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**Datasheet for the decision  
of 30 March 2021**

**Case Number:** T 2235/17 - 3.3.06

**Application Number:** 06018936.2

**Publication Number:** 1775122

**IPC:** B32B27/32, B32B7/10

**Language of the proceedings:** EN

**Title of invention:**

Easy-open reclosable films having an interior frangible interface and articles made therefrom

**Patent Proprietor:**

CURWOOD, INC.

**Opponents:**

Cryovac, Inc.  
Henkel AG & Co. KGaA

**Headword:**

Easy-open reclosable films / CURWOOD INC.

**Relevant legal provisions:**

EPC Art. 83, 54, 56

**Keyword:**

Sufficiency of disclosure - (yes)

Novelty - (yes)

Inventive step - (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 2235/17 - 3.3.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.06**  
**of 30 March 2021**

**Appellant:** Henkel AG & Co. KGaA  
(Opponent 2) Henkelstrasse 67  
40589 Düsseldorf (DE)

**Representative:** Viering, Jentschura & Partner mbB  
Patent- und Rechtsanwälte  
Hamborner Straße 53  
40472 Düsseldorf (DE)

**Respondent:** CURWOOD, INC.  
(Patent Proprietor) 2200 Badger Avenue  
Oshkosh,  
Wisconsin 54904 (US)

**Representative:** Vossius & Partner  
Patentanwälte Rechtsanwälte mbB  
P.O. Box 86 07 67  
81634 München (DE)

**Party as of right:** Cryovac, Inc.  
(Opponent 1) 100 Rogers Bridge Road  
Duncan, SC 29334 (US)

**Representative:** Uexküll & Stolberg  
Partnerschaft von  
Patent- und Rechtsanwälten mbB  
Beselerstraße 4  
22607 Hamburg (DE)

**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
28 July 2017 maintaining European Patent  
No. 1775122 in amended form.**

**Composition of the Board:**

**Chairman**            J.-M. Schwaller  
**Members:**           P. Ammendola  
                          C. Brandt

## Summary of Facts and Submissions

I. The appeal was filed by opponent 2 (hereinafter "the appellant") against the interlocutory decision of the opposition division to maintain European patent Nr. 1 775 122 in amended form according to the third auxiliary request filed during oral proceedings on 12 July 2017, claim 1 of which reads as follows:

*"1. A peelable resealable multilayer film comprising:  
at least a first thermoplastic layer, a second thermoplastic layer and a third thermoplastic layer;  
wherein said first layer comprises a homopolymer or copolymer selected from the group consisting of polyolefin, ionomer and blends thereof;  
wherein said second layer is in direct contact with and bonded to both said first and third layers;  
wherein said second layer comprises a tacky pressure-sensitive adhesive;  
wherein said third layer comprises a polymer having a glass transition temperature of at least 5°C as measured in accordance with ASTM D-3418 test method; and  
wherein said bond between said second and third layers comprises a peelable resealable interface having a first interfacial peel strength "A" and a second interfacial peel strength "B" such that the value of A is less than 3500 gram-force/inch (1350 newton/meter) as measured in accordance with ASTM F-904 test method when peeled from a second thermoplastic film to which said film has been heat-sealed, and the value of B is at least 330 gram-force/inch (127 newton/meter) as measured in accordance with ASTM F-904 when peeled from and*

*resealed to said second film: wherein the relative values of A and B satisfy the relationship  $A \geq B$ , wherein said polymer in the third layer is selected from an ethylene/vinyl alcohol copolymer, polyester, polyamide, polystyrene, polyketone, acrylic ester, polymer, methylpentene copolymer, and cyclic olefin copolymer or blends thereof."*

II. In the grounds of appeal the appellant held the claimed subject-matter to be insufficiently disclosed (Article 83 EPC), not novel over **D2** (WO 90/07427 A1) or **D6** (JP 2004-83094 A and its English translation labelled D6b) and not inventive in view of D6/6b *per se* or in combination with D2. The appellant also referred to D12 (US 5,089,320 B), but only stated that "*In the following, reference will only be made to D2. However, similar arguments apply with respect to D12, since D2 and D12 make essentially the same disclosure*". No more detailed reference as to D12 was later made in writing or orally by this party.

III. The patent proprietor (hereinafter "the respondent") replied with letter dated 19 April 2018 enclosed with, *inter alia*, two new auxiliary requests 1 and 2.

IV. No submission as to the substance of the case was filed by opponent 1.

V. At the oral proceedings - held on 30 March 2021 - the final requests were established to be as follows:

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

The respondent requested that the appeal be dismissed (main request), alternatively, that the patent be

maintained in amended form on the basis of one of auxiliary request 1 or 2, both filed with the reply to the grounds of appeal.

## **Reasons for the Decision**

*Main Request (patent as maintained by the opposition division)*

### 1. Construction of claim 1

#### 1.1 The term "layer"

The appellant argued that this term should be construed as also encompassing the combination of distinct sub-layers of different chemical compositions because:

- of the use in claim 1 of the term "*comprising*";
- the embodiment of the claimed film depicted in FIG. 4 of the patent and described in paragraph [0044], wherein the layer "32" had necessarily to be a distinct layer (due to the presence of a different shading in each layer of the figure) and also necessarily be either a sub-layer forming in combination with (sub-)layer "31" the "*first layer*" of the film defined in claim 1, or a sub-layer forming in combination with (sub-)layer "33" the "*second layer*" of the film defined in claim 1, and
- the expression "*[i]n film 30, second polymer layer 32 may have an identical chemical composition as that of third polymer layer 33*" in paragraph [0044] implied the possibility that the layers 32 and 33 "may" have a different chemical composition.

1.1.1 The board is of the opinion that a skilled person reading claim 1 *per se* would normally construe the term "layer" as identifying a portion of the claimed film having a single chemical composition and, thus, not as

encompassing sub-layers of different chemical compositions. Nor is this conventional construction of the term "*layer*" put into question by the fact that in claim 1 the chemical compounds that are the essential components (but not necessarily the sole components) of each layer are identified by reciting that each layer "*comprises*" them (rather than "*is made of*" them, or "*consists of*" them). Indeed, such "open" definition of the essential chemical ingredients is conventional in claims directed to aggregation of matter. Hence, this term would appear to the skilled reader of claim 1 clear and descriptive of a portion of the claimed film having one (i.e. a single) chemical composition.

- 1.1.2 Moreover, when considering the remainder of the patent disclosure the skilled person would also immediately identify as erroneous at least in part the embodiment of the invention diagrammatically shown in "*FIG.4*" and described in paragraph [0044] of the patent in suit. Indeed, the teaching in paragraph [0044] that the line "*300*" located between the second and third layers "*32*" and "*33*" of this drawing represents the "*peelable resealable interface*", in spite of seeming *prima facie* in accordance with the definition of the film in claim 1, is necessarily found in contradiction with the preceding indication in the same paragraph [0044] (via a comparison with the layers of the film of FIG. 3 described in the preceding paragraph [0043]) that the third layer "*33*" and the fourth layer "*34*" of FIG.4 correspond respectively with the "*second layer*" and the "*third layer*" of FIG.3. Since the embodiment depicted in FIG.3 is undisputedly in accordance with claim 1 (also because the "*peelable resealable interface*" is located between the "*second layer*" and the "*third layer*" of such figure), the above-identified teaching of paragraph [0044] necessarily implies that the



"peelable sealable interface" is located between layers "33" and "34" in FIG.4.

One could speculate whether this contradiction originates from an error made in FIG.4 or in formulating its description in paragraph [0044], or from a combination thereof. In any case, already the contradiction within paragraph [0044] described above renders ambiguous the general disclosure in the patent in suit of the embodiment of FIG.4 at least in as far it hinges on the correlation between the layers in such figure and the definitions of the "*second layer*" and "*third layer*" in claim 1.

In view of this finding, it is also not plausible for the board that a skilled reader of the patent would consider of conclusive relevance the possibility (only implied in the same paragraph [0044]), that the layers 32 and 33 "may" also have a different chemical composition. Indeed, an embodiment of FIG.4 in which these two layers would have a different chemical composition would also be in contradiction with the preceding statement in paragraph [0044] that the third layer "33" of FIG.4 would correspond to the "*second layer*" of FIG.3.

- 1.1.3 This ambiguous description of the embodiment of FIG.4, however, does not justify ignoring the clear teaching of the Examples 1 to 6 (all produced by coextrusion of several films, see paragraph [0049]) that, in spite of the explicit qualification of these examples as in accordance with FIG.4, are consistent with the definition of claim 1 under consideration, when the term "layer" therein is construed as normal. As a matter of fact, in each of these examples the two layers "32" and "33" do have identical composition and

are generated within a coextrusion process. As also convincingly argued by the respondent and undisputed by the appellant, a skilled person is well aware that a single layer of a film is often produced by combining (e.g. by coextrusion) two initially separately formed layers having the same chemical composition, the skilled reader of Examples 1 to 6 would immediately conclude that in the final films produced in the examples these two layers are no longer distinct, but rather constitute together a single layer. This renders apparent that layers "32" and "33" of identical composition constitute together the "*second layer*" (that claim 1 requires to be "*in direct contact with and bonded to the said first and third layers*") and, thus, that the "*peelable resealable interface*" between the "*second layer*" and the "*third layer*" of claim 1, corresponds in the examples to the interface between the layers "33" and "34". Accordingly, the skilled person finds indeed that the "*peelable resealable interface*" is explicitly described as located between layers "33" and "34" in Examples 1 to 6 (see first sentence in paragraph [0057]).

The skilled reader of claim 1 attributing to the term "*layer*" its normal meaning would hence find consistent therewith the description of the patent examples.

Thus, the board finds that the whole patent disclosure confirms more than jeopardise the normal construction of the clear term "*layer*" used in claim 1 as descriptive of a portion of the patented multilayer film having one single chemical composition.

1.2 The term "*polyolefin*"

In the conventional language "*polyolefin*" is a polymer of aliphatic unsaturated hydrocarbons. Instead "*polystyrene*" is a polymer of an aromatic unsaturated hydrocarbon. The definition in the first sentence of paragraph [0023] of the patent reading: "*As used herein, the phrase "polyolefin" refers to homopolymers and copolymers having a methylene linkage between monomer units which may be formed by any method known to a person of ordinary skill in the art*" does not justify to diverge from the conventional language. Indeed this definition, when interpreted as referring to conventional (i.e. aliphatic) "*polyolefin*" only, still retains an immediately clear technical meaning, namely that of identifying specifically the poly-*alpha*-olefins (thereby excluding polymers of "internal" olefins, such as butene-2). Accordingly, the literal interpretation of the definition in paragraph [0023] proposed by the appellant as encompassing also "*polystyrene*" and the consequent construction of the term "*polyolefin*" in claim 1 appear made with a mind willing to misunderstand and would be discarded by the skilled person.

1.3 Alleged lack of limiting function of the features relating to the "*peelable resealable interface*".

In the appellant's opinion, the skilled reader of the patent would derive from the "absence of any further information in the patent how to achieve that the bond between the second and third layers is a peelable and resealable interface having the claimed peel strengths" that the features relating to the "*peelable resealable interface*" (in particular those defining the peel strengths A and B) must be the direct consequence of the other features of claim 1. This amounts to alleging that the features of claim 1 relating to "*peelable*

*resealable interface*" should be construed as deprived of any limiting function and thus, that: "any three layer structure having (i) a first layer which comprises a homopolymer or copolymer selected from the group consisting of polyolefin, ionomer and blends thereof ..., (ii) a second layer which comprises a tacky pressure-sensitive adhesive ... and (iii) a third layer which comprises a polymer having a glass transition temperature of at least 5°C as measured in accordance with ASTM D-3418 test method ... and which is selected from an ethylene/vinyl alcohol copolymer, polyester, polyamide, polystyrene, polyketone, acrylic ester polymer, methylpentene copolymer and cyclic olefin copolymer or blends thereof ..., wherein the second layer is in direct contact with and bonded to the first and third layers ..., has a peelable and resealable interface between the second and third layers and has the claimed peel strengths".

- 1.3.1 The board finds this argument speculative. Indeed, the author of the patent in suit may also have considered for instance unnecessary - or omitted from the description of the patent in suit for any other reason (including a mistake) - the "further information" that the appellant alleges to be mandatory to the reproducibility of the invention.

Hence, the alleged lack of disclosure is insufficient for necessarily concluding that the features relating to the "*peelable resealable interface*" (in particular those defining the peel strengths A and B) can only be the inevitable result of the occurrence of the other claim features.

Accordingly, the board also finds that the features of claim 1 relating to "*peelable resealable interface*" are

construed by the skilled person as having a limiting function on the claimed subject-matter.

2. Main Request - Sufficiency of disclosure

2.1 The appellant based this objection essentially on the alleged lack of reproducibility of the patent examples and because "claim 1 covers a large number of possible combinations of layer thicknesses and layer compositions, wherein it is not credible that all these combinations fulfill the parametric requirements of claim 1 regarding the peel strengths A and B, and wherein there is not enough guidance for the skilled person to identify those combinations that fulfill these requirements".

2.2 The board notes preliminarily that the appellant has not attempted to carry out any embodiment of the invention.

2.3 As to the alleged impossibility to carry out the invention examples in the patent, the appellant focused on the lack of disclosure in any of these examples of the thickness of the layers and/or of their densities. Thus, even when considering that the description of these examples encompassed the weight percentages of the each layer in respect of the total weight of the film as well as the film overall thickness, still an unacceptable amount of experimental work would be required in order to arrive at determining the layers' thicknesses in each exemplified film to be reproduced. Finally, the appellant pointed out that only in Example 1 the total of the percentages of the different layers (in respect of the total weight of the film) added up to 100% ; in the remaining Examples 2 to 6 the total of

the weight percentages of the different layers was instead about 106%.

2.3.1 The board however finds it plausible the respondent's argument that the densities of the different layers for which examples 1 to 6 give the complete chemical composition may be easily determined by routine measurements, i.e. without any unacceptable amount of experimental work. Nor represents the necessarily erroneous weight percentages of the layers in Examples 2 to 6 a substantial obstacle to the reproducibility of the invention because, as submitted by the respondent and undisputed by the appellant, a skilled person aiming at reproducing embodiments of the invention similar to those described in Examples 2 to 6 would proportionally reduce each of the layers' weight percentages (that add up to 106%) to the very limited extents required for rendering their total equal to 100%. Thus, even if most of the examples cannot be exactly reproduced, still embodiments of the patented film substantially similar thereto can be prepared without undue burden.

2.4 The appellant also stressed that the multilayer films of Examples 1 to 6 have substantially similar chemical composition. The board notes however that the patent in suit discloses many alternatives (many of which are even identified by their commercial names) for each of the materials to be used to form the layers (see e.g. paragraphs [0023] to [0025], [0031] to [0039] of the patent). It is apparent that this disclosure enables the skilled person to envisage and to carry out many different variants of the films disclosed in Examples 1 to 6.

2.5 Nor has the appellant sufficiently identified which of the further embodiments or groups of invention would necessarily appear only realisable after an undue amount of experimental work.

The appellant argued that, due to the definition of each layer of the claimed multilayer film by using the expression "*comprising*" followed by the indication of one or more classes of materials, claim 1 at issue would embrace films in which two or more of the three essential layers could in particular be mostly made of one and the same material (apt at film-forming) and only differing for the presence of just detectable amounts of the specific materials that said claim describes as just "comprised" in each of the three layers. The appellant concluded that the patent would not disclose how to achieve the different peel strengths A and B at the peelable resealable interface when the second and third or even all the three mandatory layers were mostly made of one and the same material.

2.5.1 The board finds however that the term "*comprising*" in a claim has to be understood in the context of the whole claim and (when considering the requirement of sufficiency of disclosure) of the whole patent. In the present case, it is immediately apparent to the skilled reader of claim 1 that the materials listed after "*comprising*" in the definition of each of the three essential layers is plausibly functionally linked to the attainment of the required peel strengths A and B at the peelable resealable interface located between the second and third layers. Hence, the skilled person would expect that the material(s) listed after the term "*comprising*" must be present in the corresponding layer in an amount so substantial to produce that peelable

resealable interface with the peel strengths A and B between the second and the third layer. Hence, the claim appears to the skilled reader clearly not directed to films in which all the three layers were almost exclusively made of one and the same material. Accordingly, also the fact that the patent does not disclose how to produce films in which the layers may comprise just detectable amounts of the materials(s) listed after "*comprising*" and nevertheless displayed a peelable resealable interface with the peel strengths A and B between two layers (of almost identical chemical composition), is not relevant for assessing the sufficiency of disclosure of the claimed subject-matter.

2.6 The appellant has finally pointed to passages of the patent explicitly mentioning the dependence of the force required to separate the peelable resealable interface of the invention upon the chemical composition and the thickness of the layers (see e.g. the passage in paragraph [0010] reading "*The force required to separate the interface may be dependent upon the chemical composition of each of the two interior film layers, i.e. the chemical similarities or dissimilarities of each film layer, or both the chemical composition and thickness of each interior film layer*"). This would amount to an implicit acknowledgement that a substantial amount of experimental work would be necessary for identifying the chemical composition and layers' thicknesses required for obtaining the peel strengths.

2.6.1 However, these teachings in the patent - rather than necessarily being an implicit acknowledgement of difficulties to be encountered upon attempting to carry out the invention (as implied in the appellant's



reasoning) - may as well imply the existence of common general knowledge. This latter appears particularly plausible to the board when also considering:

- the other teachings in the patent specification as to the possible ingredients of the different layers (see e.g. the teachings on the "tacky pressure-sensitive adhesive", hereinafter also **PSA**, of the second layer implied in paragraph [0038]), as well as
- the abundance of prior art in the field of reclosable packaging structures apparent from the many citations submitted during the opposition proceedings, abundance that has been stressed by the respondent (see page 7, third and fourth paragraph of the reply to the appeal) and undisputed by the appellant.

2.7 Hence the board finds in the appellant's submissions no serious grounds for doubting that the skilled person aware of the common general knowledge in the field of reclosable packaging structures can readily carry out many embodiments of the film of claim 1, e.g. by modifications of the examples in accordance with the other instructions in the patent description.

Accordingly, the subject-matter of claim 1 is found sufficiently disclosed and thus to comply with the requirements of Article 83 EPC.

### 3. Main Request - Novelty

The appellant only disputed the novelty of claim 1 in view of D2 and D6/6b.

3.1 The novelty objection in view of D2 is essentially based on the alleged lack of limiting function of the

features of claim 1 relating to the "peelable resealable interface" rejected above at point 1.3, and on the construction of the term "polyolefin" in claim 1 as encompassing "polystyrene" that the board has found unconvincing for the reasons given in point 1.2 above. If only of these reasons the board finds this novelty objection unconvincing.

- 3.2 Also the novelty objection in view of D6/6b is essentially based on the construction of the term "layer" in claim 1 as encompassing the possible presence of distinct sub-layers of different chemical composition, i.e. the construction that the board has found unconvincing for the reasons given in point 1.1 above. If only of this reason the board finds unconvincing this novelty objection as well.
- 3.3 Nor sees the board any other reason to depart from the finding of the opposition division that the subject-matter of the claims of the main request is novel over the cited prior art and, thus, complies with the requirements of Article 54 EPC.
4. Main Request - Inventive step
  - 4.1 It is undisputed among the parties that the closest prior art is represented by Example 1 of D6/6b.
  - 4.2 The appellant argued in essence, that the multilayer film of claim 1 would be an alternative to the prior art disclosed in this example. In the appellant's opinion the modification of this prior art example required to arrive at the claimed film would be obvious in view of D6/6b *per se* or in combination with the teachings in D2 relating to the reclosable packaging

structure of its Example 1 having certain advantageous peel strengths.

- 4.3 In the board's view, for the reasons given on the construction of claim 1 in point 1.1, the subject-matter of this claim differs from the disclosure of Example 1 in D6/6b in that it requires that the "*third layer*" in "*direct contact*" and "*bonded*" to the "*second layer*" (i.e. to the PSA layer) must comprise a polymer selected from "*an ethylene/vinyl alcohol copolymer, polyester, polyamide, polystyrene, polyketone, acrylic ester polymer, methylpentene copolymer, and cyclic olefin copolymer or blends thereof*". Hence, and since in the prior art of departure the layer in direct contact and bonded to the PSA layer is made of an ethylene-methacrylic acid ionomer (representing the surface layer "A" of the film claimed in D6/6b), in order to arrive at the subject-matter of claim 1 under dispute when starting from Example 1 of D6/6b it is necessary to replace the ionomer forming layer "A" with a polymer selected from "*an ethylene/vinyl alcohol copolymer, polyester, polyamide, polystyrene, polyketone, acrylic ester polymer, methylpentene copolymer, and cyclic olefin copolymer or blends thereof*" (this modification to arrive at the claimed subject-matter is hereinafter referred to as **the required modification**).

- 4.3.1 The board notes that the appellant and the respondent disagreed on whether the ethylene-methacrylic acid ionomer of layer "A" of Example 1 of D6/6b possessed the  $T_g$  value required in claim 1. It was also disputed whether the technical problem solved by the subject-matter of claim 1 vis-à-vis this prior art was the provision of a film with improved properties (namely with a reduced loss of peel strength over the course of

removing and reattaching) or just the provision of a further peelable and resealable multilayer film.

4.4 As to the question whether the required modification was obvious or not, the board finds that, even assuming for the sake of an argument in favour of the appellant, that the ethylene-methacrylic acid ionomer of D6/6b displays the  $T_g$  required for the third layer in claim 1 under dispute, and that the technical problem solved by the claimed film was simply the provision of an alternative to the prior art, still neither the disclosure in D6/6b *per se* nor its combination with that of D2 render obvious the required modification.

4.4.1 Indeed, it is undisputed that D6/6b explicitly teaches that:

- (a) the layer "A" of the film claimed may have a "single layer structure" or a "multilayer layer structure" (see in [0011] the initial sentence reading "*[t]he surface resin layer (A) of the co-extruded multilayer film ... may be a resin layer having a single layer structure or a resin layer having a multilayer structure*"; the same teaching is also repeated in paragraph [0021]);
- (b) the layer "A" with "single layer structure", also present in the film of Example 1 of D6/6b, is made of an "olefin-based resin" (a1), preferably an "ethylene-(meth)acrylic acid copolymer" and/or the metal neutralisation products thereof (see paragraphs [0021] and [0022]);
- (c) instead, the layer "A" with "multilayer structure" comprises two distinct layers, namely a surface layer made of a resin (a2) exemplified *inter alia* as "styrene-based resin", "ester-based resin", "amide-based resin" or "saponificated product-based resins of ethylene-vinyl acetate copolymer", and a

further layer (interposed between the surface layer (a2) and the layer B) made of an "olefin-based adhesive resin".

Hence, the (a2) resins defined in D6/6b - several of which also fall under the definition of the polymer of the "*third layer*" of claim 1 under dispute - are not presented in this prior art document as possible components of the preferred layer "A" with "single layer structure" (i.e. not disclosed as an alternative to ethylene-methacrylic acid ionomer in direct contact and bonded to the PSA layer "B" in Example 1 of D6/6b), but rather only suggested for forming the surface layer of the "multilayer structure" in which another resin (namely an olefin-based adhesive layer) is the one directly contacted and bonded to the PSA layer "B".

4.4.2 Accordingly, the board finds that D6/6b *per se* does not disclose or even suggest to place the resins (a2) in direct contact and bonded to the PSA layer "B". Hence this citation *per se* cannot render obvious the modification required to arrive at the subject-matter of claim 1.

4.5 Nor would a skilled person, starting from Example 1 of D6c and searching for an alternative to the ethylene-methacrylic acid ionomer layer therein, go against this explicit instruction in this document not to locate the (a2) resins directly onto the PSA layer "B", simply because Example 1 of D2 allegedly disclosed that a film that can be peeled and resealed with certain peel strengths comprises instead a layer of PET (i.e. of an "ester-based resin") in direct contact and bonded to a PSA layer.

It is also stressed that PET is only disclosed in Example 1 of D2 as a "substrate layer", whereas the peeling of the structure formed therewith is described in the same Example as occurring at the heat seal (see D2, page 7, lines 9 to 11 and 26 to 27), i.e. involving other layers, different from the PET layer. Hence, Example 1 does not provide any clear statement possibly suggestive that in this specific embodiment of D2 (also) the PET/PSA interface is indeed "peelable and resealable". Accordingly, this Example does not render obvious to use a PET layer as replacement of the ionomer directly bound to the PSA in Example 1 of D6/6b, let aside to do so in spite of the explicit teaching in this latter citation not to bind directly polyester layers (such as the PET layers) onto the PSA.

Hence, the board concludes that also the combination of D6/6b with D2 cannot render obvious the modification of Example 1 of D6/6b required to arrive at the subject-matter of claim 1.

- 4.6 The board finds therefore that the appellant also failed to provide convincing reasons to depart from the finding of the opposition division that the subject-matter of the claims of the main request involves an inventive step over the cited prior art and, thus, complies with the requirements of Article 56 EPC.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:



A. Pinna

J.-M. Schwaller

Decision electronically authenticated