

Internal distribution code:

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

**Datasheet for the decision
of 6 February 2025**

Case Number: T 0541/23 - 3.2.06

Application Number: 17210828.4

Publication Number: 3346035

IPC: D04H1/02, A41D27/00, B60N2/28,
D04H1/4382, B68G1/00

Language of the proceedings: EN

Title of invention:
BLENDED PADDING

Patent Proprietor:
Moririn Co., Ltd.

Opponent:
Carl Freudenberg KG

Headword:

Relevant legal provisions:
EPC Art. 83
RPBA 2020 Art. 13(2)

Keyword:

Sufficiency of disclosure - main request (no) - auxiliary requests 2 and 3 (no)
Amendment after notification of Art. 15(1) RPBA communication - exceptional circumstances (no) -auxiliary requests 4 to 7 taken into account (no)

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

Case Number: T 0541/23 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 6 February 2025

Appellant: Carl Freudenberg KG
(Opponent) Höhnerweg 2-4
69469 Weinheim (DE)

Representative: Banse & Steglich
Patentanwälte PartmbB
Patentanwaltskanzlei
Herzog-Heinrich-Straße 23
80336 München (DE)

Respondent: Moririn Co., Ltd.
(Patent Proprietor) 22-10, Honmachi 4-chome
Ichinomiya-shi
Aichi 491-8610 (JP)

Representative: Viering, Jentschura & Partner mbB
Patent- und Rechtsanwälte
Am Brauhaus 8
01099 Dresden (DE)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
12 January 2023 concerning maintenance of the
European Patent No. 3346035 in amended form.**

Composition of the Board:

Chairman M. Harrison
Members: P. Cipriano
W. Ungler

Summary of Facts and Submissions

- I. An appeal was filed by the appellant (opponent) against the interlocutory decision of the opposition division in which it found that European patent No. 3 346 035 in an amended form met the requirements of the EPC.
- II. The appellant requested in its statement of grounds of appeal that the decision under appeal be set aside and the patent be revoked.
- III. In its reply to the appeal, the respondent (patent proprietor) requested that the appeal be dismissed (main request), or as an auxiliary measure that the patent be maintained on the basis of one of auxiliary requests 2 and 3 filed with letter of 11 September 2023, or one of auxiliary requests 4 to 7 filed with letter of 16 January 2025.
- IV. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that the objections raised under Article 83 EPC against the main request might require discussion at the oral proceedings.
- V. With its submission of 16 January 2025 the respondent filed new auxiliary requests 4 to 7.
- VI. Oral proceedings were held before the Board.

At the close of the oral proceedings the requests remained unchanged.

VII. Claim 1 of the main request reads as follows (with paragraph annotation adapted from the one used by the opponent in its grounds of appeal - see item I):

"A A blended padding comprising two or more types of fibers comprising a main fiber and a functional fiber,
B wherein the main fiber is a polyester fiber, characterized in that
C the main fiber and the functional fiber are different types of fibers,
D/E a fiber diameter and a fiber length of the functional fiber are within a range between minus 10% and plus 10% ($\pm 10\%$) to a fiber diameter and a fiber length of the main fiber,
F a specific gravity of the functional fiber is within a range between minus 10% and plus 10% ($\pm 10\%$) to a specific gravity of the main fiber, and
G when 2 g of the blended padding is randomly sampled from each of 6 places to determine a blending ratio by a raveling method according to JIS L 1030, a blending ratio variation, which is calculated by the formula: maximum blending ratio - minimum blending ratio, between said two or more types of fibers is 10% by mass or less,
H wherein the blended padding has a form of a fiber ball."

VIII. Claim 1 of auxiliary request 2 differs from claim 1 of the main request in that feature G reads:

"when 2 g of the blended padding is randomly sampled from each of 6 places to determine a blending ratio by a raveling method according to JIS L 1030, a blending ratio variation, which is calculated by the formula: maximum blending ratio - minimum blending ratio, between said two or more types of fibers is 5% by mass or less,"

IX. Claim 1 of auxiliary request 3 differs from claim 1 of auxiliary request 2 in that the following features were appended at the end of the claim:

"wherein the blended padding is obtained from a method comprising:

a step A for opening,

wherein raw fibers are transferred to a carding machine (2) through a first feed lattice (10), and then the raw fibers are opened to arrange fibers in parallel to each other to produce a web,

wherein the web is stored in an opened fiber storage chamber (4) by a first wadding transfer means (30), and

wherein step A is carried out separately for each of a main fiber and a functional fiber;

a step B for fiber blending,

wherein predetermined amounts of the main fiber and the functional fiber of step A are each transferred from a second feed lattice (11) to a wadding storage room (5) by a second wadding transfer means (31),

wherein, in the wadding storage room (5), the main fiber and the functional fiber are agitated and mixed by an air blower to produce a blended wadding in which the main fiber and the functional fiber are homogeneously mixed,

wherein the blended wadding is discharged by suction from the wadding storage room (5) in a horizontal direction by a suction port (8) that is provided at a side of the wadding storage room (5), the suction port (8) having an aperture that extends from a bottom to a top of the wadding storage room (5), and

wherein the wadding sucked from the wadding storage room (5) is transferred to a blended

wadding storage chamber (9) by a third wadding transfer means (32); and
a step C for producing the fiber ball,
wherein the wadding from the blended wadding storage chamber (9) of step B is spread on a third feed lattice (12), and is transferred to a balling machine (20) by a fourth wadding transfer means (32),
wherein then a fiber ball is produced using a balling machine (20), and
wherein the obtained fiber ball is transferred to a storage chamber (21)."

- X. Claim 1 of auxiliary request 4 reads as follows:
"1. A blended padding comprising a main fiber and a functional fiber, wherein the main fiber is a polyester fiber,
characterized in that the main fiber and the functional fiber are different types of fibers,
a fiber diameter and a fiber length of the functional fiber are within a range between minus 10% and plus 10% ($\pm 10\%$) to a fiber diameter and a fiber length of the main fiber,
a specific gravity of the functional fiber is within a range between minus 10% and plus 10% ($\pm 10\%$) to a specific gravity of the main fiber, and
when 2 g of the blended padding is randomly sampled from each of 6 places to determine a blending ratio by a raveling method according to JIS L 1030, a blending ratio variation, which is calculated by the formula:
maximum blending ratio - minimum blending ratio,
between said main and functional fibers constituting the fiber ball is 5% by mass or less,
wherein the blended padding has a form of a fiber ball."

- XI. Claim 1 of auxiliary request 5 differs from claim 1 of auxiliary request 4 in that the same features as for auxiliary request 3 were appended at the end of the claim.
- XII. Claim 1 of auxiliary request 6 differs from claim 1 of the main request in that the same features as for auxiliary request 3 were appended at the end of the claim.
- XIII. Claim 1 of auxiliary request 7 reads:
"1. A method for manufacturing a blended padding having a form of a fiber ball, the method comprising:
a step A for opening,
wherein raw fibers are transferred to a carding machine (2) through a first feed lattice (10), and then the raw fibers are opened to arrange fibers in parallel to each other to produce a web,
wherein the web is stored in an opened fiber storage chamber (4) by a first wadding transfer means (30), and
wherein step A is carried out separately for each of a main fiber and a functional fiber;
a step B for fiber blending,
wherein predetermined amounts of the main fiber and the functional fiber of step A are each transferred from a second feed lattice (11) to a wadding storage room (5) by a second wadding transfer means (31),
wherein, in the wadding storage room (5), the main fiber and the functional fiber are agitated and mixed by an air blower to produce a blended wadding in which the main fiber and the functional fiber are homogeneously mixed,

wherein the blended wadding is discharged by suction from the wadding storage room (5) in a horizontal direction by a suction port (8) that is provided at a side of the wadding storage room (5), the suction port (8) having an aperture that extends from a bottom to a top of the wadding storage room (5), and

wherein the wadding sucked from the wadding storage room (5) is transferred to a blended wadding storage chamber (9) by a third wadding transfer means (32); and

a step C for producing the fiber ball, wherein the wadding from the blended wadding storage chamber (9) of step B is spread on a third feed lattice (12), and is transferred to a balling machine (20) by a fourth wadding transfer means (32), wherein then the fiber ball is produced using a balling machine (20), and wherein the obtained fiber ball is transferred to a storage chamber (21);

the blended padding comprising two or more types of fibers comprising a main fiber and a functional fiber, wherein the main fiber is a polyester fiber, wherein the main fiber and the functional fiber are different types of fibers,

a fiber diameter and a fiber length of the functional fiber are within a range between minus 10% and plus 10% ($\pm 10\%$) to a fiber diameter and a fiber length of the main fiber,

a specific gravity of the functional fiber is within a range between minus 10% and plus 10% ($\pm 10\%$) to a specific gravity of the main fiber, and

when 2 g of the blended padding is randomly sampled from each of 6 places to determine a blending ratio by a raveling method according to JIS L 1030, a blending ratio variation, which is calculated by the formula:

maximum blending ratio - minimum blending ratio, between said two or more types of fibers is 10% by mass or less."

XIV. The appellant's arguments relevant to the present decision may be summarised as follows:

Main request - Article 83 EPC

The invention according to claim 1 was not sufficiently disclosed.

It was not clear how samples were taken and it was not actually possible to obtain 6 samples of 2 grams from the fiber balls disclosed in the patent. In addition, the result from 6 probes was anyway not statistically significant, i.e. 6 probes were not a significant amount of probes, such that the parameter did not characterize the blend in any reliable manner, because it took into account only the two most extreme values from a very low number of samples.

Auxiliary requests 2 and 3 - Article 83 EPC

The amendments to auxiliary requests 2 and 3 did not overcome the objection under Article 83 EPC against the main request.

Auxiliary requests 4 to 7 - admittance

There were no exceptional circumstances under Article 13(2) RPBA that should allow the Board to take auxiliary requests 4 to 7 into account.

XV. The respondent's arguments relevant to the present decision may be summarised as follows:

Main request - Article 83 EPC

The method to carry out the blending ratio variation determination was sufficiently disclosed by the method according to JIS L 1030 as described in paragraphs [0036] to [0039], [0059], and [0063] of the patent.

The burden was on the appellant to show that the experiments were not reliable and that the parameter blending ratio variation was unusual. In addition, the amount of each sample was sufficient to provide reliable information on the blending ratio and the number of samples was sufficient to provide reliable information on the blending ratio variation, because a substantial amount of sample was considered.

As to the alleged difficulty of taking six samples from the fiber balls disclosed in the patent, the skilled person reading the patent would recognize that the fiber balls to be sampled were necessarily much bigger, as could be inferred from Figures 4 and 5 of the patent, thus enabling six samples of 2 g to be obtained from a large fiber ball.

Auxiliary request 3 - Article 83 EPC

The product-by-process features defined the product in a more limited way, more specifically that claim 1 now defined a specific step C for producing the fiber ball. These features taught the skilled person that the fiber ball should be bigger such that the skilled person now knew how to carry out the sampling.

Auxiliary requests 4 to 7 - admittance

It was the first time that feature H had been discussed in such detail such that the introduction of the steps for producing the fiber ball in claim 1 of auxiliary request 7 in order to overcome the Article 83 objection could only have been made after receiving the preliminary opinion. This constituted exceptional circumstances under Article 13(2) RPBA.

Reasons for the Decision

1. *Admissibility of the appeal*

1.1 In section VI of the reply to the grounds of appeal, the respondent argued that the appellant had not provided any new arguments and merely reiterated the arguments provided in the first instance proceedings. Whilst the appellant clarified in the oral proceedings that admissibility of the appeal was not challenged, the Board had nevertheless given its opinion on the admissibility of the appeal in this regard already in its communication under Article 15(1) RPBA as follows:

"The opponent's grounds of appeal are considered by the Board to have set out the legal or factual reasons on which the case for setting aside the decision is based and to have addressed the reasons given in the decision under appeal (e.g. the last two paragraphs on page 4 and the first paragraphs on page 5 of the grounds, the last paragraphs on page 11, the first paragraph of section 4.6.2 on page 13 or the second paragraph on page 28)."

1.2 Absent any further argument in this regard from the appellant, the Board confirmed its opinion, with the result that the appeal is admissible.

2. Main request - Article 83 EPC

2.1 Claim 1 of the main request defines *inter alia* that "when 2 g of the blended padding is randomly sampled from each of 6 places to determine a blending ratio by a raveling method according to JIS L 1030, a blending ratio variation, which is calculated by the formula: maximum blending ratio - minimum blending ratio, between said two or more types of fibers is 10% by mass or less, wherein the blended padding has a form of a fiber ball".

2.2 The respondent argued that the burden was on the appellant to show that the experiments were not reliable, because the parameter "blending ratio variation" was not unusual since the skilled knew how to carry out all the necessary steps to obtain the blending ratio variation.

This argument is, however, not persuasive. The parameter "blending ratio variation" as defined in feature G is not commonly known to the skilled person nor shown in any of the documents in the available prior art. The respondent also did not file any document showing otherwise. On the contrary, the proprietor is under a particular obligation to disclose all the information necessary in order to reliably define the new parameter not only (i) in a formally correct and complete manner such that its values can be obtained by a person skilled in the art without undue

burden, but also that the parameter produces a reliable rather than a random result.

2.3 On the first point, the skilled person does not know how to carry out the step of random sampling in feature G when the blended padding has the form of a fiber ball as defined in feature H to obtain values for the parameter blending ratio variation.

2.4 The respondent submitted on page 3 of its letter dated 16 January 2025 that the amount of each sample was sufficient to provide reliable information on the blending ratio and the number of samples was sufficient to provide reliable information on the blending ratio variation, since "a substantial amount of sample was considered".

However, the person skilled in the art is not taught by the patent how to randomly sample 2 g of the blended padding from each of 6 places of a fiber ball to determine a blending ratio. All the examples in the patent concerning a fiber ball (both Comparative Examples 1 and Example 2 in paragraphs [0056] to [0064]) are directed to a fiber ball having a diameter of 5 mm and the method described in paragraphs [0034] to [0036] for producing a fiber ball describes the fiber balls obtained suitably having a diameter in the order of 1mm to 10mm and preferably 5 to 8 mm. No other sizes for the fiber balls are disclosed in the patent, which is logical given that the invention relates to a blended padding which can be used as a padding material for cold weather protection such as a down jacket, a down coat, a quilt, a pillow or the like (see paragraphs [0001] and [0002]).

For fiber balls of this size, the skilled person would not be able to extract 6 samples weighing 2 grams each. Taking for example comparative example 1 described in paragraphs [0056] to [0059] of the patent, it was discussed during the oral proceedings that if for example 100 fiber balls were taken, each of two polyester fibers with 2,2 dtex with a diameter of 5 mm, these would together need to weigh at least 1,2 kg in order that 6 samples of 2 g (i.e. a minimum of 12 g per ball) could be taken from each ball. The skilled person however knows immediately that this is not a realistic weight for 100 fiber balls having 5 mm diameter made of polyester fibers and that the weight would necessarily be very much lower.

Indeed, the patent does not disclose information in any manner that would allow the skilled person in the art to obtain six samples of 2 g from each ball, let alone without undue burden.

2.5 The respondent did not contest that six samples could not be taken from such small balls but instead argued that the skilled person reading the patent would recognize that the fiber balls were necessarily much bigger and that this could be inferred from Figures 4 and 5 of the patent. The skilled person would allegedly recognize in these Figures that the many dark spots recognizable in each of the bigger fiber balls would correspond to a 2 g sample that could be taken, as defined in paragraphs [0056] to [0059].

2.5.1 This argument is, however, not convincing. Paragraph [0059] states that an "enlarged photographic image" of the) fiber ball is shown in Figure 4. Hence, it is clear that Figure 4 depicts a single fiber ball. Paragraph [0061] then describes Figures 4 and 5 as

showing a fiber ball of blended wadding having "lumps" of black dyed polyester fibers scattered throughout the fiber ball. Hence each ball shown in Figure 4 or 5 has these. In addition, paragraph [0011] describes Figures 4 and 5 as *enlarged* photographic images and, as already mentioned above, paragraphs [0034] to [0036] describe a method for producing the fiber balls suitably having a diameter in the order of 1mm to 10 mm. The skilled person would thus not derive from the whole content of the patent that the Figures show a somehow much bigger fibre ball from which six samples of 2 g could be taken.

2.5.2 Even if the skilled person should then conclude that there was a contradiction/error in the disclosure, there would be several possible ways of trying to make it coherent. In other words, the skilled person would not derive that the fiber ball must necessarily be bigger, in particular given the very small ball sizes mentioned at several junctures in the patent. Even if the ball size were bigger, it is anyway pure conjecture what size it might be. Another way to try and make the samples fit for example might be to use much smaller samples, which might make the sampling coherent at least as far as weight is concerned, albeit the actual sample weight is simply unknown (is it 0.2 g, 0.02 g or 0.002 g or some other value?). There is thus more than one sensible option for the skilled person to consider.

2.5.3 The Board also notes that the total weight of main and functional fiber used in the comparative example 1 of paragraphs [0056] to [0059] is 500 g (2 x 250 g) such that the size of the resulting fiber ball if a single ball would result, would then be much bigger. Therefore, if that were the case, the skilled person would hardly consider that 6 samples would be

statistically representative for a much bigger fiber ball and indeed, 6 randomly taken samples from such a mass (if the whole amount were made into a large ball) would not lead to a reliable/meaningful result for the whole ball because other non-tested areas of the 500 g not covered by the 6 g of samples may be vastly different.

In this case, the parameter "blending ratio variation" would also not be defined in a manner which reliably retains the validity of the parameter.

- 2.6 The skilled person does therefore not know how to carry out the random sampling of feature G when the blended padding has the form of a fiber ball as defined in feature H. In the present case, the patent does not even indicate one way enabling the person skilled in the art to carry out the invention.
- 2.7 The main request is therefore not allowable since the invention specified in independent claim 1 is not disclosed in a manner sufficiently clear and complete for it to be carried out by the skilled person (Article 83 EPC).
3. Auxiliary request 2 - Article 83 EPC
 - 3.1 Claim 1 of auxiliary request 2 differs from claim 1 of the main request in that the blending ratio variation between the two or more types of fibers has been reduced to 5% by mass or less, instead of 10% by mass or less.
 - 3.2 The respondent has not argued that the amendments to claim 1 of auxiliary request 2 would remedy an insufficient disclosure of the invention as seen in the

case of the main request, nor can the Board see that this could be the case.

3.3 Therefore, auxiliary request 2 is not allowable since the invention specified in its independent claim 1 is not disclosed in a manner sufficiently clear and complete for it to be carried out by the skilled person (Article 83 EPC), for the same reasons as given above for the main request.

4. Auxiliary request 3 - Article 83 EPC

4.1 Claim 1 of auxiliary request 3 differs from claim 1 of auxiliary request 2 in that the product-by-process features listed above in item IX. have been added.

4.2 The respondent argued that the product-by-process features defined the product in a more limited way, more specifically that claim 1 now defined a specific step C for producing the fiber ball. These features allegedly taught the skilled person that the fiber ball should be bigger such that the skilled person now knew how to carry out the sampling.

The Board does not agree. The process steps added to claim 1 refer generally to the use of a balling machine but do not limit its operation by any parameter, or the wadding to any amount. In addition, paragraph [0036] of the patent description states that the blended fiber ball obtained by a balling machine suitably has a diameter of the order of 1 to 10 mm. No other values are disclosed in the patent. The skilled person is thus not taught that the fiber ball should be bigger.

4.3 Auxiliary request 3 is not allowable since the invention specified in independent claim 1 is not

disclosed in a manner sufficiently clear and complete for it to be carried out by the skilled person (Article 83 EPC).

- 4.4 During the oral proceedings it was also concluded that the requirements of Article 84 EPC were not met by the use of the product-by-process claim, but the reasons for this need not be stated here since the request anyway failed to meet the requirements of Article 83 EPC.
5. Auxiliary requests 4 to 7 - admittance
6. Auxiliary requests 4 to 7 were filed with letter dated 16 January 2025 after notification of the Board's communication under Article 15(1) RPBA.
 - 6.1 According to Article 13(2) RPBA any amendment to a party's appeal case made after notification of a communication under Article 15, paragraph 1, shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.
 - 6.2 The respondent did not wish to comment on the issue of admittance of auxiliary requests 4 to 6 into the proceedings. However, regarding auxiliary request 7, the respondent argued that the oral proceedings were the first time that it was questioned that the sampling of 6 samples weighing 2 g for a fiber ball could not be carried out by the person skilled in the art.

This argument is not persuasive. The opponent had argued already on page 8, second and third paragraph, of its grounds of appeal that the parameter was unusual, since the patent lacked information on how the

samples were to be taken and that measurements could not be carried out by a person skilled in the art, because there was no information on the preparation of the samples.

The proprietor replied in its letter dated 16 January 2025 that a relevant number and substantial amount of sample was considered, i.e. 2 g from each of six places, and submitted that the amount of each sample was sufficient to provide reliable information on the blending ratio and the number of samples is sufficient to provide reliable information on the blending ratio variation.

In the oral proceedings these arguments from the parties were only further developed in that it was assessed how such a relevant and substantial amount of sample (2 g from each of six places) could be extracted from the balls in Comparative Example 1 of paragraphs [0056] to [0059]. This argument does not go beyond the framework of the earlier discussion, regarding whether the samples could be prepared by a skilled person given the disclosure in the patent.

6.3 In the absence of any arguments regarding auxiliary requests 4 to 6 and of any persuasive ones regarding auxiliary request 7, the Board finds that there are no exceptional circumstances justifying the amendment of the respondent's appeal case and the filing of auxiliary requests 4 to 7 addressing the objection under Article 83 EPC after the preliminary opinion of the Board.

6.4 For the above reasons, the Board exercised its discretion under Article 13(2) RPBA 2020 not to take into account auxiliary requests 4 to 7.

7. Since all of the respondent's requests are either not allowable or not taken into account, the appellant's request for revocation of the patent is justified.

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:



D. Grundner

M. Harrison

Decision electronically authenticated