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**Datasheet for the decision  
of 14 February 2008**

**Case Number:** T 1808/06 - 3.3.09

**Application Number:** 92903433.8

**Publication Number:** 0567529

**IPC:** B32B 1/04

**Language of the proceedings:** EN

**Title of invention:**  
Oxygen-absorbing label

**Patentee:**  
Multisorb Technologies, Inc.

**Opponent:**  
Mitsubishi Gas Chemical Company, Inc.

**Headword:**

-

**Relevant legal provisions:**  
EPC Art. 69(1), 84, 123(2)

**Relevant legal provisions (EPC 1973):**

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**Keyword:**

"Adaptation of description: Reliance on Article 69(1) (no) -  
Reliance on Article 84 (yes)"

"Different interpretations of relative terms by inappropriate  
amendment of passages in the description - not admissible  
under Article 123(2)"

**Decisions cited:**

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**Headnote:**

When the description has to be amended with regard to the requirement of Article 84 EPC that the claims have to be supported by the description, reference to Article 69(1) EPC as justification for a less stringent adaptation of the description is misleading insofar as it can be understood to suggest a direct applicability of its contents at the examination or opposition stage. This is clearly not the case as Article 69(1) EPC relates to the scope of protection.

It is only in situations where the removal of inconsistencies is not possible for procedural reasons (eg no amendment possible of the granted version) that - purely as an auxiliary construction - Article 69(1) EPC can be invoked for an interpretation of the claimed subject-matter.



Case Number: T 1808/06 - 3.3.09

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.09  
of 14 February 2008

**Appellant:** Mitsubishi Gas Chemical Company, Inc.  
(Opponent) 5-2, Marunouchi 2-chome  
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**Representative:** Weber-Bruls, Dorothee  
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**Respondent:** Multisorb Technologies, Inc.  
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**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted  
17 October 2006 concerning maintenance of  
European patent No. 0567529 in amended form.

**Composition of the Board:**

**Chairman:** P. Kitzmantel  
**Members:** W. Ehrenreich  
M-B. Tardo-Dino

## Summary of Facts and Submissions

I. The appeal lies from the interlocutory decision of the Opposition Division to maintain the European patent No. 0 567 529 of *Multisorb Technologies, Inc.* entitled "*Oxygen-Absorbing Label*" on the basis of the following documents:

- Claims 1-7 in accordance with the decision of the Board of Appeal 3.3.09 in its decision T 139/01 of 12 May 2005;

### Description:

- pages 2 and 4-10 of the patent specification;
- page 3 filed by the Patent Proprietor with fax of 10 April 2006;
- page 2a introduced by the Opposition Division with its decision;

### Drawings:

- figures 1-14 of the patent specification.

II. In its decision the Opposition Division held that it was unambiguously clear from the wording of the claims that embodiments not comprising a sheet of moisture-absorbing paper were excluded from protection and that an interpretation of the claims contrary to the claimed wording based on the description was contrary to the provisions of Article 69(1) EPC and thus ruled out.

III. An appeal against the decision was filed by the Opponent

*Mitsubishi Gas Chemical Company Inc.*

on 4 December 2006.

In its Statement of the Grounds of Appeal submitted on 16 February 2007 the Opponent (hereinafter: the Appellant) explained that the description and the figures were not correctly adapted to the claims as allowed by the Board in its decision T 139/01. This inconsistency between the claims and the description and drawings therefore gave rise to objections under Article 84 EPC.

- IV. The Appellant in particular referred to its proposed amendments on pages 2 and 3 of the description submitted previously in the opposition proceedings with the letter dated 13 March 2006, and reiterated its objections raised against passages in the description at page 3 concerning the use of the claimed labels in a low moisture environment and at page 9 concerning the explanations as to figures 8 to 14.

As to the passage in the second paragraph of the description at page 3, the Appellant argued that the requirement to use a moisture-absorbing paper in a low-moisture environment was not in agreement with the original disclosure.

In the Appellant's view, the explanations at page 9 relating to figures 8 and 9 did not refer to the possible presence of a moisture-absorbing paper. The same applied to the embodiments of figures 10 to 14, which, according to the text at page 9, referred to

- embodiments according to figures 4 to 7 depicting labels without a moisture-absorbing paper.
- V. The Respondent/Patent Proprietor contested the Appellant's submissions and fully agreed with the text of the description set out in the appealed decision.
- VI. In the oral proceedings held on 14 February 2008 the text of the description and the figures of the patent specification were considered page by page in the light of the claims upheld in T 139/01 and an adapted version emerged in which the passage in the second paragraph at page 3 remained as the only point in dispute between the parties.
- VII. Concerning the first sentence of the second paragraph at page 3 that the oxygen-absorbing label is "*intended for use in either low-moisture ... environments*" (emphasis by the Board) the Appellant maintained its previous argument that the function of the moisture-absorbing paper in the claimed label, namely to attract moisture from the environment, was not guaranteed in a low moisture environment. This gave rise to ambiguities as to the protection of the amended patent. Therefore, the wording "*either low moisture*" should be deleted and the subsequent text in the paragraph should be adapted accordingly, as proposed in the letter dated 13 March 2006. Alternatively, the Appellant was prepared to agree to a complete deletion of the second paragraph.
- VIII. The Respondent disagreed with the Appellant's explanations and argued that a low moisture environment would not prevent the moisture-absorbing paper from

attracting moisture from the environment. The terms "high moisture" and "low moisture" were relative terms and conveyed the sense that the environment could contain more or less moisture. In this context, the Respondent referred to example 1 in the patent specification wherein a moist blotter paper was used, which, however, was able to absorb moisture in addition to its original moisture content.

The Respondent filed, as bases for a main and an auxiliary request, an amended description according to pages 2, 2a and 3 to 10 and amended figures according to pages 14, 15.

At page 3 according to the main request the first sentence of the second paragraph was maintained and the rest of the paragraph was deleted. The pages according to the auxiliary request differed from the main request only in that the second paragraph in page 3 was completely deleted.

IX. The Appellant requested that the decision under appeal be set aside and that the patent be maintained after amendment of the description according to pages 2, 2a, 4 to 10, 14, 15 of the Respondent's auxiliary request and page 3 filed with the Appellant's letter dated 13 March 2006.

X. The Respondent requested that the patent be maintained after amendment of the description and figures according to pages 2, 2a, 3 to 10, 14, 15 of its main request or, alternatively, according to pages 2, 2a, 3 to 10, 14, 15 of its auxiliary request, both as filed during the oral proceedings.

## Reasons for the Decision

1. The appeal is admissible.
  
2. In order to meet the requirement of Article 84 EPC that the claims have to be supported by the description, the adaptation of the description to amended claims must be performed carefully in order to avoid inconsistencies between the claims and the description/drawings which could render the scope of the claims unclear. Any disclosure in the description and/or drawings inconsistent with the amended subject-matter should normally be excised. Reference to embodiments no longer covered by amended claims must be deleted, unless these embodiments can reasonably be considered to be useful for highlighting specific aspects of the amended subject-matter. In such a case, the fact that an embodiment is not covered by the claims must be prominently stated.

The placing of reliance on Article 69(1) EPC, as was done in the decision under appeal, is not an appropriate justification for a less stringent adaptation of the description.

In the Board's judgment, the reference to Article 69(1) EPC in the Guidelines for Examination, part C, chapter III, point 4,3 "Inconsistencies", is misleading insofar as it can be understood to suggest a direct applicability of its content at the examination and/or opposition stage as regards the requirement of clarity and support of the claims by the description. This is clearly not the case as Article 69 EPC relates to the scope of protection. The only provision to be applied



with regard to the removal of inconsistencies is Article 84 EPC (of course subject to such other provisions of the EPC as may be applicable). It is only in situations where such removal is not possible for procedural reasons (eg no amendment possible of the granted version) that - purely as an auxiliary construction - Article 69(1) can be invoked for the interpretation of the claimed subject-matter.

3. The Board does not agree to the Respondent's argument that, on an appeal by an Opponent against a decision of the Opposition Division concerning the appropriate adaptation of the description to support amended claims, it is restricted to the objections raised by the Appellant/Opponent in its Statement of the Grounds of Appeal.

The requirement of Article 84 EPC, namely that the amended claims are supported by the description, demands the same scrutiny when the case is remitted to the Opposition Division for adaptation of the description as when the description is adapted directly before the Board in the same hearing as that during which the patent is ordered to be maintained in amended form.

The fact of an appeal cannot be an obstacle to the necessary adaptation of the description caused by the amendments.

#### *Main Request*

4. As mentioned above (points VI to VIII) the only issue remaining under dispute in the oral proceedings was the first sentence in the second paragraph at page 3 reading as follows:

*"By way of further introduction, the oxygen-absorbing labels of the present invention are intended for use in either low-moisture or high-moisture environments."*

The Respondent wanted to maintain this passage, while the Appellant wished to delete the reference to low-moisture environments. The Appellant also suggested maintaining the slightly amended ensuing sentence, which had been deleted in the version decided upon by the Opposition Division. In accordance with the decision under appeal, there was agreement between the parties that the remainder of this paragraph should be deleted.

In the Board's judgment, however, the above-quoted sentence has to be understood in context with the subsequent passages which read as follows: *"In this respect, in certain containers, there is a high moisture content, and in these the labels of the present invention can contain a moisture absorbent ... to absorb moisture from the container ..."*. and *"In other containers, such as those having fried foods ... there is very low moisture, and in these the labels of the present invention may contain a moisture-carrying material, such as hydrogel to release moisture to activate the oxygen-absorbing action."*

It is clear from these passages that only the high-moisture environment is connected with a moisture-absorbent capacity of the paper and that the low-moisture environment requires a system which releases moisture to the environment.

Contrary to the provisions of Article 123(2) EPC, deletion of these passages without deleting the first sentence of the paragraph would therefore have an impact on the meaning of the terms "high-moisture environment" and "low-moisture environment" because when standing alone these purely relative terms are open to different interpretations. The same conclusion applies, in a different way, if the Appellant's proposal was followed, because the applicability of the claimed labels to low moisture environments cannot be ruled out completely in the light of the specification which encompasses such a use as long as the moisture absorbing paper is able to perform the function of attracting moisture from the "low moisture" environment (see section VIII above).

By virtue of this unallowable amendment on page 3, the amended version of the specification according to the main request cannot be allowed.

*Auxiliary Request*

5. The above-mentioned contravention of Article 123(2) EPC is removed by the complete deletion of the second paragraph of page 3, because this avoids undisclosed interpretations of the degree of moisture present in the environment where the labels are used.

The auxiliary request is therefore allowable.

**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 with the order to maintain the patent on the basis of the following documents:
  - Claims 1 to 7 according to the decision T 139/01 of 12 May 2005;
  - Description and Drawings pages 2, 2A, 3 to 10 and 14, 15 according to the auxiliary request filed in the oral proceedings.

The Registrar

The Chairman

G. Röhn

P. Kitzmantel