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**Datasheet for the decision  
of 4 March 2021**

**Case Number:** T 3077/19 - 3.2.02

**Application Number:** 09727929.3

**Publication Number:** 2257260

**IPC:** A61H15/00, A47G9/02, A61M21/02

**Language of the proceedings:** EN

**Title of invention:**  
WEIGHT QUILT

**Patent Proprietor:**  
Somna AB

**Opponent:**  
Mondian AB

**Headword:**

**Relevant legal provisions:**  
EPC Art. 100(c), 104(1), 123(2)

**Keyword:**

Amendments - undisclosed disclaimer

Amendments - allowable (no)

Apportionment of costs - not equitable

Novelty - accidental disclosure

Grounds for opposition - late-filed ground for opposition -  
discretion of opposition division

**Decisions cited:**

G 0001/03, G 0001/16, G 0010/91

**Catchword:**



**Beschwerdekammern**

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**Case Number: T 3077/19 - 3.2.02**

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.02**  
**of 4 March 2021**

**Appellant:** Somna AB  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 25 September  
2019 revoking European patent No. 2257260  
pursuant to Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman** M. Alvazzi Delfrate  
**Members:** A. Martinez Möller  
C. Schmidt

## **Summary of Facts and Submissions**

- I. The appeal lies from the decision of the Opposition Division revoking European Patent No. 2257260.

The Opposition Division introduced a new ground for opposition under Article 100(c) EPC following a written submission by the opponent requesting that the ground be considered. The new ground under Article 100(c) EPC was found by the Opposition Division in the appealed decision to prejudice the maintenance of the patent. A request by the patent proprietor for apportionment of costs due to the late filing by the opponent of the new ground under Article 100(c) EPC was rejected by the Opposition Division.

- II. Document E4 (US 1 364 601) is relevant to the present decision.

- III. The appellant (patent proprietor) requested that the decision be set aside and that the patent be maintained as granted or on the basis of one of auxiliary requests 1-5 filed together with the statement of grounds of appeal. The appellant further requested that the decision of the Opposition Division to allow the new ground for opposition under Article 100(c) EPC be overturned and that the case be remitted to the Opposition Division. The appellant likewise requested that the Opposition Division be required to apportion costs to the appellant.

- IV. The respondent (opponent) requested that the decision under appeal be upheld.

- V. Independent claim 1 according to each of the claim requests on file reads as follows:

**Main request**

"A weight blanket for therapeutic treatment, comprising means for increasing the weight of the blanket, characterized in that said means includes at least one linked object (5);  
said at least one linked object (5) is placed in several corresponding channels (2) between a first and a second cloth layer (11, 12) in the blanket (1);  
said at least one linked object (5) creating bands of weights spread over the blanket, in order for the pressure to follow the shape of the body of the user of the blanket, wherein the at least one linked object (5) is completely enclosed inside the blanket, wherein said weight blanket is void of crossing linked objects of the same size."

**Auxiliary request 1**

"A weight blanket for therapeutic treatment, comprising means for increasing the weight of the blanket, characterized in that said means includes at least one linked object (5);  
the at least one linked object (5) is in the form of a chain;  
said at least one linked object (5) is placed in several corresponding channels (2) between a first and a second cloth layer (11, 12) in the blanket (1);  
said at least one linked object (5) creating bands of weights spread over the blanket, in order for the pressure to follow the shape of the body of the user of the blanket, wherein the at least one linked object (5) is completely enclosed inside the blanket, wherein said

weight blanket is void of crossing linked objects of the same size."

**Auxiliary request 2**

"A weight blanket for therapeutic treatment, comprising means for increasing the weight of the blanket, characterized in that said means includes at least one linked object (5);  
the at least one linked object (5) is in the form of a chain made of metal;  
said at least one linked object (5) is placed in several corresponding channels (2) between a first and a second cloth layer (11, 12) in the blanket (1);  
said at least one linked object (5) creating bands of weights spread over the blanket, in order for the pressure to follow the shape of the body of the user of the blanket, wherein the at least one linked object (5) is completely enclosed inside the blanket, wherein said weight blanket is void of crossing linked objects of the same size."

**Auxiliary request 3**

"A weight blanket for therapeutic pressure treatment of a person, comprising means for increasing the weight of the blanket, characterized in that said means includes at least two linked objects (5);  
said at least two linked objects (5) are placed in several corresponding channels (2) between a first and a second cloth layer (11, 12) in the blanket (1);  
said at least two linked objects (5) creating bands of weights spread over the blanket, in order for the pressure to follow the shape of the body of the user of the blanket, wherein the at least two linked objects (5) are completely enclosed inside the blanket and all

said linked objects are parallel with each other, wherein said weight blanket is void of crossing linked objects of the same size."

**Auxiliary request 4**

"A weight blanket for therapeutic pressure treatment of a person, comprising means for increasing the weight of the blanket, characterized in that said means includes at least two linked objects (5); all said at least two linked objects (5) are placed in several corresponding channels (2) between a first and a second cloth layer (11, 12) in the blanket (1); wherein said channels are distributed over the surface of the blanket and run parallel in the lengthwise or width direction of the blanket, said at least two linked objects (5) creating bands of weights spread over the blanket, in order for the pressure to follow the shape of the body of the user of the blanket, wherein the at least two linked objects (5) are completely enclosed inside the blanket and all said linked objects are parallel with each other, wherein said weight blanket is void of crossing linked objects of the same size."

**Auxiliary request 5**

"A weight blanket for therapeutic pressure treatment of a person, comprising a head end (A) and a foot end (B) and a cross band (3) transversal to the blanket provided in both the head end (A) and the foot end (B), wherein attachment points are formed in said respective head and foot ends of the blanket, means for increasing the weight of the blanket, characterized in that said means includes at least two linked objects (5);

all said at least two linked objects (5) are placed in several corresponding channels (2) between a first and a second cloth layer (11, 12) in the blanket (1); wherein said channels are distributed over the surface of the blanket and run parallel in the lengthwise direction of the blanket, attachment points (6) formed by eyes formed by a wire woven into each crossband are provided at the respective ends of each channel, all said linked objects are metal chains with one chain per channel and the end links of each chain are attached to the band (3) by the eye at each end of the respective channel, said at least two linked objects (5) creating bands of weights spread over the blanket, in order for the pressure to follow the shape of the body of the user of the blanket, wherein the at least two linked objects (5) are completely enclosed inside the blanket and all said linked objects are parallel with each other, wherein said weight blanket is void of crossing linked objects of the same size."

VI. The arguments of the appellant relevant to the present decision are summarised as follows.

*New ground for opposition under Article 100(c) EPC and apportionment of costs*

The late filing of the ground four months before the oral proceedings was an evident abuse of proceedings. The new ground should not have been introduced into the proceedings at such a late stage.

The ground for opposition under Article 100(c) EPC could have been raised at the filing date of the opposition on the basis of G 1/03, irrespective of the publication date of G 1/16. Waiting until four months before the oral proceedings to raise the new ground



made much of the previous discussion in the case redundant and led to considerable unnecessary costs for the appellant.

*Main request*

The disclaimed subject-matter was fully disclosed in the application as filed.

The disclaimer did not remove more than necessary to restore novelty over E4 because in the context of the invention all linked objects were actually chains.

*Auxiliary requests 1-2*

If the Board found that the disclaimer of the main request was undisclosed, auxiliary requests 1-2 restricted the linked objects to render the disclaimer disclosed.

*Auxiliary requests 3-5*

The amendments did not add subject-matter. Claim 1 of each of auxiliary requests 3-5 defined the linked objects as being parallel with each other, thereby excluding crossing linked objects from its subject-matter. There was thus no subject-matter excluded by the disclaimer.

VII. The arguments of the respondent relevant to the present decision are summarised as follows.

*New ground for opposition under Article 100(c) EPC and apportionment of costs*

The Opposition Division was permitted by G 10/91 to consider the new ground. There were, *prima facie*, clear

reasons why the new ground under Article 100(c) EPC was relevant and would prejudice the maintenance of the patent. The undisclosed disclaimer clearly removed more than was necessary to restore novelty over E4. The late filing was not an abuse of proceedings. Decision G 1/16 was published in the Official Journal of August 2018 and was much clearer on the legal consequence of an undisclosed disclaimer removing more than necessary than G 1/03. The respondent raised the new ground more than six months before the oral proceedings.

*Main request*

The disclaimer in claim 1 was an undisclosed disclaimer. The undisclosed disclaimer removed more than was necessary to restore novelty over E4 and thus violated Article 123(2) EPC. E4 disclosed only a network of chains with perpendicular crossings, the chains being of the interlocked flat link type. The undisclosed disclaimer removed all kind of chains crossing at any angle.

*Auxiliary requests 1-2*

The undisclosed disclaimer removed more than was necessary to restore novelty over E4. The limitation added in claim 1 did not necessarily apply to linked objects not included in the means for increasing the weight of the blanket.

*Auxiliary requests 3-5*

Auxiliary requests 3-5 did not fulfil the requirements of Article 123(2) EPC. The undisclosed feature was not deprived of all technical contribution. The wording of

the claim, without relying on the undisclosed disclaimer, did not exclude from its scope a weight blanket with two linked objects parallel to each other, and one or several other linked object(s) crossing the two linked objects parallel to each other.

## **Reasons for the Decision**

### 1. The invention

The invention relates to a weight blanket for the therapeutic treatment of a person. The blanket comprises means for increasing the blanket's weight including at least one linked object, such as a chain, which is completely enclosed inside the blanket. By applying pressure to the body, such blankets provide a feeling of safety and helps relieve complaints such as unrest and sleep problems (paragraphs [0002]-[0003] of the description).

### 2. New ground for opposition under Article 100(c) EPC

The ground for opposition under Article 100(c) EPC was introduced into the opposition proceedings by a discretionary decision of the Opposition Division.

A board of appeal should only overrule how a department of first instance exercised its discretion if it concludes that the department of first instance did so according to the wrong principles, without taking into account the right principles or in an unreasonable way, and thus exceeded the proper limits of its discretion (Case Law of the Boards of Appeal of the European Patent Office, 9th edition 2019, IV.C.4.5.2 and V.A. 3.5.5).

As indicated in point 11.2.1 of the impugned decision, the Opposition Division considered the ground of opposition under Article 100(c) EPC to be *prima facie* relevant and thus made use of its discretion. The Opposition Division even went on to revoke the patent based on this ground.

Furthermore, there is no indication that the Opposition Division exercised its discretion according to the wrong principles, without taking into account the right principles or in an unreasonable way. Hence, there is no reason to overrule the discretionary decision of the Opposition Division and disregard this ground for opposition.

3. Main request - added subject-matter
- 3.1 Claim 1 of the main request - as well as claim 1 of each of the auxiliary requests - comprises the following disclaimer: "wherein said weight blanket is void of crossing linked objects of the same size."
- 3.2 The appellant alleged in its grounds of appeal that the disclaimer was fully disclosed in the application as filed. The appellant did not provide arguments or indications supporting such an allegation. The Board neither finds a basis in the application as filed for the disclaimer nor for the subject-matter excluded by it. The Board thus concurs with the impugned decision (point 11.3.2.3) that the disclaimer of claim 1 is an undisclosed disclaimer.
- 3.3 An undisclosed disclaimer may be allowable under Article 123(2) EPC following the criteria established in decisions G 1/03 and G 1/16. The criteria relevant

for the present decision are that the undisclosed disclaimer is added to restore novelty by delimiting the claim against an accidental anticipation under Article 54(2) EPC and that it does not remove more than necessary to restore novelty.

- 3.4 Document E4 is prior art under Article 54(2) EPC. E4 deals with a blanket for protecting a car, including features to prevent the theft of the blanket. It is not disputed that E4 anticipates on page 2, lines 9-23, and Figures 1-2, the subject-matter of claim 1 if its disclaimer is disregarded.

However, the technical field of E4 (car blankets) is so remote and the disclosure of E4 so unrelated from the claimed blanket for therapeutic treatment that the person skilled in the art would never have taken it into consideration when making the invention.

Hence, E4 represents an accidental anticipation. An undisclosed disclaimer to restore novelty over E4 may thus be allowable.

- 3.5 The only linked object that falls within the meaning of claim 1 disclosed in document E4 is chains of the interlocked flat link type (see page 1, lines 77-83, and page 2, lines 9-17). However, the disclaimer is directed to the broader term "linked objects". Furthermore, the chains 7 in E4 form a network with perpendicular crossings (Figure 1 and page 2, lines 9-17), whereas the disclaimer removes crossings at any angle. At least for these reasons, the undisclosed disclaimer removes more than necessary to restore novelty over E4. The undisclosed disclaimer is thus unallowable. Claim 1 contains subject-matter which extends beyond the content of the application as filed.

3.6 It follows that Article 100(c) EPC prejudices the maintenance of the patent as granted.

4. Auxiliary requests 1 and 2

4.1 The amendment in claim 1 of auxiliary requests 1 and 2 restricts the "at least one linked object (5)" included in the means for increasing the weight of the blanket to be in the form of respectively a chain (auxiliary request 1) or a chain made of metal (auxiliary request 2). The claim does not exclude the presence of other linked objects not included in the means for increasing the weight of the blanket. These other linked objects are not restricted by the amendment.

The disclaimer excludes from the scope of the claim weight blankets with crossing linked objects of the same size, irrespective of whether these crossing linked objects are included in the means for increasing the weight of the blanket. Hence, the amendment in claim 1 of auxiliary requests 1 and 2 does not limit the linked objects excluded by the disclaimer to linked objects "in the form of a chain" and "in the form of a chain made of metal", respectively.

4.2 As indicated for the main request, the Board does not recognise any appropriate basis for the disclaimer, nor has the appellant provided any. Hence, the disclaimer of claim 1 of auxiliary requests 1 and 2 is an undisclosed disclaimer.

4.3 For the same reasons indicated under point 3.5 for the main request above, the disclaimer removes more than necessary to restore novelty over E4. The disclaimer is thus an unallowable undisclosed disclaimer.

4.4 It follows that auxiliary requests 1 and 2 do not comply with Article 123(2) EPC.

5. Auxiliary requests 3-5

5.1 Also for auxiliary requests 3-5, it must be considered whether the limitations added in claim 1 restricting the "at least two linked objects (5)" and "all said linked objects" are directed to all the linked objects of the blanket and thus also to the linked objects of the disclaimer. Claim 1 of auxiliary requests 3-5 does also not exclude the presence of other linked objects not included in the means for increasing the weight of the blanket. Thus, the limitations added in claim 1 do not restrict any other linked objects not included in the means for increasing the weight of the blanket.

5.2 For the same reasons indicated under point 3.5 for the main request above, the disclaimer still excludes subject-matter from claim 1 not disclosed by E4 and thus removes more than necessary to restore novelty over E4.

5.3 It follows that auxiliary requests 3-5 do not comply with Article 123(2) EPC.

6. Apportionment of costs

6.1 In accordance with Article 104(1) EPC, each party to the opposition proceedings shall bear the costs it has incurred unless a different apportionment of costs is ordered for reasons of equity. An apportionment of costs is justified if costs arise from culpable actions of an irresponsible or even malicious nature (Case Law

of the Boards of Appeal of the European Patent Office, 9th Edition 2019, III.R.2).

- 6.2 It is true that the respondent could have raised the ground for opposition under Article 100(c) EPC with the notice of opposition based on G 1/03 and thus before the publication of decision G 1/16.

However, decision G 1/16 addressed the inconsistencies in the assessment of undisclosed disclaimers in the case law (see the order and point 24 of the Reasons of G 1/16). It is credible that its publication in the EPO's Official Journal (OJ EPO 2018, A70) triggered a careful analysis of the disclaimer of claim 1 by the respondent. The respondent requested that the Opposition Division consider the new ground more than six months before the oral proceedings, substantiating the request at the same time. Furthermore, the objections according to the new ground were based on a single three-page document, E4, known to the appellant because it had already been cited in the supplementary European search report and had played an important role during the examination proceedings, leading to the addition of the disclaimer.

Hence, the appellant had sufficient time to deal with the new ground and react accordingly. There was no need for postponement or adjournment of the oral proceedings before the Opposition Division. Thus, the late filing did not hinder a decision at those oral proceedings. The Board is thus satisfied that there was no tactic of delay or abuse of proceedings by the respondent.

- 6.3 The introduction of the new ground eventually made much of the previous discussions in the case redundant. However, this was not because of the respondent's delay



in raising the new ground but because the new ground under Article 100(c) EPC was found by the Opposition Division to prejudice the maintenance of the patent. Dealing with all raised grounds of opposition and all objections on file is part of the normal work of the patent proprietor or its representative in opposition proceedings. This also includes dealing with grounds of opposition and/or with objections which may eventually not be discussed because other grounds are addressed first and found to prejudice the maintenance of the patent. Therefore, the fact that much of the previous discussions were made redundant does not constitute in the case at hand any special circumstance justifying a different apportionments of costs.

- 6.4 There is thus no reason of equity which would justify overruling the decision of the Opposition Division that each party to the opposition proceedings shall bear the costs it has incurred.
  
7. In the statement of grounds of appeal, the appellant made a precautionary request for oral proceedings. However, the appellant declared, in its letter dated 29 January 2021, that it would not be attending nor be represented at the oral proceedings. In accordance with the established jurisprudence (Case Law of the Boards of Appeal of the European Patent Office, 9th Edition 2019, III.C.4.3.2), the Board considered that this procedural declaration represented a withdrawal of the request for oral proceedings. Hence the Board cancelled the oral proceedings and took the present decision in the written procedure.

## Order

### For these reasons it is decided that:

1. The appeal is dismissed.
2. The request for an apportionment of costs is rejected.

The Registrar:

The Chairman:



D. Hampe

M. Alvazzi Delfrate

Decision electronically authenticated