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**Datasheet for the decision
of 3 May 2021**

Case Number: T 2575/17 - 3.3.09

Application Number: 10756751.3

Publication Number: 2411214

IPC: C08J5/18, C08K5/00, C08L23/10

Language of the proceedings: EN

Title of invention:
POLYOLEFIN FILMS FOR IN-MOLD LABELS

Patent Proprietor:
Fina Technology, Inc.

Opponents:
Borealis AG
Basell Poliolefine Italia S.r.l.

Headword:
Polyolefin films/FINA

Relevant legal provisions:
EPC Art. 83, 100(b)
EPC R. 103(4)(c)

Keyword:

Sufficiency of disclosure - enabling disclosure (no)

Oral proceedings - withdrawal of request for oral proceedings

Reimbursement of appeal fee - (no)



Beschwerdekammern

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Case Number: T 2575/17 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 3 May 2021

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 22 September
2017 revoking European patent No. 2411214
pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman A. Haderlein
Members: F. Rinaldi
 D. Rogers

Summary of Facts and Submissions

I. This decision concerns the appeal filed by the patent proprietor against the decision of the opposition division to revoke European patent No. EP 2 411 214.

II. In their notices of opposition, opponents 1 and 2 had requested revocation of the patent based among other things on Article 100(b) and (c) EPC.

III. In the decision under appeal, the opposition division decided that the patent as granted (main request) and the second to fourth auxiliary requests encompassed added subject-matter. The first to fifth auxiliary requests were not sufficiently disclosed. All the auxiliary requests were filed with a letter dated 27 April 2017.

IV. The documents submitted during the opposition proceedings included:

D27: Declaration E. Pomakhina (25 April 2017)

V. Wording of the relevant claims

Claim 1 as granted (main request) and claim 1 of the first auxiliary request read:

"An in-mold label comprising a cast film comprising a polypropylene resin and a nucleator, wherein said polypropylene resin has a melt flow rate from 2 dg/min. to 10 dg/min., a xylene solubles content less than 1 wt%,

and meso pentad distribution greater than 98%, wherein the film has a 2% secant modulus of from 1030 to 1720 MPa (150 to 250 kpsi)."

Claim 1 of the second to fifth auxiliary requests is based on the wording of claim 1 set out above, with additional features that further characterise the in-mold label.

VI. The board summoned the parties to oral proceedings. In its preliminary opinion, it concluded that the invention as set out in claim 1 was not sufficiently disclosed, and that this conclusion applied to all the requests on file.

VII. In its submission dated 13 April 2021, the appellant declared:

"The EPO is herewith informed that neither the applicant [sic] nor his representative will attend the oral proceedings on July 29, 2021.

Additionally, our request for oral proceedings is herewith withdrawn.

Further, the EPO is hereby requested to decide on the arguments on file.

Also it is respectfully requested to reimburse the appeal fee, if any."

VIII. The board cancelled the oral proceedings.

IX. Final requests

The appellant requested that the decision under appeal be set aside and that the case be remitted to the opposition division for examination of the grounds of opposition under Article 100(a) EPC on the basis of the

patent as granted (main request) or any one of the first to fifth auxiliary requests on which the decision under appeal was based.

Respondents 1 and 2 requested that the appeal be dismissed.

- X. The parties' arguments are evident from the Reasons for the Decision.

Reasons for the Decision

1. The patent concerns polypropylene-based cast films for use in in-mold labels.
2. *Admission of document D27*
 - 2.1 At the oral proceedings, the opposition division decided to admit document D27 into the proceedings because it was *prima facie* relevant. The appellant requested that this decision to admit D27 be set aside.
 - 2.2 The admission of documents filed after the nine-month time limit for opposition is within the discretion of the opposition division. When reviewing the discretionary decision of an opposition division on a procedural matter, the board normally maintains this decision if the opposition division has exercised its discretion, first, according to the right principle(s) and, secondly, in a reasonable way (Case Law of the Boards of Appeal of the EPO, 9th edition, 2019, Chapter IV.C.4.5.2).

2.3 Both conditions are fulfilled. A principle that the opposition division may apply in deciding to admit a late-filed document is that of *prima facie* relevance. Moreover, there is no indication that the opposition division exercised its discretion in an unreasonable way. D27 relates to a feature of claim 1 (meso pentad distribution) and explains issues that the skilled person would encounter when determining this parameter. In addition, D27 had been used during oral proceedings before the opposition division both by the opponents and the patent proprietor (decision under appeal, point 4.2.2.2; minutes, point 5.2.3).

2.4 In view of this, there is no reason to disregard this document during the appeal.

3. *Sufficiency of disclosure - main request*

3.1 The appellant contested the opposition division's decision that the invention (in the auxiliary requests and consequently also in the main request) was not sufficiently disclosed. The appellant argued that examples were not required in disclosing an invention, and that the general part of the patent provided detailed information about the parameters in question. In other words, the skilled person would have known how to measure the parameters in claim 1.

3.2 It is correct that examples are not mandatory for an invention to be sufficiently disclosed. However, the subject-matter of claim 1 is characterised by a combination of parameters which describe the polypropylene resin comprised in the cast film and the cast film itself. Therefore, the question is not only whether the skilled person would be able to measure the parameters of claim 1; for the invention under

examination to be sufficiently disclosed, the skilled person would also have to be able to prepare the cast film of claim 1 with all its features.

3.3 However, this is not possible.

3.3.1 In the decision under appeal, the opposition division reasoned that from the examples of table 1 of the contested patent it was evident that the resin had to be visbroken (i.e. the polymer chain had to be chemically broken) in order to achieve the secant modulus of claim 1. However, degradation of the TOTAL Petrochemicals 3270 resin by means of visbreaking would necessarily increase the xylene solubles content above 1 wt% and decrease the meso pentad distribution outside the range of claim 1 (Reasons for the decision, point 4.2.3.3).

3.3.2 Respondent 1 convincingly reaffirmed this. In its view, there was no teaching in the patent in suit of how a skilled person could obtain the cast film of claim 1, having (i) a rather low 2% secant modulus, that also comprised a polypropylene (ii) with rather high crystallinity (i.e. with a polypropylene having a xylene solubles content less than 1 wt%) and (iii) a meso pentad distribution (mmmm) greater than 98%.

The board agrees that the need to fulfil these three parameters simultaneously would place the skilled person in a dilemma, and that the patent in suit does not set out how this may be done.

The appellant did not contest this.

3.4 Therefore, the issue here is not only that the examples in the patent in suit do not fall within claim 1, which

is uncontested. Rather, the point is that the skilled person would not know how to provide a cast film with the secant modulus of claim 1 which comprises a polypropylene resin having the xylene solubles content and the meso pentad distribution of claim 1. The skilled person appears to have no option other than to subject cast films to the tests described in claim 1 and find suitable cast films by trial and error. Moreover, there is no indication in the patent in suit of what would have to be done in the event of failure.

3.5 In this context, it is observed that the method for measuring the meso pentad distribution is not defined in the patent in suit. As explained in D27, the outcome depends on parameters such as hardware set-up, sample preparation, acquisition parameters, processing parameters and data analysis. The nucleator is yet another element that the skilled person would have to select in order to arrive at the cast film of claim 1. These aspects add to the difficulties that the skilled person would face when trying to carry out the invention.

3.6 It is concluded that the appellant has not convinced the board that the invention as set out in claim 1 is sufficiently disclosed. Thus, the grounds for opposition under Article 100(b) EPC prejudice the maintenance of the patent.

4. *Sufficiency of disclosure - auxiliary requests*

All the auxiliary requests include the same combination of features as claim 1 as granted. For the reasons explained above in point 3, the invention in claim 1 of these requests does not comply with the requirements set out in Article 83 EPC.

5. *Reimbursement of the appeal fee*

5.1 The appellant requested a reimbursement of "the appeal fee, if any". This is understood to be a request for a (partial) refund of the appeal fee, if applicable.

5.2 Reimbursement of the appeal fee is governed by Rule 103 EPC. The appeal fee is reimbursed at 25% if any request for oral proceedings is withdrawn within one month of notification of the communication issued by the Board of Appeal in preparation for the oral proceedings, and no oral proceedings take place (Rule 103(4)(c) EPC).

5.3 The board issued a communication under Article 15(1) RPBA 2020 with a date of 19 February 2021, which is deemed to have been notified on 1 March 2021 (Rule 126(2) EPC). The request for oral proceedings was withdrawn by a submission dated 13 April 2021, i.e. after the expiry of one month from notification of the communication (which would be 1 April 2021, Rule 131(4) EPC).

5.4 Thus, there is no legal basis for a (partial) refund of the appeal fee.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



A. Nielsen-Hannerup

A. Haderlein

Decision electronically authenticated