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**Datasheet for the decision  
of 20 January 2026**

**Case Number:** T 0953/23 - 3.2.08

**Application Number:** 09844125.6

**Publication Number:** 2424466

**IPC:** A61F2/12

**Language of the proceedings:** EN

**Title of invention:**

APPARATUS FOR SILICONE BREAST IMPLANT DELIVERY

**Patent Proprietor:**

Keller Medical, Inc.

**Opponent:**

IDEAL MEDICAL SOLUTIONS LTD

**Relevant legal provisions:**

EPC Art. 54

**Keyword:**

Novelty - public prior use (yes)



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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Case Number: T 0953/23 - 3.2.08

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.08**  
**of 20 January 2026**

**Appellant:**

(Opponent)

IDEAL MEDICAL SOLUTIONS LTD  
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**Representative:**

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**Respondent:**

(Patent Proprietor)

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**Representative:**

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**Decision under appeal:**

**Decision of the Opposition Division of the  
European Patent Office posted on 23 March 2023  
rejecting the opposition filed against European  
patent No. 2424466 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairwoman**            P. Acton  
**Members:**            M. Foulger  
                              C. Schmidt

## Summary of Facts and Submissions

- I. With the decision posted on 23 March 2023, the opposition division rejected the opposition against the European patent No. 2 424 466 B1.
- II. The opponent filed an appeal against this decision.
- III. The appellant (opponent) requested that the patent be revoked.
- IV. The respondent (patent proprietor) requested that the appeal be dismissed or in the alternative that the patent be maintained in amended form according to one of auxiliary requests 1 - 6 all filed with the reply to the grounds of appeal dated 30 November 2023.
- V. The following documents are relevant for this decision:  
  
D1: "How the Keller Funnel got its start", American Journal of Cosmetic Surgery, Vol. 29, No. 4, 2012, pages 283 - 285
- VI. Claim 1 as granted reads as follows:  
  
**1.1** An apparatus for manually delivering a pre-filled prosthesis into a surgical pocket, the prosthesis being a breast implant, the apparatus comprising:  
**1.2a** a flexible sleeve (10) including a proximal opening (12), a distal opening (14),  
**1.2b** and an interior with a hydrophilic lubricant coating adhered thereon,  
**1.3** wherein said coating is adapted to become lubricious when the flexible sleeve is soaked in fluid,  
**1.4** wherein the sleeve (10) is tapered

**1.5** wherein the proximal opening (12) is relatively larger than the distal opening (14), and  
**1.6** wherein the sleeve (10) is adapted to be manually manipulatable to push the prosthesis along the interior and through the distal opening (14)."

(feature numbering as used by the appellant added in bold)

VII. The essential arguments of the parties are summarised below in the reasons for the decision.

### **Reasons for the Decision**

1. Novelty

1.1 Assessment of prior use

According to established case law of the European Patent Office (see Case Law of the Boards of Appeal, IV.C.2.2.8 i)), an alleged prior use must establish the following:

- i) when the alleged use occurred.
- ii) what was used
- iii) the circumstances of the use in order to determine whether and to what extent it was made available to the public.

1.2 Standard of proof

It is common ground that the facts relating to the prior use were not under the control of the appellant and that both parties had equal access to the evidence. In accordance with the principle of free evaluation of evidence and in line with the established case law (see

CLBA 11th edition, III.G.4.3.2 a)), the Board assessed the relevant facts on the basis of the balance of probabilities.

### 1.3 Prior use

D1 is an article published in 2012, i.e. after the filing date of 29 April 2009 of the patent. The article concerns the development of the "Keller Funnel".

#### 1.3.1 When was the prior use disclosed

On the first page of the article (p. 283 at the bottom right), it is stated that "[w]e began introducing the prototype and its potential benefits to influential plastic surgeons at the beginning of 2009 ...". The appellant alleged that it followed from this passage that the invention had been disclosed to the public, namely to influential plastic surgeons, before the filing date of the patent in suit.

The respondent argued that the cited passage could also be understood as referring to the first half of 2009 and hence to a time after the application date.

In the absence of any indication of a different understanding, the Board interprets the expression "at the beginning of 2009" in accordance with general linguistic usage. According to which "at the beginning of 2009" refers to a point of time not later than within the first three months of 2009. Had a later period been intended, wording such as mid 2009 would have been used. Thus, the Board is convinced that, on the balance of probabilities, the disclosure to the influential plastic surgeons did take place before the

filing date of the patent in suit.

1.3.2 What was disclosed and to whom

In the section of D1 entitled "Serendipity", second paragraph, it is explained that Mr Preissman perfected the funnel's design by using ripstop nylon with an interior hydrophilic coating (features 1.2a, 1.2b). Due to the funnel shape features 1.4 and 1.5 are known from this passage, moreover because of the hydrophilic nature of the coating it would become lubricious when soaked (feature 1.3). Being made of ripstop nylon, "the sleeve is adapted to be manually manipulatable to push the prosthesis along the interior and through the distal opening" (feature 1.6).

Subsequently, according to the section entitled "Energy", the prototype was introduced to "influential plastic surgeons at the beginning of 2009".

The respondent argued that there was no evidence of what was disclosed.

The Board considers that the section "Serendipity" as discussed above shows that the demonstrated product comprised all features of claim 1.

Thus, the Board considers that the invention i.e. the funnel with an interior hydrophilic coating was disclosed to the public, i.e. the influential plastic surgeons.

The subject-matter of claim 1 is therefore not new.

2. Paragraph [0042]

This paragraph introduces the illustrative examples with the statement that they were conducted "under confidential clinical site conditions". The respondent argued that this implied that the demonstrations mentioned in D1 were likewise confidential.

The Board does not accept this argument. The "clinical site conditions" do not correspond to the demonstrations described in D1. When preparing a patent application, an applicant must ensure that experimental data remain confidential so as not to prejudice their own patent. D1, however, describes a different situation, in which the inventor was seeking investors.

The statement in paragraph [0042] therefore does not alter the Board's conclusion.

3. The subject-matter of claim 1 of the main request is not new with respect to the prior use shown in D1.

4. Request for adjournment of the oral proceedings

The respondent requested that the oral proceedings be adjourned so that it could be investigated whether there was any evidence of a non-disclosure agreement or at least so that it could be confirmed that such documentation could not be procured.

The Board considers that it was not apparent which documents the respondent could only file after an adjournment had been granted and which could not have been filed in due time in accordance with the requirements of Article 12 and 13 RPBA.

Moreover according to Article 15(6) RPBA the Board shall ensure that the case is ready for decision at the conclusion of the oral proceedings. An adjournment would run counter to this provision.

Given the above, the Board rejected the request for adjournment.

5. Auxiliary requests

Claim 1 of the auxiliary requests on file is identical to that of the main request. Hence, these requests are likewise also not allowable.

6. Petition for review

As mentioned in the minutes, the respondent might wish to file a petition for review (Article 112a EPC), however they did not indicate any reasons or procedural defect which could form the basis for such a petition.

## Order

### For these reasons it is decided that:

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

The Registrar:

The Chairwoman:



C. Moser

P. Acton

Decision electronically authenticated