Article 12 (8) RPBA 2020 the present decision is taken in the written proceedings on the basis of the parties' requests and their submissions on file and without holding oral proceedings.

4.3 The requirements of Rule 103(4)(c) EPC for an appeal fee reimbursement at 25% are therefore fulfilled.

4.4 Therefore, the Board decides under Rule 103(6), 2nd sentence, EPC that the appeal fee is to be reimbursed at 25% in accordance with Rule 103(4)(c) EPC.

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 for further prosecution.
3. The appeal fee is reimbursed at 25%.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated