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**Datasheet for the decision
of 3 February 2022**

Case Number: T 0935/18 - 3.2.07

Application Number: 11715116.7

Publication Number: 2467308

IPC: B65D33/24, B65D75/58, B65D75/00

Language of the proceedings: EN

Title of invention:
RECLOSABLE POUCH

Applicant:
Velcro IP Holdings LLC

Headword:

Relevant legal provisions:
EPC Art. 83

Keyword:
Sufficiency of disclosure - undue burden

Decisions cited:

Catchword:



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Case Number: T 0935/18 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 3 February 2022

Appellant: Velcro IP Holdings LLC
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Representative: Fish & Richardson P.C.
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 5 December 2017
refusing European patent application No.
11715116.7 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman I. Beckedorf
Members: S. Watson
V. Bevilacqua

Summary of Facts and Submissions

- I. An appeal was filed by the applicant (appellant) in the prescribed form and within the prescribed period against the decision of the examining division refusing European patent application No. 11715116.7.
- II. In its decision the examining division found that claim 1 of the sole request (main request) was unclear (Article 84 EPC) and that the application did not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Article 83 EPC).
- III. In preparation for oral proceedings the Board gave its preliminary assessment of the case by means of a communication pursuant to Article 15(1) RPBA 2020 dated 2 September 2021. The Board indicated that the appeal was likely to be dismissed as claim 1 of the main request was unclear and the application did not sufficiently disclose the invention.
- IV. In response to the Board's communication, the appellant filed written submissions and an auxiliary request on 30 December 2021.
- V. Oral proceedings before the Board took place on 3 February 2022. At the end of the oral proceedings the decision was announced. For further details of the oral proceedings reference is made to the minutes.
- VI. The final requests of the appellant are

that the decision under appeal be set aside
and

that a patent be granted on the basis of the set of claims according to either the main request re-filed with the statement setting out the grounds of appeal, or the auxiliary request submitted with letter dated 30 December 2021.

VII. Claim 1 of the main request reads as follows:

"A reclosable package (100) comprising a pouch of flexible material defining an interior volume and an opening providing access to the interior volume; and a reclosable closure (112) secured to the flexible material adjacent the opening and operable to releasably retain the opening of the pouch in a closed state after partial removal of contents from the interior volume, the closure comprising fastenable closure strips (118,120) extending along at least portions of opposite sides of the opening; wherein the closure strips (118,120) are releasably fastened in multiple relative positions spaced along each of two perpendicular directions; characterized in that the closure (112) and flexible material of the pouch are configured to provide a maximum fastened stiffness, in resistance to bending about a pouch axis extending along the pouch perpendicular to the closure strips (118,120), as determined at a point along the closure (112) with the closure strips (118,120) fastened, that is at least 10 times a maximum fastened stiffness, in resistance to bending about the pouch axis, of one of the closure strips (118,120) as secured to the flexible material, as determined at the point along the

closure (112) with the closure strips unfastened (118,120), wherein the maximum fastened stiffness and the maximum unfastened stiffness are determined using a test that is similar to ASTM D 790-03, Procedure B, but differs in that a contact cylinder is positioned so that its length extends in a horizontal plane parallel to the test sample and deflection force is measured directly by the load sensor."

VIII. Claim 1 of the auxiliary request reads as follows:

"A reclosable package (100; 500; 600) comprising a pouch of flexible material defining an interior volume and an opening (164) providing access to the interior volume; and a reclosable closure (112; 512; 612) secured to the flexible material adjacent the opening and operable to releasably retain the opening of the pouch in a closed state after partial removal of contents from the interior volume, the closure comprising fastenable closure strips (118,120; 518,520; 618,620) extending along at least portions of opposite sides of the opening; wherein the closure strips are releasably fastened in multiple relative positions spaced along each of two perpendicular directions; characterized in that the closure and flexible material of the pouch are configured to provide a maximum stiffness, in resistance to bending about a pouch axis extending along the pouch perpendicular to the closure strips, as determined at a point along the closure with the closure strips fastened, that is at least 10 times the maximum stiffness, in resistance to bending about the pouch axis, of one of the closure

strips as secured to the flexible material, as determined at the point along the closure with the closure strips unfastened, wherein the maximum stiffness is determined as described herein."

- IX. The lines of argument of the appellant are dealt with in detail in the reasons for the decision.

Reasons for the Decision

Transitional provisions

1. The appeal proceedings are governed by the revised version of the Rules of Procedure which came into force on 1 January 2020 (Articles 24 and 25(1) RPBA 2020), with the exception of Article 12(4) to (6) RPBA 2020, instead of which Article 12(4) RPBA 2007 remains applicable (Article 25(2) RPBA 2020).

Main and auxiliary requests - sufficiency of disclosure - (Article 83 EPC)

2. The examining division found that the application did not fulfil the requirements of Article 83 EPC, as it was "not clear how to determine when a maximum fastened stiffness, in resistance to bending, is at least 10 times a maximum unfastened stiffness" (see decision under appeal, point 18.1).
3. The Board indicated in its communication pursuant to Article 15(1) RPBA 2020 that although it followed the predominant line of case law that a lack of clarity in relation to a parameter does not necessarily imply

insufficiency of disclosure (Case Law of the Boards of Appeal (CLB), 9th edition, 2019, II.C.8.2, fourth to seventh paragraphs), it was of the view that the invention, for other reasons, was not sufficiently disclosed.

Under points 10.4 and 10.5 of the communication, the Board raised the objections that, contrary to established case law, the application did not clearly indicate at least one way of carrying out the invention and did not contain sufficient information to direct the skilled person directly to success through the evaluation of initial failures (see CLB, *supra*, II.C.5.2 and II.C.6.7).

4. The feature in claim 1 of the main request that the Board views as insufficiently disclosed is the following:

"the closure (112) and flexible material of the pouch are configured to provide a maximum fastened stiffness, in resistance to bending about a pouch axis extending along the pouch perpendicular to the closure strips (118,120), as determined at a point along the closure (112) with the closure strips (118,120) fastened, that is at least 10 times a maximum fastened stiffness, in resistance to bending about the pouch axis, of one of the closure strips (118,120) as secured to the flexible material, as determined at the point along the closure (112) with the closure strips unfastened (118,120)."

The same objection was analogously raised during the oral proceedings to the corresponding feature in claim 1 of the auxiliary request, which is as follows:

"the closure and flexible material of the pouch are configured to provide a maximum stiffness, in resistance to bending about a pouch axis extending along the pouch perpendicular to the closure strips, as determined at a point along the closure with the closure strips fastened, that is at least 10 times the maximum stiffness, in resistance to bending about the pouch axis, of one of the closure strips as secured to the flexible material, as determined at the point along the closure with the closure strips unfastened."

Both features will be referred to in this decision as the fastened to unfastened stiffness ratio.

5. The appellant argued in its submissions of 30 December 2021 and during oral proceedings, that although a certain amount of trial and error would be necessary to carry out the invention, the amount required in the present case was not unreasonable.

In its submissions of 30 December 2021 the appellant argued that figures 5 to 11 and page 7, line 9, to page 13, line 12, of the description as originally filed disclosed implementations of a reclosable closure and the appellant gave a non-exhaustive list of parameters relating to the design of the closure (see point 2.5.2).

According to the appellant, the skilled person, using their common general knowledge, was aware of how each of the listed parameters affected stiffness and was

therefore able to prepare packages, to test them and in the event that the required result was not achieved, to modify the parameters to derive values which would lead to a reclosable package with the claimed fastened to unfastened stiffness ratio.

As an example, the appellant considered that increasing the fastener element density might "generally increase a feeling of stiffness of the fastened closure", and that each of the parameters listed would appear to be "suitable for making a fastener more or less stiff to the touch" (submissions of 30 December 2021, page 12, second complete paragraph).

6. The Board does not find the arguments of the appellant persuasive.

The passages of the description cited by the appellant show a large number of parameters. For example, the exemplary shape of the fastening element alone appears to have more than ten parameters which can be varied within specified ranges (page 8, line 11 to page 10, line 6 of the application as published).

Even if it were accepted that the skilled person, on the basis of their common general knowledge, understands how individual parameters could be altered in order to increase stiffness generally, this knowledge is insufficient to overcome the gap in the teaching of the application, as the claimed invention requires that the fastened stiffness is a specific multiple higher than the unfastened stiffness.

It is therefore not sufficient to make one component or the whole of the closure stiffer. The claim requires that a specific ratio of the fastened to unfastened

stiffness is achieved. The application as a whole however gives no indication of how the parameters, whether alone or in combination, should be modified to achieve the claimed fastened to unfastened stiffness ratio.

The application contains no worked examples, showing concrete dimensions and test results, of packages having closures which fulfil the fastened to unfastened stiffness ratio.

In the absence of such examples and without any information disclosing which of the numerous parameters affect the stiffness ratio and how these parameters should be varied to achieve the desired ratio, the skilled person, when trying to carry out the claimed invention, has to perform extensive experimentation with no information to lead them directly to success through the evaluation of initial failures. This cannot be viewed as a reasonable amount of trial and error and amounts to an undue burden.

7. Thus the Board finds that neither the main nor the auxiliary request fulfils the requirements of Article 83 EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated