

**Internal distribution code:**

- (A) [ - ] Publication in OJ
- (B) [ - ] To Chairmen and Members
- (C) [ - ] To Chairmen
- (D) [ X ] No distribution

**Datasheet for the decision  
of 13 September 2023**

**Case Number:** T 1700/21 - 3.2.01

**Application Number:** 14170403.1

**Publication Number:** 2796386

**IPC:** B65D81/26, B65D69/00,  
B65D73/00, B65D1/24, B65D51/18,  
B65D43/16, B65D83/08

**Language of the proceedings:** EN

**Title of invention:**  
Use of a substantially moisture tight container and cap  
assembly

**Patent Proprietor:**  
CSP Technologies, Inc.

**Opponent:**  
Airnov France

**Headword:**

**Relevant legal provisions:**  
EPC Art. 76(1), 100(c), 123(2)  
RPBA 2020 Art. 12(3), 12(8), 13(1), 15(1)

**Keyword:**

Divisional application - subject-matter extends beyond content of earlier application (yes)

Amendments - extension beyond the content of the application as filed (yes)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

Boards of Appeal of the  
European Patent Office  
Richard-Reitzner-Allee 8  
85540 Haar  
GERMANY  
Tel. +49 (0)89 2399-0  
Fax +49 (0)89 2399-4465

**Case Number: T 1700/21 - 3.2.01**

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.01**  
**of 13 September 2023**

**Appellant:** CSP Technologies, Inc.  
(Patent Proprietor) 1030 Riverfront Center  
Amsterdam, New York 12010 (US)

**Representative:** Maiwald GmbH  
Elisenhof  
Elisenstraße 3  
80335 München (DE)

**Appellant:** Airnov France  
(Opponent) 6 Rue Louise Michel  
94600 Choisy-Le-Roi (FR)

**Representative:** Hoffmann Eitle  
Patent- und Rechtsanwälte PartmbB  
Arabellastraße 30  
81925 München (DE)

**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
20 July 2021 concerning maintenance of the  
European Patent No. 2796386 in amended form.**

**Composition of the Board:**

**Chairman** G. Pricolo  
**Members:** A. Pieracci  
S. Fernández de Córdoba

## **Summary of Facts and Submissions**

- I. Appeals were filed by the patent proprietor and by the opponent in the prescribed form and within the prescribed time limit against the interlocutory decision of the opposition division maintaining the European patent No. 2 796 386 in amended form according to the patent proprietor's first auxiliary request.
- II. In preparation for oral proceedings, the Board gave its preliminary opinion in a communication pursuant to Article 15(1) RPBA 2020, in which it indicated that the patent proprietor's appeal could not be allowed whereas the appeal of the opponent appeared to be successful.
- III. With letter dated 28 August 2023 the patent proprietor informed the Board that it would not attend the oral proceedings and requested a decision according to the state of the file.
- IV. The Board cancelled the oral proceedings and decided in written proceedings pursuant to Article 12(8) RPBA 2020.
- V. The final requests of the parties are as follows:

The patent proprietor (appellant) requested:

that the appealed decision be set aside  
and that the patent be maintained as granted,  
or in the alternative, when setting the decision  
aside,  
that the patent be maintained on the basis of the  
set of claims according to auxiliary requests 1 to

7 filed with the reply to the opponent's statement setting out the grounds of appeal.

The patent proprietor also requested to remit the case to the opposition division should the Board decide to neither maintain the patent as granted nor as amended according to auxiliary request 1.

The opponent (appellant) requested:

that the appealed decision be set aside and that the patent be revoked.

The opponent also requested not to admit auxiliary requests 5 to 7 into the proceedings.

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

VII. Independent claim 1 of the patent as granted (main request) reads as follows:

1. Use of a substantially moisture tight container and cap assembly (10)
2. for storing and packaging drug delivery strips or diagnostic test strips,
3. the assembly (10) comprising a container (14) and a cap (12),
4. wherein the container (14) has
  - 4.1 a container base (13),
  - 4.2 a sidewall (11) depending upwardly from the base (13),
  - 4.3 and a top container surface (17) extending inward from the sidewall (11),

5. the top container surface (17) is provided with an opening (20) that permits access to an interior of the container (14),
6. the opening (20) being bound by a lip (22) extending upwards from the top container surface (17),
7. wherein the container (14) contains a desiccant,
8. wherein the cap (12) has a base portion (24) with an outer periphery (25) that extends over at least a portion of the container (14),
9. the cap (12) being provided with a skirt (26) that extends downwardly therefrom and being positioned at a location on the cap (12) that allows the skirt (26) to enter into a closing relationship with the lip (22) in which the skirt (26) fits over a periphery of the lip (22),
10. wherein an inwardly facing extension (28) that extends around the interior periphery of the skirt (26) is provided at a distal end of the skirt (26),
11. and the lip (22) is provided with a distal end (21) whereby an outwardly facing extension (23) extends around the periphery of the lip distal end (21),
12. wherein the inwardly facing extension (28) and the outwardly facing extension (23) are adapted to abut and interlock with each other
13. wherein the cap (12) further includes a lip seal member (30) that extends downwardly therefrom,
14. extends around the inside of the cap (12) and is configured to abut at least a portion of the interior side of the lip (22) when the cap (12) is in a closed position so as to provide a sealing position, in addition to the closing relationship between the skirt (26) and the lip (22), and

15. wherein a moisture tight seal between the cap (12) and the container (14) is formed by the lip seal member (30) and the lip (22).

VIII. Independent claim 1 of the patent as amended according to auxiliary request 1 reads as follows (additions to claim 1 of the patent as granted being underlined):

1. Use of a substantially moisture tight container and cap assembly (10)
2. for storing and packaging drug delivery strips or diagnostic test strips,
3. the assembly (10) comprising a container (14) and a cap (12),
4. wherein the container (14) has
  - 4.1 a container base (13),
  - 4.2 a sidewall (11) depending upwardly from the base (13),
  - 4.3 and a top container surface (17) extending inward from the sidewall (11),
5. the top container surface (17) is provided with an opening (20) that permits access to an interior of the container (14),
6. the opening (20) being bound by a lip (22) extending upwards from the top container surface (17),
7. wherein the container (14) contains a desiccant,
8. wherein the cap (12) has a base portion (24) with an outer periphery (25) that extends over at least a portion of the container (14),
9. the cap (12) being provided with a skirt (26) that extends downwardly therefrom and being positioned at a location on the cap (12) that allows the skirt (26) to enter into a closing relationship with the lip (22) in which the skirt (26) fits over a periphery of the lip (22),

10. wherein an inwardly facing extension (28) that extends around the interior periphery of the skirt (26) is provided at a distal end of the skirt (26),
11. and the lip (22) is provided with a distal end (21) whereby an outwardly facing extension (23) extends around the periphery of the lip distal end (21),
12. wherein the inwardly facing extension (28) and the outwardly facing extension (23) are adapted to abut and interlock with each other when the cap (12) is closed on the container portion, thereby forming at least a substantially moisture-tight sealing arrangement with each other,
13. wherein the cap (12) further includes a lip seal member (30) that extends downwardly therefrom,
14. extends around the inside of the cap (12) and is configured to abut at least a portion of the interior side of the lip (22) when the cap (12) is in a closed position so as to provide a sealing position, in addition to the closing relationship between the skirt (26) and the lip (22), and
15. wherein a moisture tight seal between the cap (12) and the container (14) is formed by the lip seal member (30) and the lip (22).

IX. Independent claim 1 of the patent as amended according to auxiliary request 2 reads as follows (additions to claim 1 of the patent as granted being underlined):

Use of a substantially moisture tight container and cap assembly (10) for storing and packaging drug delivery strips or diagnostic test strips, the assembly (10) comprising a container (14) and a cap (12),

- wherein the container (14) has a container base (13), a sidewall (11) depending upwardly from the base (13), and a top container surface (17) extending inward from the sidewall (11), the top container surface (17) is provided with an opening (20) that permits access to an interior of the container (14), the opening (20) being bound by a lip (22) extending upwards from the top container surface (17),
- wherein the container (14) contains a desiccant,
- wherein the cap (12) has a base portion (24) with an outer periphery (25) that extends over at least a portion of the container (14), a portion of the base portion (24) serves as a tab (13) for facilitating the opening and closing of the assembly (10), the cap (12) being provided with a skirt (26) that extends downwardly therefrom and being positioned at a location on the cap (12) that allows the skirt (26) to enter into a closing relationship with the lip (22) in which the skirt (26) fits over a periphery of the lip (22),
- wherein an inwardly facing extension (28) that extends around the interior periphery of the skirt (26) is provided at a distal end of the skirt (26), and the lip (22) is provided with a distal end (21) whereby an outwardly facing extension (23) extends around the periphery of the lip distal end (21),
- wherein the inwardly facing extension (28) and the outwardly facing extension (23) are adapted to abut and interlock with each other when the cap (12) is closed on the container portion, thereby forming at least a substantially moisture-tight sealing arrangement with each other,
- wherein the cap (12) further includes a lip seal member (30) that extends downwardly therefrom, extends around the inside of the cap (12) and is

configured to abut at least a portion of the interior side of the lip (22) when the cap (12) is in a closed position so as to provide a sealing position, in addition to the closing relationship between the skirt (26) and the lip (22), and

- wherein a moisture tight seal between the cap (12) and the container (14) is formed by the lip seal member (30) and the lip (22)

X. Independent claim 1 of the patent as amended according to auxiliary request 3 reads as follows (additions to claim 1 of the patent as granted being underlined and deletions striked-through):

Use of a substantially moisture tight container and cap assembly (10) for storing and packaging drug delivery strips or diagnostic test strips, the assembly (10) comprising a container (14) and a cap (12),

- wherein the container (14) has a container base (13), a sidewall (11) depending upwardly from the base (13), and a top container surface (17) extending inward from the sidewall (11), the top container surface (17) is provided with an opening (20) that permits access to an interior of the container (14), the opening (20) being bound by a lip (22) extending upwards from the top container surface (17),
- wherein the container (14) contains a desiccant,
- wherein the cap (12) has a base portion (24) with an outer periphery (25) that extends over at least a portion of the container (14), the cap (12) being provided with a skirt (26) that extends downwardly therefrom and being positioned at a location on the cap (12) that allows the skirt (26) to enter into a closing relationship with the lip (22) in which the skirt (26) fits over a periphery of the lip (22),

- wherein an inwardly facing extension (28) that extends around the interior periphery of the skirt (26) is provided at a distal end of the skirt (26), and the lip (22) is provided with a distal end (21) whereby an outwardly facing extension (23) extends around the periphery of the lip distal end (21),
- wherein the inwardly facing extension (28) and the outwardly facing extension (23) are adapted to abut and interlock with each other when the cap (12) is closed on the container portion, thereby forming at least a substantially moisture-tight sealing arrangement with each other,
- wherein the cap (12) further includes a lip seal member (30) that extends downwardly therefrom, extends around the inside of the cap (12) and is configured to abut at least a portion of the interior side of the lip (22) when the cap (12) is in a closed position so as to provide a sealing position, in addition to the closing relationship between the skirt (26) and the lip (22), and wherein a moisture tight seal between the cap (12) and the container (14) is formed by the lip seal member (30) and the lip (22), and wherein a space is provided between the lip (22) of the container (14) and the base portion (24) of the cap (12) when the cap (12) is in the closed position.

XI. Independent claim 1 of the patent as amended according to auxiliary request 4 reads as follows (additions to claim 1 of the patent as granted being underlined and deletions striked-through):

Use of a substantially moisture tight container and cap assembly (10) for storing and packaging drug delivery strips or diagnostic test strips, the assembly (10) comprising a container (14) and a cap (12),

- wherein the container (14) has a container base (13), a sidewall (11) depending upwardly from the base (13), and a top container surface (17) extending inward from the sidewall (11), the top container surface (17) is provided with a noncircular opening (20) that permits access to an interior of the container (14), the opening (20) being bound by a lip (22) extending upwards from the top container surface (17),
- wherein the container (14) contains a desiccant,
- wherein the cap (12) has a base portion (24) with an outer periphery (25) that extends over at least a portion of the container (14), the cap (12) being provided with a skirt (26) that extends downwardly therefrom and being positioned at a location on the cap (12) that allows the skirt (26) to enter into a closing relationship with the lip (22) in which the skirt (26) fits over a periphery of the lip (22),
- wherein an inwardly facing extension (28) that extends around the interior periphery of the skirt (26) is provided at a distal end of the skirt (26), and the lip (22) is provided with a distal end (21) whereby an outwardly facing extension (23) extends around the periphery of the lip distal end (21),
- wherein the inwardly facing extension (28) and the outwardly facing extension (23) are adapted to abut and interlock with each other when the cap (12) is closed on the container portion, thereby forming at least a substantially moisture-tight sealing arrangement with each other,
- wherein the cap (12) further includes a lip seal member (30) that extends downwardly therefrom, extends around the inside of the cap (12) and is configured to abut at least a portion of the interior side of the lip (22) when the cap (12) is in a closed position so as to provide a sealing

- position, in addition to the closing relationship between the skirt (26) and the lip (22), and
- wherein a moisture tight seal between the cap (12) and the container (14) is formed by the lip seal member (30) and the lip (22).

XII. Independent claim 1 of the patent as amended according to auxiliary request 5 reads as follows (additions to claim 1 of the patent as granted being underlined):

Use of a substantially moisture tight container and cap assembly (10) for storing and packaging drug delivery strips or diagnostic test strips, the assembly (10) comprising a container (14) and a cap (12),

- wherein the container (14) has a container base (13), a sidewall (11) depending upwardly from the base (13), and a top container surface (17) extending inward from the sidewall (11), the top container surface (17) is provided with an opening (20) that permits access to an interior of the container (14), the opening (20) being bound by a lip (22) extending upwards from the top container surface (17),
- wherein the container (14) contains a desiccant,
- wherein the cap (12) has a base portion (24) with an outer periphery (25) that extends over at least a portion of the container (14), the cap (12) being provided with a skirt (26) that extends downwardly therefrom and being positioned at a location on the cap (12) that allows the skirt (26) to enter into a closing relationship with the lip (22) in which the skirt (26) fits over a periphery of the lip (22),
- wherein an inwardly facing extension (28) that extends around the interior periphery of the skirt (26) is provided at a distal end of the skirt (26), and the lip (22) is provided with a distal end (21)

- whereby an outwardly facing extension (23) extends around the periphery of the lip distal end (21),
- wherein the inwardly facing extension (28) and the outwardly facing extension (23) are adapted to abut and interlock with each other thereby forming a moisture-tight sealing arrangement with each other when the cap (12) is closed on the container portion,
  - wherein the cap (12) further includes a lip seal member (30) that extends downwardly therefrom, extends around the inside of the cap (12) and is configured to abut at least a portion of the interior side of the lip (22) when the cap (12) is in a closed position so as to provide a sealing position, in addition
  - to the closing relationship between the skirt (26) and the lip (22), and
  - wherein a moisture tight seal between the cap (12) and the container (14) is formed by the lip seal member (30) and the lip (22).

XIII. Independent claim 1 of the patent as amended according to auxiliary request 6 reads as follows (additions to claim 1 of the patent as granted being underlined):

Use of a substantially moisture tight container and cap assembly (10) for storing and packaging drug delivery strips or diagnostic test strips, the assembly (10) comprising a container (14) and a cap (12),

- wherein the container (14) has a container base (13), a sidewall (11) depending upwardly from the base (13), and a top container surface (17) extending inward from the sidewall (11), the top container surface (17) is provided with an opening (20) that permits access to an interior of the container (14), the opening (20) being bound by a

lip (22) extending upwards from the top container surface (17),

- wherein the container (14) contains a desiccant, in the shape of a disc or sleeve or a desiccant entrained plastic is located in a desiccant liner that covers at least a portion of the container,
- wherein the cap (12) has a base portion (24) with an outer periphery (25) that extends over at least a portion of the container (14), the cap (12) being provided with a skirt (26) that extends downwardly therefrom and being positioned at a location on the cap (12) that allows the skirt (26) to enter into a closing relationship with the lip (22) in which the skirt (26) fits over a periphery of the lip (22),
- wherein an inwardly facing extension (28) that extends around the interior periphery of the skirt (26) is provided at a distal end of the skirt (26), and the lip (22) is provided with a distal end (21) whereby an outwardly facing extension (23) extends around the periphery of the lip distal end (21),
- wherein the inwardly facing extension (28) and the outwardly facing extension (23) are adapted to abut and interlock with each other when the cap (12) is closed on the container portion, thereby forming at least a substantially moisture-tight sealing arrangement with each other,
- wherein the cap (12) further includes a lip seal member (30) that extends downwardly therefrom, extends around the inside of the cap (12) and is configured to abut at least a portion of the interior side of the lip (22) when the cap (12) is in a closed position so as to provide a sealing position, in addition to the closing relationship between the skirt (26) and the lip (22), and

- wherein a moisture tight seal between the cap (12) and the container (14) is formed by the lip seal member (30) and the lip (22).

XIV. Independent claim 1 of the patent as amended according to auxiliary request 7 reads as follows (additions to claim 1 of the patent as granted being underlined):

Use of a substantially moisture tight container and cap assembly (10) for storing and packaging drug delivery strips or diagnostic test strips, the assembly (10) comprising a container (14) and a cap (12) wherein the cap portion of the assembly is attached to the container portion by a hinge,

- wherein the container (14) has a container base (13), a sidewall (11) depending upwardly from the base (13), and a top container surface (17) extending inward from the sidewall (11), the top container surface (17) is provided with an opening (20) that permits access to an interior of the container (14), the opening (20) being bound by a lip (22) extending upwards from the top container surface (17),
- wherein the container (14) contains a desiccant,
- wherein the cap (12) has a base portion (24) with an outer periphery (25) that extends over at least a portion of the container (14), the cap (12) being provided with a skirt (26) that extends downwardly therefrom and being positioned at a location on the cap (12) that allows the skirt (26) to enter into a closing relationship with the lip (22) in which the skirt (26) fits over a periphery of the lip (22),
- wherein an inwardly facing extension (28) that extends around the interior periphery of the skirt (26) is provided at a distal end of the skirt (26), and the lip (22) is provided with a distal end (21)

- whereby an outwardly facing extension (23) extends around the periphery of the lip distal end (21),
- wherein the inwardly facing extension (28) and the outwardly facing extension (23) are adapted to abut and interlock with each other when the cap (12) is closed on the container portion, thereby forming at least a substantially moisture-tight sealing arrangement with each other,
  - wherein the cap (12) further includes a lip seal member (30) that extends downwardly therefrom, extends around the inside of the cap (12) and is configured to abut at least a portion of the interior side of the lip (22) when the cap (12) is in a closed position so as to provide a sealing position, in addition to the closing relationship between the skirt (26) and the lip (22), and
  - wherein a moisture tight seal between the cap (12) and the container (14) is formed by the lip seal member (30) and the lip (22).

## **Reasons for the Decision**

### *Appeal of the patent proprietor*

1. The patent proprietor (see section B of the statement setting out the grounds of appeal) contests the finding of the opposition division that feature 15 (see the feature analysis on point I.10 of the impugned decision and correspondingly in point VII above), namely:

"wherein a moisture tight seal between the cap and the container is formed by the lip seal member and the lip",

prejudices the maintenance of the patent as granted pursuant to Article 100 (c) EPC.

2. The opposition division (see the impugned decision, page 7 and 8, points II.12.9 to II.12.11) found that claim 1 includes two possible ways of sealing, namely (1) a sealing only on the inner periphery of the lip, and (2) a seal on both the inner and the outer periphery of the lip.

Since the first possibility is not disclosed in the parent application the claim is contrary to Article 76(1) EPC (see point II.12.9 and II.12.11 of the impugned decision).

Since the application as originally filed mentions always the moisture-tight seal when defining the interlock of the extension and this specification is missing in claim 1, the requirements of Article 123(2) EPC are not fulfilled (see point II.12.10 of the impugned decision).

3. As outlined by the opponent (see reply to the patent proprietor's statement setting out the grounds of appeal, page 3, first paragraph) the patent proprietor, although indicating claim 1 as originally filed of the opposed patent as a basis for having a seal only on the inner periphery of the container lip (see point 12 and 13 at page 3 of the statement setting out the grounds of appeal), does not contest in a substantiated manner in its grounds of appeal the finding of the opposition division of added subject-matter with respect to the parent application.

The Board notes that the patent proprietor's allegation that the opposition division examined the compliance of feature 15 with Article 76(1) EPC though the opponent never contested it (see the statement setting out the

grounds of appeal, page 2, point 7), even if found to be correct, does not exempt the patent proprietor from setting out clearly and concisely their case as to why the decision of the opposition division is not correct as required by Article 12 (3) RPBA 2020.

4. The Board also concurs with the opponent (see letter dated 21 October 2022, page 2, second paragraph) that the patent proprietor only addressed the issue of added subject-matter in substance with respect to the parent application in relation to feature 15 of claim 1 for the first time with letter dated 31 August 2022, well after the filing of their statement setting out the grounds of appeal of 28 September 2021.
5. Since no reasons have been provided by the patent proprietor for substantiating their appeal on this issue only at this point in time in appeal proceedings, even after receiving the Board communication pursuant to Article 15(1) RPBA 2020 addressing this issue, the Board decides not to admit this argument into the proceedings pursuant to Article 13(1) RPBA 2020 as requested by the opponent (see letter dated 21 October 2022, page 2, third paragraph).
6. Independently from the above the Board concurs with the opponent (see letter dated 21 October 2022, page 2, fifth paragraph) that the arguments of the patent proprietor (see letter dated 31 August 2022, page 2, points 8 and 9) are not convincing since the passage of the parent application as originally filed (WO 2004/033339 A1, page 2, lines 6 to 12) indicated does not mention any sealing at all, in particular not a moisture tight seal, and therefore can not provide a basis for a moisture tight seal only on the inner periphery of the lip.

7. The Board has thus no reasons not to concur with the opposition division that subject-matter has been added with respect to the parent application and that therefore Article 100 (c) EPC prejudices the maintenance of the patent as granted.
8. The patent proprietor's appeal is therefore unsuccessful.

*Appeal of the opponent*

9. Auxiliary request 1

- 9.1 The opponent contests that although the opposition division correctly repeated their argument that the wording of claim 1 implies that there is a different quality of seal in features 12 and 15 which is not to be found in the parent application (see the feature analysis on point I.10 of the impugned decision and in point VIII above), namely:

"wherein the inwardly facing extension and the outwardly facing extension are adapted to abut and interlock with each other when the cap is closed on the container portion, thereby forming at **least a substantially moisture-tight sealing arrangement** with each other" (feature 12)

and

"wherein a **moisture tight seal** between the cap and the container is formed by the lip seal member and the lip" (feature 15),

it did not address that argument in substance (see impugned decision, point 13.1.1., first sentence; opponent's statement of grounds of appeal, page 6, penultimate paragraph, to page 7, second complete paragraph).

- 9.2 This issue has also not been addressed in substance by the patent proprietor in its reply to the opponent's statement setting out the grounds of appeal (see section C thereof) in which it is only contested that this objection was not raised in opposition proceedings. This however does not appear to be correct as apparent from point 13.1.1 of the reasons of the appealed decision.

The above issue has also not been addressed by the patent proprietor in their subsequent submissions (see the letter dated 31 August 2022, page 3, first two paragraphs, in which only feature 15 is addressed and page 6, point B, and the letter dated 15 February 2023, pages 3 and 4, point B).

- 9.3 The Board concurs with the opponent that there is no disclosure in the parent application of a "substantially moisture tight sealing" formed by the lip and the skirt as set out in feature 12 in combination with a "moisture tight seal" formed by the lip and the lip seal member as set out in feature 15 of claim 1 auxiliary request 1 (see opponent's statement setting out the ground of appeal, page 6, penultimate paragraph, to page 7, second complete paragraph and the reply to the patent proprietor's statement setting out the grounds of appeal, page 4, first paragraph).

- 9.4 The Board thus concludes that the opponent has successfully demonstrated the incorrectness of the decision of the opposition division with respect to the

issue of added subject-matter of the patent as amended and maintained according to auxiliary request 1 of the opposition proceedings and that therefore the patent cannot be maintained as amended in that form (Article 101(3) EPC).

10. Auxiliary requests 2 to 7

10.1 Auxiliary requests 2 to 4, 6 and 7 also comprise features 12 and 15 of claim 1 of auxiliary request 1 with the features of the "substantially moisture tight sealing arrangement" and of the "moisture tight seal" so that these requests are not allowable for the same reasons as auxiliary request 1.

10.2 Claim 1 of auxiliary request 5 corresponds to claim 1 of auxiliary request 1 in which feature 12 has been amended as follows:

"wherein the inwardly facing extension and the outwardly facing extension are adapted to abut and interlock with each other ~~when the cap is closed on the container portion,~~ thereby forming ~~at least a~~ substantially moisture-tight sealing arrangement with each other when the cap is closed on the container portion"

10.3 The patent proprietor has indicated column 5, lines 22 to 25 of the application as originally filed and page 5, lines 8 to 11 of the parent application as a basis for the amendment, i.e. for not introducing the word "substantially" in feature 12 of claim 1 (see the reply to the opponent's statement setting out the grounds of appeal, point 38 and 39 on page 6).

- 10.4 The opponent contests that the combination of features of claim 1 of auxiliary request 5 has been originally disclosed for the embodiment in which the cap and the container are connected by a hinge (see letter dated 6 July 2022, point 7.1, page 12 to 13).
- 10.5 The Board concurs with the opponent that the passage given as a basis for the amendment refers to a specific embodiment of the invention and that the patent proprietor has failed to indicate why the added features, which have been disclosed in a specific embodiment in combination with other features, such as the hinge 16 (see column 4, lines 37 to 39 of the application as originally filed), could be taken in isolation and introduced in combination with the features of claim 1 without adding subject-matter in the sense of Article 123(2) EPC.

The Board finds that it is not apparent why the other features of the specific embodiment, in particular the hinge 16, can be allowably omitted in claim 1. Furthermore, no further argument has been submitted in this regard by the patent proprietor even after receiving the Board's communication pursuant to Article 15(1) RPBA 2020 addressing this issue. In view of the above the Board concludes that auxiliary request 5 cannot be allowed pursuant to Article 123(2) EPC.

- 10.6 It follows from the above that the issue of admittance into the proceedings of auxiliary requests 5, 6 and 7 raised by the opponent does not need to be addressed.
- 10.7 Furthermore, in view of the above findings the request of remittal of the case to the opposition division is to be denied.

## **Conclusions**

11. The Board concludes that the patent proprietor has not demonstrated the incorrectness of the appealed decision with respect to the main request, while the opponent has successfully demonstrated the incorrectness of the appealed decision in relation to auxiliary request 1. Furthermore auxiliary requests 2 to 7 are not allowable.  
Therefore the opposed patent is to be revoked.

**Order**

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

1.       **The decision under appeal is set aside.**
  
2.       **The patent is revoked.**

The Registrar:

The Chairman:



A. Vottner

G. Pricolo

Decision electronically authenticated