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**Datasheet for the decision  
of 3 July 2025**

**Case Number:** T 0825/23 - 3.3.05

**Application Number:** 16744037.9

**Publication Number:** 3250315

**IPC:** B01J13/04, B05B5/00

**Language of the proceedings:** EN

**Title of invention:**

METHOD FOR PREPARING AN ENCAPSULATED PRODUCT AND PRODUCT

**Patent Proprietor:**

FONA Technologies, LLC

**Opponent:**

ZoomEssence, Inc.

**Headword:**

Encapsulated product/FONA

**Relevant legal provisions:**

EPC Art. 54(1), 54(2), 111(1)  
RPBA 2020 Art. 11

**Keyword:**

**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 0825/23 - 3.3.05

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.05**  
**of 3 July 2025**

**Appellant:** FONA Technologies, LLC  
(Patent Proprietor) 1900 Averill Road  
Geneva, IL 60134 (US)

**Representative:** Schollweck, Susanne  
ZSP Patentanwälte PartG mbB  
Hansastraße 32  
80686 München (DE)

**Respondent:** ZoomEssence, Inc.  
(Opponent) 1131 Victory Place  
Hebron, KY 41048 (US)

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

**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 21 February  
2023 revoking European patent No. 3250315  
pursuant to Article 101(3)(b) EPC.**

**Composition of the Board:**

**Chairman** E. Bendl  
**Members:** T. Burkhardt  
S. Fernández de Córdoba

## **Summary of Facts and Submissions**

- I. The appeal of the patent proprietor (appellant) is against the opposition division's decision to revoke European patent No. EP 3 250 315 B1.
- II. The following document was among those discussed at the opposition stage.

D1            US 8,939,388 B1

- III. The opposition division concluded that the subject-matter of independent method claim 1 of the patent as granted lacked novelty over D1.
- IV. Independent method claim 1 of the patent as granted (the main request) reads as follows:

"1. A method for preparing an encapsulated product having a core component encapsulated within a wall material comprising the steps of:

forming an emulsion by emulsifying at least one core material with a solution or a suspension comprising water and at least one wall material, wherein the resulting emulsion has a solids content of 15% to 50% by weight of the emulsion and a viscosity of 150 cps to 250 cps;

atomizing the emulsion into droplets in an electrostatic spray dryer and applying an electrostatic charge to the droplets in the range of about 5 kV to about 60 kV;

drying the droplets in the electrostatic spray dryer at an inlet temperature of about 25°C to about 110°C and an outlet temperature of about 25°C to about 80°C to obtain the encapsulated product."

- V. The board issued a preliminary opinion under Article 15(1) RPBA, indicating that it was likely that the decision would be set aside and that the case would be remitted.
- VI. The opponent (respondent) replied by presenting further arguments and withdrew its request for oral proceedings in the event the board maintained its preliminary opinion.
- VII. The appellant also replied by withdrawing its own request for oral proceedings in the event the board maintained its preliminary opinion.
- VIII. The board cancelled the oral proceedings.
- IX. The arguments put forward by the appellant during the appeal proceedings that are relevant to the present decision can be summarised as follows.

The subject-matter of claim 1 of the main request was novel over D1.

The case had to be remitted to the opposition division.

- X. The arguments put forward by the respondent during the appeal proceedings that are relevant to the present decision can be summarised as follows.

The subject-matter of claim 1 of the main request was not novel over D1.

XI. The appellant requested that the decision under appeal be set aside and the patent be maintained as granted. In the alternative, they requested that, after acknowledging novelty of the subject-matter of claim 1, the case be remitted to the opposition division for further prosecution. As an auxiliary measure they requested that the patent be maintained in amended form on the basis of one of auxiliary requests I to III submitted with the grounds of appeal.

The respondent requested that the appeal be dismissed.

## **Reasons for the Decision**

Main request

1. Novelty of the subject-matter of independent method claim 1 in view of **D1**

The board is of the opinion that the respondent's interpretation of D1 is speculative and the subject-matter of claim 1 is novel (Article 54(1) and (2) EPC) for the reasons set out below.

1.1 The passage from column 5, line 56, to column 6, line 28, of D1 states that the use of:

- a "non-conventional slurry", and/or
- specific electrostatic charging

allows the use of a non-heated drying fluid (as opposed to prior-art processes using heated drying fluids).

In this regard, D1 defines a "conventional" slurry as containing 50-70 wt% of water (column 6, lines 22-24,

of D1) and a "non-conventional" slurry as one having a relatively low water content of 20% to 50% (corresponding to a solids content of between 50% and 80%), or, "[a]dditionally or alternatively", a viscosity of more than 300 cP as viscosity also "relat[es] to the water content of the slurry" (column 6, lines 1 to 4 and 11, of D1).

Further, column 7, lines 23 to 27, of D1 discloses three options indicating that the use of:

- a slurry with a relatively low water content (labelled "option 1" in point II.3.3 of the decision under appeal),
- an electrostatic charge ("option 2"), or
- a slurry with a relatively low water content and an electrostatic charge ("option 3")

allows a different temperature upon drying compared with conventional processes.

1.2 The opposition division deduced from this passage in column 7 that since option 3 makes use of a "non-conventional slurry", option 2 necessarily uses a conventional slurry. Option 2 hence anticipated the subject-matter of claim 1 since the viscosity and solids content ranges of conventional slurries overlapped with those of claim 1 (see points II.3.3.2, II.3.3.3 and II.3.3.4 of the decision under appeal).

However, the deduction that option 2 necessarily uses a conventional slurry within the meaning of D1 is incorrect.

The passage in column 7 of D1 indicates that option 2 uses an electrostatic charge and that the slurry has a water content *outside* the "relative low water content" range (otherwise the slurry would fall under option 3).

If it was acknowledged, *arguendo*, that the expression "relative low water content" refers to the water content of the non-conventional slurries of between 20% and 50% in column 6, line 15, the water content outside this range would correspond to contents below 20% or above 50% (i.e. a solids content below 50% or above 80%).

However, the conventional and non-conventional slurries of D1 do not encompass all slurries. To facilitate understanding, the slurries not encompassed by conventional and non-conventional slurries are referred to in this decision as "undefined slurries". For example, slurries with a water content of less than 20% or of more than 70% (corresponding to a solids content of more than 80% or of less than 30%) are possible, but are neither conventional nor non-conventional. Thus, these would be included in these undefined slurries.

Since the passage in column 7 of D1 does not indicate that the slurries of option 2 are strictly limited to conventional slurries, it follows that the slurries of option 2 may be "conventional" or "undefined" slurries.

- 1.3 The respondent argued that the teaching of D1 was limited to conventional and non-conventional slurries. Undefined slurries were not disclosed. Hence, the combination of option 2 with undefined slurries extended beyond the teaching of D1.

This is not convincing. Although D1 does not explicitly refer to slurries belonging to the class of "undefined slurries", these are still conceptually encompassed by option 2 of D1. There is thus no unallowable

combination of option 2 with the undefined slurries that goes beyond the teaching of D1.

- 1.4 A sub-set of these undefined slurries are slurries with solids contents of less than 15% or of more than 80% (i.e. water contents of less than 20% or more than 85%). Yet these slurries do not fall within the range of claim 1 of the patent in suit.
- 1.5 In the same vein, since the passage in column 7 does not indicate that the slurries of option 2 are strictly limited to "conventional slurries" and since this passage is silent on viscosity, the slurries of option 2 may have viscosities of below 150 cps or of between 250 cps and 300 cps, and these viscosities do not fall under the ambit of claim 1 either.
- 1.6 Consequently, D1 does not disclose the subject-matter of independent method claim 1 in a direct and unambiguous manner (Article 54(1) and (2) EPC).

#### Remittal

2. In the event the subject-matter of claim 1 was considered novel, the appellant requested remittal for further prosecution.

The respondent has not objected to such a remittal.

The decision under appeal only addressed the novelty of the subject-matter of the method claims of the claim requests. By contrast, the novelty of the subject-matter of the product claims, which are defined by product-by-process features, has not yet been discussed. The question of whether these product-by-

process features confer novelty was not dealt with in the decision under appeal.

Moreover, the question of inventive step was not dealt with in the decision under appeal either.

In the context of the case at hand, this amounts to exceptional circumstances within the meaning of Article 11 RPBA, and justifies a remittal.

## Order

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

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for further prosecution.

The Registrar:

The Chairman:



C. Vodz

E. Bendl

Decision electronically authenticated