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**Datasheet for the decision
of 6 December 2022**

Case Number: T 3202/19 - 3.2.07

Application Number: 09747708.7

Publication Number: 2280882

IPC: B65D43/16

Language of the proceedings: EN

Title of invention:
VIAL WITH NON-ROUND SEAL

Patent Proprietor:
CSP Technologies, Inc.

Opponent:
Clariant Healthcare Packaging (France) SAS

Headword:

Relevant legal provisions:
EPC Art. 84, 123(2)
RPBA 2020 Art. 12(3), 12(5), 13(2), 15(1)

Keyword:

Amendments - added subject-matter (yes) - main request
Discretion not to admit submission - auxiliary requests 1 to 5
- requirements of Art. 12(3) RPBA 2020 met (no)
Claims - clarity - auxiliary requests 6 and 7 (no)
Amendment after summons - auxiliary requests 8 and 9 -
exceptional circumstances (no)

Decisions cited:

Catchword:



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Case Number: T 3202/19 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 6 December 2022

Appellant: CSP Technologies, Inc.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
17 October 2019 concerning maintenance of the
European Patent No. 2280882 in amended form.**

Composition of the Board:

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

Summary of Facts and Submissions

- I. Appeals were filed by both the patent proprietor and the opponent in the prescribed form and within the prescribed time limit against the decision of the opposition division maintaining European patent No. 2 280 882 in amended form according to auxiliary request 6.
- II. The opposition division found that claims 1 and 13 of the patent as granted (main request), as well as claim 13 of auxiliary request 1 contained subject-matter which extended beyond the content of the application as originally filed (Articles 100(c) and 123(2) EPC); the subject-matter of claim 1 of auxiliary requests 2 and 5 was not novel (Article 54 EPC) and the subject-matter of claim 1 of auxiliary requests 3 and 4 was not inventive (Article 56 EPC).
- III. In preparation for oral proceedings the Board communicated its preliminary assessment of the case to the parties in a communication pursuant to Article 15(1) RPBA 2020 of 1 February 2022. The patent proprietor responded in substance to this communication with its submissions of 5 August 2022, the opponent with its submissions of 3 November 2022.
- IV. Oral proceedings before the Board took place on 6 December 2022. At the conclusion of the proceedings the decision was announced. Further details of the oral proceedings can be found in the minutes.

V. The final requests of the parties are as follows:

for the patent proprietor,

- that the decision under appeal be set aside and the patent be maintained as granted (main request);
- alternatively, when setting aside the decision under appeal, that the patent be maintained in amended form on the basis of one of the sets of claims of auxiliary requests 1 to 5 filed with the statement of grounds of appeal;
- or, alternatively, that the patent be maintained in amended form on the basis of the set of claims of auxiliary request 6 filed with the patent proprietor's reply to the opponent's statement setting out the grounds of appeal, whereby auxiliary request 6 corresponds to the set of claims which the opposition division found to meet the requirements of the EPC, *i.e.* that the appeal of the opponent be dismissed;
- or, in the further alternative, when setting aside the decision under appeal, that the patent be maintained in amended form on the basis of the set of claims of auxiliary request 7 filed with the patent proprietor's reply to the opponent's statement setting out the grounds of appeal, or one of auxiliary requests 8 and 9 filed during the oral proceedings on 6 December 2022.

for the opponent,

- that the decision under appeal be set aside;
- that the patent be revoked.

VI. The following documents are referred to in this decision:

- D1: WO 01/94240 A1;
- D3: WO 2004/033339 A1;

D12: WO 2006/045087 A2;
D14: US 2007/0193891 A1;
D15: WO 03/064275 A1;
D27: WO 03/082092 A1.

VII. Claim 1 of the patent as granted (main request) and auxiliary request 2 reads as follows:

"A moisture-tight, re-sealable container (10) comprising:

- a. a body (12) having a generally tubular sidewall (24) with first (26) and second (28) axially opposed ends, a base, and a dispensing opening (30) axially spaced from the base and at least adjacent to the second end (28);
- b. an interior space (14) disposed generally within the sidewall (24) and at least generally between the base (26) and the dispensing opening (30);
- c. the generally tubular sidewall (24) having a cross-section (32) having a major diameter (34) and a minor diameter (36), wherein the ratio between the major diameter (34) and the minor diameter (36) of the sidewall cross-section (32) is a value between 1.1 : 1 and 10 : 1, inclusive;
- d. a non-round body sealing surface (16) located on the body (12) and disposed about the dispensing opening (30), the body sealing surface (16) having a major diameter (40) and a minor diameter (42), wherein the ratio between the major diameter and the minor diameter of the body sealing surface is a value between 1.1 : 1 and 10 : 1, inclusive;
- e. a lid (18) configured to seat on the body (12);
- f. a lid sealing surface (20) located on the lid (18);
- g. the body sealing surface (16) and the lid sealing surface (20) being configured to mate to

form a seal (50) between the lid (18) and the body (12) when the lid is seated on the body; and

h. the lid (18) and lid sealing surface (20) at least substantially closing the dispensing opening (30) and isolating the interior space (14) from ambient conditions;

i. the container (10) having a moisture ingress rate of 100-1000 micrograms per day, at 80% relative humidity and 22.2°C, and

j. comprising a reinforcement (22, 162, 184, 206) stiffening the body sealing surface (16) against deflection along an axis defined by the minor diameter when the lid is seated on the body, and characterized in that,

the interior space (14) is defined at least in part by the reinforcement (22, 162, 184, 206) stiffening the container against deflection along the minor axis and in which the reinforcement is an insert (206) assembled with the container, or

in which the reinforcement is defined at least in part by a liner (184), or

in which the reinforcement comprises a spline (162) within the interior space."

VIII. Claim 13 of the main request and auxiliary request 1 reads as follows:

"The container of claim 1, in which the spline (162) extends generally parallel to the minor diameter of the body sealing surface."

IX. Claim 1 of auxiliary request 1 reads as follows (deletions with respect to the patent as granted are shown struck-through):

"A moisture-tight, re-sealable container (10) comprising:

- a. a body (12) having a generally tubular sidewall (24) with first (26) and second (28) axially opposed ends, a base, and a dispensing opening (30) axially spaced from the base and at least adjacent to the second end (28);
- b. an interior space (14) disposed generally within the sidewall (24) and at least generally between the base (26) and the dispensing opening (30);
- c. the generally tubular sidewall (24) having a cross-section (32) having a major diameter (34) and a minor diameter (36), wherein the ratio between the major diameter (34) and the minor diameter (36) of the sidewall cross-section (32) is a value between 1.1 : 1 and 10 : 1, inclusive;
- d. a non-round body sealing surface (16) located on the body (12) and disposed about the dispensing opening (30), the body sealing surface (16) having a major diameter (40) and a minor diameter (42), wherein the ratio between the major diameter and the minor diameter of the body sealing surface is a value between 1.1 : 1 and 10 : 1, inclusive;
- e. a lid (18) configured to seat on the body (12);
- f. a lid sealing surface (20) located on the lid (18);
- g. the body sealing surface (16) and the lid sealing surface (20) being configured to mate to form a seal (50) between the lid (18) and the body (12) when the lid is seated on the body; and
- h. the lid (18) and lid sealing surface (20) at least substantially closing the dispensing opening (30) and isolating the interior space (14) from ambient conditions;
- i. the container (10) having a moisture ingress rate of 100-1000 micrograms per day, at 80% relative humidity and 22.2°C, and

j. comprising a reinforcement (22, 162, 184, 206) stiffening the body sealing surface (16) against deflection along an axis defined by the minor diameter when the lid is seated on the body, and characterized in that, the interior space (14) is defined at least in part by the reinforcement (22, 162, 184, 206) stiffening the container against deflection along the minor axis and in which the reinforcement is an insert (206) assembled with the container, or
in which the reinforcement is defined at least in part by a liner (184), ~~or~~
~~in which the reinforcement comprises a spline (162) within the interior space.~~

- X. Claim 1 of auxiliary request 3 reads as follows (additions with respect to the patent as granted are shown underlined, deletions are struck-through):
- "A moisture-tight, re-sealable container (10) comprising:
- a. a body (12) having a generally tubular sidewall (24) with first (26) and second (28) axially opposed ends, a base, and a dispensing opening (30) axially spaced from the base and at least adjacent to the second end (28);
 - b. an interior space (14) disposed generally within the sidewall (24) and at least generally between the base (26) and the dispensing opening (30);
 - c. the body (12) being at least generally oval in cross-section such that the generally tubular sidewall (24) ~~having~~ has a cross-section (32) having a major diameter (34) and a minor diameter (36) perpendicular to each other, wherein the ratio between the major diameter (34) and the minor diameter (36) of the sidewall cross-section (32) is a value between 1.1 : 1 and 10 : 1, inclusive;

- d. a non-round body sealing surface (16) located on the body (12) and disposed about the dispensing opening (30), the body sealing surface (16) having a major diameter (40) and a minor diameter (42), wherein the ratio between the major diameter and the minor diameter of the body sealing surface is a value between 1.1 : 1 and 10 : 1, inclusive;
- e. a lid (18) configured to seat on the body (12);
- f. a lid sealing surface (20) located on the lid (18);
- g. the body sealing surface (16) and the lid sealing surface (20) being configured to mate to form a seal (50) between the lid (18) and the body (12) when the lid is seated on the body; and
- h. the lid (18) and lid sealing surface (20) at least substantially closing the dispensing opening (30) and isolating the interior space (14) from ambient conditions;
- i. the container (10) having a moisture ingress rate of 100-1000 micrograms per day, at 80% relative humidity and 22.2°C, and
- j. comprising a reinforcement (22, 162, 184, 206) stiffening the body sealing surface (16) against deflection along an axis defined by the minor diameter when the lid is seated on the body, and characterized in that,
the interior space (14) is defined at least in part by the reinforcement (22, 162, 184, 206) stiffening the container against deflection along the minor axis and in which the reinforcement is an insert (206) assembled with the container, or
in which the reinforcement is defined at least in part by a liner (184), or
in which the reinforcement comprises a spline (162) within the interior space."

XI. Claim 1 of auxiliary request 4 reads as follows (additions with respect to the patent as granted are shown underlined, deletions are struck-through):

"A moisture-tight, re-sealable container (10) comprising:

a. a body (12) having a generally tubular sidewall (24) with first (26) and second (28) axially opposed ends, a base, and a dispensing opening (30) axially spaced from the base and at least adjacent to the second end (28);

b. an interior space (14) disposed generally within the sidewall (24) and at least generally between the base (26) and the dispensing opening (30);

c. the body (12) being at least generally oval in cross-section such that the generally tubular sidewall (24) ~~having~~ has a cross-section (32) having a major diameter (34) and a minor diameter (36), wherein the ratio between the major diameter (34) and the minor diameter (36) perpendicular to each other of the sidewall cross-section (32) is a value between 1.1 : 1 and 10 : 1, inclusive;

d. a non-round body sealing surface (16) located on the body (12) and disposed about the dispensing opening (30), the body sealing surface (16) having a major diameter (40) and a minor diameter (42), wherein the ratio between the major diameter and the minor diameter of the body sealing surface is a value between 1.1 : 1 and 10 : 1, inclusive;

e. a lid (18) configured to seat on the body (12);

f. a lid sealing surface (20) located on the lid (18);

g. the body sealing surface (16) and the lid sealing surface (20) being configured to mate to form a seal (50) between the lid (18) and the body (12) when the lid is seated on the body; and

h. the lid (18) and lid sealing surface (20) at least substantially closing the dispensing opening (30) and isolating the interior space (14) from ambient conditions;

i. the container (10) having a moisture ingress rate of 100-1000 micrograms per day, at 80% relative humidity and 22.2°C, and

j. comprising a reinforcement (22, 162, 184, 206) stiffening the body sealing surface (16) against deflection along an axis defined by the minor diameter when the lid is seated on the body, and characterized in that,

the interior space (14) is defined at least in part by the reinforcement (22, 162, 184, 206) stiffening the container against deflection along the minor axis and in which the reinforcement is an insert (206) assembled with the container, or

in which the reinforcement is defined at least in part by a liner (184), ~~or~~

~~in which the reinforcement comprises a spline (162) within the interior space."~~

XII. Claim 1 of auxiliary request 5 reads as follows (additions with respect to the patent as granted are shown underlined, deletions are struck-through):

"A moisture-tight, re-sealable container (10) comprising:

a. a body (12) having a generally tubular sidewall (24) with first (26) and second (28) axially opposed ends, a base, and a dispensing opening (30) axially spaced from the base and at least adjacent to the second end (28), wherein at least a portion of the dispensing opening (5) is defined by the second end (28) of the sidewall (24);

- b. an interior space (14) disposed generally within the sidewall (24) and at least generally between the base (26) and the dispensing opening (30);
- c. the generally tubular sidewall (24) having a cross-section (32) having a major diameter (34) and a minor diameter (36), wherein the ratio between the major diameter (34) and the minor diameter (36) of the sidewall cross-section (32) is a value between 1.1 : 1 and 10 : 1, inclusive;
- d. a non-round body sealing surface (16) located on the body (12) and disposed about the dispensing opening (30), the body sealing surface (16) having a major diameter (40) and a minor diameter (42), wherein the ratio between the major diameter and the minor diameter of the body sealing surface is a value between 1.1 : 1 and 10 : 1, inclusive;
- e. a lid (18) configured to seat on the body (12);
- f. a lid sealing surface (20) located on the lid (18);
- g. the body sealing surface (16) and the lid sealing surface (20) being configured to mate to form a seal (50) between the lid (18) and the body (12) when the lid is seated on the body; and
- h. the lid (18) and lid sealing surface (20) at least substantially closing the dispensing opening (30) and isolating the interior space (14) from ambient conditions;
- i. the container (10) having a moisture ingress rate of 100-1000 micrograms per day, at 80% relative humidity and 22.2°C, and
- j. comprising a reinforcement (22, 162, 184, 206) stiffening the body sealing surface (16) against deflection along an axis defined by the minor diameter when the lid is seated on the body, and characterized in that,

the interior space (14) is defined at least in part by the reinforcement (22, 162, 184, 206) stiffening the container against deflection along the minor axis and in which the reinforcement is an insert (206) assembled with the container, or in which the reinforcement is defined at least in part by a liner (184), ~~or in which the reinforcement comprises a spline (162) within the interior space.~~"

XIII. Claim 1 of auxiliary request 6 reads as follows (additions with respect to the patent as granted are shown underlined, deletions are struck-through):

"A moisture-tight, re-sealable container (10) comprising:

- a. a body (12) having a generally tubular sidewall (24) with first (26) and second (28) axially opposed ends, a base, and a dispensing opening (30) axially spaced from the base and at least adjacent to the second end (28);
- b. an interior space (14) disposed generally within the sidewall (24) and at least generally between the base (26) and the dispensing opening (30);
- c. the generally tubular sidewall (24) having a cross-section (32) having a major diameter (34) and a minor diameter (36), wherein the ratio between the major diameter (34) and the minor diameter (36) of the sidewall cross-section (32) is a value between 1.1 : 1 and 10 : 1, inclusive;
- d. a non-round body sealing surface (16) located on the body (12) and disposed about the dispensing opening (30), the body sealing surface (16) having a major diameter (40) and a minor diameter (42), wherein the ratio between the major diameter and the minor diameter of the body sealing surface is a value between 1.1 : 1 and 10 : 1, inclusive;

e. a lid (18) configured to seat on the body (12);
f. a lid sealing surface (20) located on the lid (18) and a generally tubular skirt (52) surrounding and depending from the lid sealing surface (20), wherein the skirt (52) cross-section is substantially congruent to the cross-section of the body sidewall (24);
g. the body sealing surface (16) and the lid sealing surface (20) being configured to mate to form a seal (50) between the lid (18) and the body (12) when the lid is seated on the body; and
h. the lid (18) and lid sealing surface (20) at least substantially closing the dispensing opening (30) and isolating the interior space (14) from ambient conditions;
i. the container (10) having a moisture ingress rate of 100-1000 micrograms per day, at 80% relative humidity and 22.2°C, and
j. comprising a reinforcement (22, 162, 184, 206) stiffening the body sealing surface (16) against deflection along an axis defined by the minor diameter when the lid is seated on the body, and ~~characterized in that,~~
in which the interior space (14) is defined at least in part by the reinforcement (22, 162, 184, 206) stiffening the container against deflection along the minor axis and in which the reinforcement is an insert (206) assembled with the container, or in which the reinforcement is defined at least in part by a liner (184), ~~or~~
~~in which the reinforcement comprises a spline (162) within the interior space~~
characterized in that the generally tubular skirt (52) is at least substantially defining an extension of the generally tubular sidewall (24) when the lid (18) is seated on the body."

XIV. Claim 1 of auxiliary request 7 reads as follows
(additions with respect to the patent as granted are
shown underlined, deletions are struck-through):

"A moisture-tight, re-sealable container (10)
comprising:

- a. a body (12) having a generally tubular sidewall (24) with first (26) and second (28) axially opposed ends, a base, and a dispensing opening (30) axially spaced from the base and at least adjacent to the second end (28);
- b. an interior space (14) disposed generally within the sidewall (24) and at least generally between the base (26) and the dispensing opening (30);
- c. the generally tubular sidewall (24) having a cross-section (32) having a major diameter (34) and a minor diameter (36), wherein the ratio between the major diameter (34) and the minor diameter (36) of the sidewall cross-section (32) is a value between 1.1 : 1 and 10 : 1, inclusive;
- d. a non-round body sealing surface (16) located on the body (12) and disposed about the dispensing opening (30), the body sealing surface (16) having a major diameter (40) and a minor diameter (42), wherein the ratio between the major diameter and the minor diameter of the body sealing surface is a value between 1.1 : 1 and 10 : 1, inclusive;
- e. a lid (18) configured to seat on the body (12);
- f. a lid sealing surface (20) located on the lid (18) and a generally tubular skirt (52) surrounding and depending from the lid sealing surface (20), wherein the skirt (52) cross-section is substantially congruent to the cross-section of the body sidewall (24);
- g. the body sealing surface (16) and the lid sealing surface (20) being configured to mate to

form a seal (50) between the lid (18) and the body (12) when the lid is seated on the body; and

h. the lid (18) and lid sealing surface (20) at least substantially closing the dispensing opening (30) and isolating the interior space (14) from ambient conditions;

i. the container (10) having a moisture ingress rate of 100-1000 micrograms per day, at 80% relative humidity and 22.2°C, and

j. comprising a reinforcement (22, 162, 184, 206) stiffening the body sealing surface (16) against deflection along an axis defined by the minor diameter when the lid is seated on the body, and ~~characterized in that,~~
in which the interior space (14) is defined at least in part by the reinforcement (22, 162, 184, 206) stiffening the container against deflection along the minor axis and in which the reinforcement is an insert (206) assembled with the container, or in which the reinforcement is defined at least in part by a liner (184),~~or~~
~~in which the reinforcement comprises a spline (162) within the interior space~~
characterized in that the generally tubular skirt (52) is defining an extension of the generally tubular sidewall (24) when the lid (18) is seated on the body (12)."

- XV. Claim 1 of auxiliary request 8 reads as follows (additions with respect to the patent as granted are shown underlined, deletions are struck-through):
- "A moisture-tight, re-sealable container (10) comprising:
- a. a body (12) having a generally tubular sidewall (24) with first (26) and second (28) axially opposed ends, a base, and a dispensing opening (30)

- axially spaced from the base and at least adjacent to the second end (28);
- b. an interior space (14) disposed generally within the sidewall (24) and at least generally between the base (26) and the dispensing opening (30);
- c. the generally tubular sidewall (24) having a cross-section (32) having a major diameter (34) and a minor diameter (36), wherein the ratio between the major diameter (34) and the minor diameter (36) of the sidewall cross-section (32) is a value between 1.1 : 1 and 10 : 1, inclusive;
- d. a non-round body sealing surface (16) located on the body (12) and disposed about the dispensing opening (30), the body sealing surface (16) having a major diameter (40) and a minor diameter (42), wherein the ratio between the major diameter and the minor diameter of the body sealing surface is a value between 1.1 : 1 and 10 : 1, inclusive;
- e. a lid (18) configured to seat on the body (12);
- f. a lid sealing surface (20) located on the lid (18) and a generally tubular skirt (52) surrounding and directed upwards and downwards from the lid sealing surface (20) in a longitudinal section, wherein the skirt (52) cross-section depending downwards is congruent to the cross-section of the body sidewall (24);
- g. the body sealing surface (16) and the lid sealing surface (20) being configured to mate to form a seal (50) between the lid (18) and the body (12) when the lid is seated on the body; and
- h. the lid (18) and lid sealing surface (20) at least substantially closing the dispensing opening (30) and isolating the interior space (14) from ambient conditions;

i. the container (10) having a moisture ingress rate of 100-1000 micrograms per day, at 80% relative humidity and 22.2°C, and

j. comprising a reinforcement (22, 162, 184, 206) stiffening the body sealing surface (16) against deflection along an axis defined by the minor diameter when the lid is seated on the body, and ~~characterized in that,~~
in which the interior space (14) is defined at least in part by the reinforcement (22, 162, 184, 206) stiffening the container against deflection along the minor axis and in which the reinforcement is an insert (206) assembled with the container, or in which the reinforcement is defined at least in part by a liner (184),~~or~~
~~in which the reinforcement comprises a spline (162) within the interior space~~
characterized in that the generally tubular skirt (52) is defining an extension of the generally tubular sidewall (24) in the longitudinal section when the lid (18) is seated on the body (12)."

XVI. Claim 1 of auxiliary request 9 reads as follows (additions with respect to the patent as granted are shown underlined, deletions are struck-through):

"A moisture-tight, re-sealable container (10) comprising:

a. a body (12) being oval in cross-section and having a generally tubular sidewall (24) with first (26) and second (28) axially opposed ends, a base, and a dispensing opening (30) axially spaced from the base and at least adjacent to the second end (28);

b. an interior space (14) disposed generally within the sidewall (24) and at least generally between the base (26) and the dispensing opening (30);

- c. the generally tubular sidewall (24) having a cross-section (32) having a major diameter (34) and a minor diameter (36), wherein the ratio between the major diameter (34) and the minor diameter (36) of the sidewall cross-section (32) is a value between 1.1 : 1 and 10 : 1, inclusive;
- d. a non-round body sealing surface (16) located on the body (12) and disposed about the dispensing opening (30), the body sealing surface (16) having a major diameter (40) and a minor diameter (42), wherein the ratio between the major diameter and the minor diameter of the body sealing surface is a value between 1.1 : 1 and 10 : 1, inclusive;
- e. a lid (18) configured to seat on the body (12);
- f. a lid sealing surface (20) located on the lid (18);
- g. the body sealing surface (16) and the lid sealing surface (20) being configured to mate to form a seal (50) between the lid (18) and the body (12) when the lid is seated on the body; and
- h. the lid (18) and lid sealing surface (20) at least substantially closing the dispensing opening (30) and isolating the interior space (14) from ambient conditions;
- i. the container (10) having a moisture ingress rate of 100-1000 micrograms per day, at 80% relative humidity and 22.2°C, and
- j. comprising a reinforcement (22, 162, 184, 206) stiffening the body sealing surface (16) against deflection along an axis defined by the minor diameter when the lid is seated on the body, and characterized in that,
the interior space (14) is defined at least in part by the reinforcement (22, 162, 184, 206) stiffening the container against deflection along the minor

axis and in which the reinforcement is an insert (206) assembled with the container, or in which the reinforcement is defined at least in part by a liner (184), ~~or in which the reinforcement comprises a spline (162) within the interior space.~~"

XVII. The arguments of the parties are dealt with in detail in the reasons for the decision.

Reasons for the Decision

1. Appeal of the patent proprietor
2. *Main request - claim 13 of the patent as granted - Article 100(c) EPC*
- 2.1 The opposition division found that claim 13 of the patent as granted contained subject-matter which extended beyond the application as originally filed (see decision under appeal, point II.13).

The opposition division found that the introduction during examination proceedings of this dependent claim did not fulfil the requirements of Article 123(2) EPC as there was no basis in the original disclosure for a container having a spline extending parallel to the minor diameter of the body sealing surface with any shape other than an oval cross-section. This finding was based *inter alia* on the reasoning

- that all the figures of the application which show a spline appear to have an oval cross-section, and
- that paragraphs [0095] and [0096] refer to an oval.

2.2 In its statement of grounds of appeal, the patent proprietor argued that the opposition division was incorrect as the cross-section of the embodiments shown in the drawings is explicitly not restricted to an oval.

Paragraphs [0035] to [0038] of the application as published disclose that an oval is only one of a number of options for the cross-section of the generally tubular sidewall of the container body. Similarly, even if the embodiments disclosed in paragraphs [0095] and [0096] indicate oval cross-sections, the skilled person understands from paragraphs [0035] to [0038] that an oval cross-section is not the only possible cross-section.

2.3 The patent proprietor further argued that the application as originally filed in any case does unambiguously disclose a spline that extends generally parallel to the minor diameter of the body sealing surface, independently of any specific shape of the cross-section. In addition to paragraphs [0035] to [0038] and [0095] and [0096], the patent proprietor relied on paragraphs [0011], [0074], [0075], [00130], [00131], [0134] and [0135] as well as claim 3 of the application as published in support of its argumentation.

2.4 The Board does not find the arguments of the patent proprietor convincing and generally follows the reasoning given in the decision under appeal and the argumentation of the opponent in its reply to the patent proprietor's statement of grounds of appeal (see points 10. to 15.).

The patent proprietor argued that non-oval body cross-sections are disclosed in paragraphs [0035] to [0038]

and that these further shapes can be applied to the embodiments where a spline is disclosed in combination with an oval cross-section.

Paragraphs [0035] to [0038] read as follows:

"[0035] Optionally, in any embodiment above, the body is at least generally oval in cross-section.

[0036] Optionally, in any embodiment above, the body is at least generally polygonal in cross-section.

[0037] Optionally, in any embodiment above, the body is at least generally rectangular in cross-section.

[0038] Optionally, in any embodiment above, the body has at least one rounded corner."

The Board notes that the description preceding these paragraphs does not mention a spline.

Therefore paragraphs [0035] to [0038] cannot be considered as a disclosure of an embodiment of a container having a spline which extends generally parallel to the minor diameter of the body sealing surface with a non-oval body cross-section.

- 2.5 None of the further paragraphs cited by the patent proprietor disclose a spline in combination with a non-oval body cross-section.
- 2.5.1 Paragraph [0011] refers to a reinforcement stiffening the container against deflection along the minor axis but does not mention a spline.
- 2.5.2 Paragraphs [0074] and [0075] relate to the embodiment described as "[a]nother embodiment" in paragraph [0059]. No mention is made of the cross-sectional shape

of the body in paragraphs [0059], [0074] or [0075]. Not all features of claim 13 as granted are found in these paragraphs.

The patent proprietor argued that the features disclosed in paragraphs [0074] to [0075] are not limited to the embodiment of paragraph [0059] and would apply equally to embodiments with non-oval cross-sectional bodies, such as disclosed in paragraphs [0035] to [0038] (see submissions of 5 August 2022, paragraph 13).

However, the mention of "any embodiment above" in paragraphs [0074] to [0075] (also found in paragraphs [0010] to [0058], [0060] to [0098], and [102] to [103]) is not a direct and unambiguous disclosure of the exact combination of features of claim 13.

Paragraphs [0074] and [0075] refer to "a spline" and "each spline" being integral with the body, which clearly relates to the embodiment of paragraph [0059] which comprises a generally tubular body and at least one spline. Indeed, the skilled person when reading the application understands that the features disclosed in paragraphs [0060] to [0098] refer to the embodiment of paragraph [0059], which is directed to a dispenser for strips of material and includes platforms, reservoirs, a region and at least one spline. The embodiment described in paragraphs [0004] to [0009] is directed to a moisture proof, resealable non-cylindrical container and lid assembly and makes no mention of platforms, reservoirs or splines.

- 2.5.3 Paragraphs [0095] and [0096] disclose splines which lie parallel to either the laterally extending long axis of the oval or the laterally extending short axis of the

oval, no indication of any other possible cross-sectional shapes is given.

2.5.4 Paragraphs [00130] and [00131] also refer explicitly to oval cross-sectional bodies, the Board notes that no mention of a spline is made in these paragraphs at all and that only inserts or liners are indicated as possible reinforcements.

2.5.5 During the oral proceedings before the Board the patent proprietor referred to paragraphs [0134] and [0135] and argued that these paragraphs showed that the teaching of the contested patent was applicable to all cross-sectional shapes.

The Board however follows the argument of the opponent that these paragraphs do not mention a spline and relate to figures which also do not disclose a spline.

2.5.6 Claim 3 as originally filed reads as follows:

"The container of claim 1, in which the interior space is defined at least in part by a reinforcement stiffening the container against deflection along the minor axis."

Neither claim 1 nor claim 3 as originally filed mentions a spline. A spline is only mentioned in the set of claims as originally filed in the dispenser of independent claim 12, which comprises "at least one spline extending axially and laterally within the reservoir and subdividing the the reservoir into plural axially extending reservoirs communicating with the dispensing opening".

2.6 Thus, the Board cannot follow the patent proprietor's arguments that there is a disclosure of a container having a non-oval body cross-section together with a spline as defined in claim 13 as granted.

There is therefore no direct and unambiguous disclosure in the application as originally filed of an embodiment of a container with the features of claim 13 as granted.

The patent proprietor has therefore not convincingly shown that the decision under appeal is incorrect with respect to the main request.

3. *Admittance into the appeal proceedings of auxiliary requests 1 to 5*

In point 112 of its reply to the patent proprietor's statement of grounds of appeal, the opponent argued that auxiliary requests 1 to 5 had not been substantiated by the patent proprietor in its statement of grounds of appeal. In its written submissions of 9 July 2021 the opponent requested that auxiliary requests 1 to 5 not be admitted into the appeal proceedings due to this lack of substantiation (see points 2, 7, 10, 16 and 17).

3.1 The Board notes that according to Article 12(3) RPBA 2020, the statement of grounds of appeal must contain a party's complete appeal case and must set out clearly and concisely why the decision under appeal should be reversed and should specify all the requests, facts, objections, arguments and evidence relied on.

Further, according to Article 12(5) RPBA 2020, the Board has the discretion not to admit any part of a

submission which does not meet the requirements of Article 12(3) RPBA 2020.

3.2 Auxiliary request 1

- 3.2.1 In point 2.1 of its statement of grounds of appeal, the patent proprietor states that auxiliary request 1 "serves to eliminate the Article 123(2) EPC objection that has been raised with regard to claim 1 of the patent as granted".

However, the opposition division found that "neither claim 1 nor 13 comprises an oval" and that the subject-matter of claim 13 therefore did not fulfil the requirements of Article 123(2) EPC (see decision under appeal, point II.14.2).

The patent proprietor did not address the decision under appeal on this point, nor indicate how the deletion of feature n) of claim 1 would overcome the objection to claim 13, thus the patent proprietor did not set out why the opposition division was incorrect in finding that auxiliary request 1 was not allowable.

- 3.2.2 In its submissions of 30 August 2021 (point A.1.) and 5 August 2022 (paragraphs 19 to 21) and during oral proceedings before the Board, the patent proprietor argued that the arguments made with respect to the main request applied equally to the first auxiliary request and that the request was intended to deal only with the objections to claim 1 of the main request.

However, the Board follows the arguments of the opponent that the patent proprietor as appellant was required to clearly demonstrate why the opposition

division's findings were incorrect regarding the auxiliary request.

As noted by the patent proprietor in its submissions of 5 August 2022, paragraph 23, if the Board were to confirm the opposition division's findings with respect to claim 13, then auxiliary request 1 would also not be allowable. As the Board finds that the opposition division was not incorrect in holding claim 13 of the patent as granted incompatible with the requirements of Article 123(2) EPC (see point 2.6 above), the Board concurs with the patent proprietor that auxiliary request 1 is not allowable for the same reason as the main request.

3.3 Auxiliary request 2

Dependent claim 13 has been deleted in auxiliary request 2. This deletion, according to the patent proprietor in point 2.2 of its statement of grounds of appeal, overcomes the objections to this claim which were found by the opposition division to be an extension of subject-matter. As claim 1 of auxiliary request 2 corresponds to claim 1 of the main request, the patent proprietor referred to sections 1.2 and 1.3 of the statement of grounds of appeal for its substantiation of this request with respect to novelty and inventive step.

The second auxiliary request was found by the opposition division to lack novelty with respect to the disclosure of D1 (see point II.16.4 of the decision under appeal).

Although section 1.2.1 of the patent proprietor's statement of grounds of appeal contains a comparison of

the subject-matter of claim 1 and the disclosure of D1, it fails to refer to the reasoning of the decision under appeal in any way and therefore does not provide any arguments demonstrating why the patent proprietor is of the opinion that the findings of the opposition division in point II.16.4 of the decision under appeal are incorrect.

In its submissions of 31 July 2020 (page 10, seventh paragraph), 30 August 2021 (point A.2.) and 5 August 2022 (paragraphs 22 to 23) the patent proprietor referred to its motivation in filing auxiliary request 2, which was to overcome the objection to claim 13 as granted, and again maintained its position that the same arguments as brought forward for the main request regarding novelty and inventive step would apply to auxiliary request 2.

However, as reiterated by the opponent at the oral proceedings, in its arguments regarding novelty with respect to the disclosure of document D1, the patent proprietor did not address the specific reasoning given by the opposition division in points II.16.4.1 to II.16.4.5 of the decision under appeal, where it found that features c, d, and j to n of claim 1 of auxiliary request 2 were disclosed in D1. Therefore this auxiliary request is not substantiated.

3.4 Auxiliary request 3

Regarding auxiliary request 3, the patent proprietor referred in point 2.3 of its statement of grounds of appeal to its previous reasoning under points 1.3.1 and 1.3.4.

- 3.4.1 In the decision under appeal (point II.20.1 and II.20.2), the opposition division found that the additional features introduced into claim 1 of auxiliary request 3 did not render the claim inventive compared with either document D1 or D14.

The patent proprietor makes no reference at all in points 1.3.1 and 1.3.4 of its statement of grounds of appeal to the decision under appeal, nor to the additional features added in the third auxiliary request.

- 3.4.2 In its submissions of 31 July 2020, the patent proprietor refers to the decision under appeal regarding auxiliary requests 3 and 4. It is however not clear how the subsequent arguments relate to the decision.

The patent proprietor writes that "Starting from D1 or D14 as closest prior art, at first, the skilled person would have to modify the cross-section of the container such that it becomes oval with a major and minor diameter" (submissions of 31 July 2020, page 11, first paragraph). In the decision under appeal however, the opposition division found that the distinguishing feature of claim 1 of the third auxiliary request over document D1 (the elliptic embodiment of page 7, line 3), was that a ratio of the major and minor diameter between 1.1:1 and 10:1 was not unambiguously disclosed. It is incumbent on the patent proprietor, as the appellant, to demonstrate and explain why the opposition division's reasoning is considered to be incorrect.

As the patent proprietor fails to address the reasoning given in the decision under appeal, this auxiliary request is also not substantiated.

3.5 Auxiliary request 4

The same reasoning as given under point 3.4 above applies to auxiliary request 4 as the fourth auxiliary request was found not allowable for the same reasons as the third auxiliary request (see decision under appeal, point II.21). In point 2.4 of its statement of grounds of appeal the patent proprietor gave no additional substantiation for this request.

3.6 Auxiliary request 5

3.6.1 Regarding auxiliary request 5 the patent proprietor argued in point 2.5 of its statement of grounds of appeal that claim 1 had been further distinguished from the subject-matter of D3 and D12 by adding features from the description. However, the patent proprietor gave no indication regarding the incorrectness of the opposition division's finding in the decision under appeal, which was that the subject-matter of claim 1 of the fifth auxiliary request lacked novelty over the disclosure of document D1.

3.6.2 In its submissions of 31 July 2020, with respect to auxiliary request 5, the patent proprietor stated in the final paragraph of the submissions, "Auxiliary request 5 mainly serves to distinguish the invention from D3, D12, D15 and D27. According to the amended claim 1 of auxiliary request 5, at least a portion of the dispensing opening is defined by the second end of the sidewall. This feature is not disclosed in any of the afore mentioned prior art documents". However, the decision under appeal had found that document D1 disclosed this feature and that the subject-matter of claim 1 of the fifth auxiliary request was therefore

not novel over document D1. In its submissions of 30 August 2021, the patent proprietor again argued that claim 1 of auxiliary request 5 was novel over D1 for the same reasons as the main request.

The Board notes that it is not sufficient to refer only to a higher ranking request to substantiate an amended claim in an auxiliary request which was found not allowable by the opposition division. The patent proprietor, as appellant, must also give arguments explaining why it considers the reasoning of the opposition division with respect to the fifth auxiliary request itself to be incorrect.

- 3.7 The Board therefore agrees with the opponent that auxiliary requests 1 to 5 have not been sufficiently substantiated as the patent proprietor has not indicated which reasoning given in the decision under appeal it regards as being incorrect, nor has it indicated why the opposition division was incorrect in its reasoning.

In the absence of any analysis of the opposition division's reasoning, the patent proprietor's appeal case for auxiliary requests 1 to 5 is not clear, leaving the Board to attempt to interpret what the party's intended case might be. This would not be appropriate considering the requirement of strict impartiality of the Board in an inter partes case.

- 3.8 The Board therefore uses its discretion under Article 12(5) RPBA 2020 and does not admit auxiliary requests 1 to 5 into the appeal proceedings.

4. The patent proprietor has not convincingly demonstrated that the opposition division was incorrect in finding

that the main request did not fulfil the requirements of Article 123(2) EPC. Auxiliary requests 1 to 5 are not admitted into the proceedings.

Therefore, the appeal of the patent proprietor must be dismissed.

Appeal of the opponent

5. *Auxiliary request 6 - claim 1 - Article 84 EPC*

5.1 The opposition division found that claim 1 of the sixth auxiliary request was clear (see decision under appeal, section II.23).

5.2 In its statement of grounds of appeal, the opponent argued that the decision under appeal was incorrect as the opposition division had not properly addressed (or understood) its clarity objections raised during the oral proceedings before the opposition division (see opponent's statement of grounds, points 2. to 9.).

5.3 Claim 1 of auxiliary request 6 has been amended by introducing the following features:

"a generally tubular skirt (52) surrounding and depending from the lid sealing surface (20), wherein the skirt (52) cross-section is substantially congruent to the cross-section of the body sidewall (24);
the generally tubular skirt (52) is at least substantially defining an extension of the generally tubular side wall (24) when the lid (18) is seated on the body (12)."

- 5.4 The opposition division understood the features of the skirt as requiring two extensions from the lid sealing surface, so that the skirt is "a tubular element extending substantially continuously from above the sealing surface to below it" (decision under appeal, II.23.3, final sentence). The patent proprietor shared this view as in its reply to the opponent's statement of grounds of appeal it writes that, "the lid's skirt has a first and second extension, both starting from the lid sealing surface but, in different directions".
- 5.5 The Board however agrees with the opponent that the decision under appeal is incorrect with respect to clarity of claim 1 of the sixth auxiliary request.
- 5.5.1 According to the opponent, the wording of the newly introduced feature first describes the skirt in general terms, "surrounding and depending from the lid sealing surface" and then introduces further additional features of the skirt, namely that the cross-section is substantially congruent to the cross-section of the body side-wall and also that the skirt at least substantially defines an extension of the body sidewall. As the opposition division found that the skilled reader would understand "depending from" as meaning "directed downwards from", when the container is in its normal orientation, it is not clear how at the same time the skirt is also an extension of the sidewall (see statement of grounds of appeal, points 4. and 6.).
- 5.5.2 In addition the use of the term "substantially" in relation to the skirt cross-section and the extension rendered the claim unclear as the skilled person could not determine which designs would fall within the scope

of claim 1 (see opponent's statement of grounds of appeal, points 5. and 9.).

5.5.3 As further argued by the opponent in point 7. of its statement of grounds of appeal, the opposition division was inconsistent in finding (decision under appeal, points II.23.3 and II.23.5) that whether the skirt is "depending from" the lid sealing surface should be assessed when viewing the container from the side, whereas the congruency of the cross-sections of the skirt and the body sidewall should be assessed from above.

The claim itself does not indicate from which viewpoint the extension of the sidewall and the congruency of the two parts' cross-sections should be considered.

5.5.4 In the Board's view, contrary to the reasoning of the opposition division and the arguments of the patent proprietor in its reply to the opponent's statement of grounds, the claim is not unambiguously directed to a skirt with two extensions, one which extends above the lid sealing surface and one which extends below it. The claim wording can also be interpreted as a skirt depending from the lid sealing surface, so that all of the skirt is below the sealing surface and has a cross-section congruent to the cross-section of the sidewall and defining an extension of the sidewall.

5.5.5 In its submissions of 5 August 2022 the patent proprietor argued that the word "surrounding" indicated that the skirt extended from both sides of the sealing surface. The Board, however agrees with the opponent that irrespective of whether such a new interpretation of the word "surrounding" represents an amendment to the patent proprietor's appeal case, it adds to a lack of clarity of the claim if the word surrounding is

intended to be understood as meaning extending in both axial directions as well as radially surrounding the lid sealing surface.

- 5.6 Therefore the claim is not clear and does not fulfil the requirements of Article 84 EPC as the skilled person is not able to reliably determine which containers fall within the scope of claim 1.

The opponent has thus convincingly demonstrated that the decision under appeal was incorrect in finding that claim 1 of auxiliary request 6 fulfilled the requirements of Article 84 EPC.

6. *Auxiliary request 7 - claim 1 - Article 84 EPC*

The Board agrees with the opponent (submissions of 9 July 2021, page 5) that claim 1 of auxiliary request 7 does not overcome all the objections raised with respect to auxiliary request 6 (see point 5.5 above). Claim 1 of auxiliary request 7 contains the same unclear features present in claim 1 of auxiliary request 6 because deleting the term "at least substantially" in claim 1 of auxiliary request 7 does not rectify the lack of clarity the Board found with respect to claim 1 of auxiliary request 6.

Therefore auxiliary request 7 is also not allowable.

7. *Auxiliary requests 8 and 9 - admittance - Article 13(2) RPBA 2020*

The patent proprietor filed auxiliary requests 8 and 9 at the oral proceedings before the Board.

- 7.1 The opponent requested that auxiliary requests 8 and 9 not be admitted into the oral proceedings as no exceptional circumstances were present as required by Article 13(2) RPBA 2020 and the auxiliary requests were not *prima facie* allowable.
- 7.2 According to Article 13(2) RPBA 2020 any amendment to a party's appeal case made after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.
- 7.3 The patent proprietor argued that exceptional circumstances were present in the current case as it was only at the oral proceedings before the Board that the patent proprietor fully understood the clarity objections raised by the opponent.
- 7.4 The Board, however, agrees with the arguments of the opponent brought forward during the oral proceedings and finds that no exceptional circumstances are present in the case at hand.

The opponent's objections were raised in its statement of grounds of appeal and the patent proprietor had had the opportunity throughout the appeal proceedings to respond with arguments; to file auxiliary requests or indeed to indicate that it did not understand the objections.

The patent proprietor did respond to the objections during the written proceedings, both before and after the preliminary opinion of the Board was issued (see patent proprietor's reply to the opponent's grounds of appeal, pages 1 and 2, and submissions of

5 August 2022, point 3.) and also filed auxiliary request 7 in reaction to the objections.

The Board therefore cannot see that any exceptional circumstances are present which would justify the admittance of auxiliary requests 8 and 9 at such a late stage of the proceedings.

8. In the absence of any allowable and admissible requests, the opponent's appeal is allowable and the patent must be revoked.

Order

For these reasons it is decided that:

1. **The appeal of the patent proprietor is dismissed.**
2. **The decision under appeal is set aside.**
3. **The patent is revoked.**

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated