Internal distribution code:

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

Datasheet for the decision of 14 October 2016

Case Number: T 2004/12 - 3.2.07

Application Number: 06114576.9

Publication Number: 1728731

IPC: B65D75/58, B65D77/20, B65D75/30

Language of the proceedings: EN

Title of invention:
Peelable vacuum skin packages

Patent Proprietor:
Bemis Company, Inc.

Opponent:
Sealed Air Corporation

Headword:

Relevant legal provisions:
EPC Art. 52(1), 56
RPBA Art. 13(1)

Keyword:
Late filed evidence - admitted (no)
Inventive step - main and first auxiliary request (no); second auxiliary request (yes)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern
Boards of Appeal
Chambres de recours

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 2004/12 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 14 October 2016

Appellant I: (Patent Proprietor)	Bemis Company, Inc. One Neenah Center, Fourth Floor 134 E. Wisconsin Street Neenah, WI 54956 (US)
Representative:	Vossius & Partner Patentanwälte Rechtsanwälte mbB P.O. Box 86 07 67 81634 München (DE)
Appellant II: (Opponent)	Sealed Air Corporation 100 Rogers Bridge Road Duncan, SC 29334 (US)
Representative:	Franck, Peter Uexküll & Stolberg Partnerschaft von Patent- und Rechtsanwälten mbB Beselerstrasse 4 22607 Hamburg (DE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 18 July 2012 concerning maintenance of the European Patent No. 1728731 in amended form.**

Composition of the Board:

Chairman	G. Patton
Members:	K. Poalas
	C. Brandt

Summary of Facts and Submissions

I. The patent proprietor and the opponent (appellants I and II) each lodged an appeal against the interlocutory decision maintaining European patent No. 1 728 731 in amended form.

II. Opposition had been filed against the patent as a whole based on Article 100(a) EPC (lack of novelty and lack of inventive step) and on Article 100(b) EPC (insufficient disclosure).

III. The opposition division found that claims 1 and 18 of the then fifth auxiliary request filed during the oral proceedings met the requirements of the EPC.

IV. Oral proceedings took place before the board on 14 October 2016.

(a) Appellant I requested that the decision under appeal be set aside and that the patent be maintained on the basis of only claims 1 to 20 of the patent as granted (main request) or according to the first auxiliary request filed with its statement setting out the grounds of appeal or according to the set of claims as maintained by the opposition division (corrected second auxiliary request filed during the oral proceedings). It also requested that the appeal of appellant II be dismissed.

(b) Appellant II requested that the decision under appeal be set aside and that the patent be revoked. It furthermore requested that the appeal filed by appellant I be dismissed.

V. Claim 1 according to the main request reads as follows:

"A vacuum skin package comprising:
(a) a thermoplastic film;
(b) a polyester substrate;
wherein said thermoplastic film comprises at least a first polymer layer having a first surface and an opposing second surface, wherein said first surface has a surface tension of between 36—60 dynes/cm as measured in accordance with ASTM D—2578—84 Test Method, wherein said first layer is an exterior film layer comprising an ethylene/unsaturated ester copolymer and is free of both polybutylene and ionomer resin; and
wherein said thermoplastic film is adapted to form a peelable seal between said first surface of said first layer of said thermoplastic film and said polyester substrate by pressure of less than 1 x 10^5 Pa applied therebetween, wherein said peelable seal has a seal strength of between 8.93 — 107.15 kg/m (0.5 - 61b/in) as measured in accordance with ASTM F-904 Test Method".

Claim 1 of the first auxiliary request has the following additional features over claim 1 of the main request:
"(c) a product [is] enclosed between said thermoplastic film and said polyester substrate"; and "said thermoplastic film extends over said product in such a manner as to assume the shape thereof and forms with the substrate a seal which extends continuously around the periphery of the product and outwardly therefrom to the perimeter of the substrate".

Claim 1 of the second auxiliary request has the following additional features over claim 1 of the main request:
"said thermoplastic film further comprises a second

polymer layer of an ionomer resin or a blend thereof, wherein said second layer adheres to said first layer and is an interior film layer".

Claim 18 of the second auxiliary request reads as follows:
"A vacuum skin packaging kit for manufacturing a vacuum skin package as claimed in any preceding claim comprising: (a) a thermoplastic film as defined in any previous claim, and (b) a polyester substrate".

VI. In the present decision reference is made to the following documents known from the opposition proceedings:

D22: US 2002/0172834 A1; and
D26: US 4 367 312.

During the oral proceedings before the board appellant II filed document D36: US 5 770 287.

VII. Appellant I's arguments, in so far as they are relevant for the present decision, may be summarised as follows:

Claim 1 according to the main request – inventive step, Articles 52(1) and 56 EPC

D26 discloses the formation of a peelable flat lid seal (FLS), whereby the lid being in the form of a film is sealed under heat and pressure to the rim of a package substrate.

D26 does not disclose the formation of a peelable seal for a vacuum skin package (VSP) between the first surface of the first layer of a thermoplastic film and a polyester substrate by applying a vacuum pressure of

less than 1 x 10^5 Pa (i.e. less than atmospheric pressure).

Considering FLS and VSP as being two alternative packaging methods, the problem to be solved starting from the package known from D26 as closest prior art can be seen in the provision of an alternative package.

Since D26 does not relate to VSP and is concerned with a different sealing technique, namely FLS, which does not involve the use of a vacuum, the provision of the package of claim 1 would not have been obvious to the skilled person at the priority date.

Starting from D26 the skilled person does not know how the materials proposed therein for FLS would behave by VSP. Since the film to be used in VSP has to be sealable not only along the rim of the substrate but also along a large area surrounding the object to be packaged, said film has implicitly to be elastic, stretchable without rupture and at the same time sealable to a polyester substrate according to claim 1.

D26 states in column 13, lines 2 to 6, that peelable seals are to be produced at higher positive sealing pressures from 13.8 N/cm^2 to 41.4 N/cm^2 [i.e. 1.38 x 10^5 to 4.14 x 10^5 Pa]. This teaches away from applying a vacuum pressure less than atmospheric pressure (i.e. less than 1 x 10^5 Pa) to form the peelable seal as claimed in claim 1.

The presence of polystyrene is essential in the composition of the first layer of D26, see column 3, lines 55 to 60, and claim 1, i.e. the invention according to D26 will not work without polystyrene. Polystyrene is nowadays avoided in VSP due to the

presumption that it is carcinogenic. Polystyrene is not part of the constituents of the film claimed in claim 1.

The film material in D26 may be a polyethylene or an ethylene-vinyl acetate copolymer and the substrate material maybe a polyester, a polyvinyl chloride, a polyamide or a polyacrylonitrile, see column 3, lines 32 to 53. On the other hand, none of the examples of D26 disclose in combination a film layer comprising an ethylene-vinyl acetate copolymer and a polyester substrate as claimed. There is therefore no hint in D26 towards the specific material selection of claim 1 out of the above-mentioned two material lists of D26.

There is no truth in the argument that, because VSP in general was in wide commercial use at the priority date and can lead to a tightly-packaged article, it would be obvious in view of the reference in D26 to ensuring "tightness of the package" to adapt D26 to VSP. Doing so would be entirely contrary to the teaching of D26 and therefore cannot be considered as being obvious from D26, the wide commercial use of vacuum skin packaging notwithstanding.

As any skilled person in the art would recognise, the absolute pressure of any system is the "gauge" pressure of the system plus the local atmospheric or ambient pressure. The sealing pressure of D26 is a positive pressure greater than atmospheric pressure and considerably higher than the highest pressure specified in claim 1 for VSP.

Claim 1 according to the first auxiliary request – inventive step, Articles 52(1) and 56 EPC

The arguments presented above in respect of claim 1 according to the main request apply *mutatis mutandis* also to claim 1 according to the first auxiliary request.

Admissibility of document D36

The board should exercise its discretion according to Articles 13(1) and (3) RPBA in favour of appellant I and not allow appellant II to amend its case by filing D36 for the first time at the latest possible stage in the appeal proceedings, namely during the oral proceedings. This new document takes appellant I by surprise, and appellant I is not prepared to deal with it within the time frame of the oral proceedings.

Claim 18 according to the second auxiliary request – inventive step, Articles 52(1) and 56 EPC

All the peelable films disclosed in D22 contain within their polymer blend polybutylene and ionomer polymers, both of which materials are explicitly excluded from the first layer of the thermoplastic film of claim 1, i.e. of claim 18.

D22 makes no reference to any polyester substrate (the substrates in the D22 examples are all LLDPE or ionomer) and makes no reference to any second polymer layer as recited in claims 1 and 18.

The film of claim 32 of D22 fails entirely to satisfy the requirement that the first layer of the thermoplastic film is to be free of polybutylene and ionomer resin.

Claim 48 of D22 states that the second layer is merely "adjacent" the first layer and may therefore be distanced from that layer by one or more further film layers. There is nothing in claim 48 to state that the second layer of that claim is "adhering" to the thermoplastic film of claim 32.

Claim 1 according to the second auxiliary request – inventive step, Articles 52(1) and 56 EPC

The arguments presented above in respect of claim 18 apply *mutatis mutandis* also to claim 1.

VIII. Appellant II's arguments, in so far as they are relevant for the present decision, may be summarised as follows:

Claim 1 according to the main request – inventive step, Articles 52(1) and 56 EPC

D26 discloses the combination of all but one of the features of claim 1, namely that the package has been evacuated.

In accordance with paragraph 2 of the patent in suit, the objective technical problem is to be seen in the provision of an alternative package adapted to the packaging of perishable foodstuff.

The problem has been solved according to claim 1 by removing air from the inside of a package as described in D26 before it is sealed.

VSP is part of common general knowledge, see paragraph 2 of the patent in suit stating that VSP was in wide commercial use.

Claim 1 due to the expression "comprises" does not exclude the presence of polystyrene in small amounts of for example about 5%. Such a small amount cannot be considered detrimental for VSP. Furthermore, there is no hint in the prior art supporting appellant I's allegation that before the priority date of the patent in suit the use of polystyrene in VSP was prohibited.

The values of the peel strengths for polyvinyl substrates depicted in Table VIII for example 4 and in Table X for example 5 of D26 are very close to each other. The skilled person will then immediately realise that, when applying a polyester substrate in example 4, values for the peel strength close to those given in Table X for the polyester substrate will also be obtained. These values fall within the claimed peel strength range.

Further, Table X of D26 shows that rigid polyvinyl chloride and polyester have similar peel strength and that they are therefore to be considered as being similar materials as far as their peeling behaviour is concerned.

In view of the detailed discussion of tightness and mechanical strength of the package in column 4, lines 52-68, of D26, there is no inventive step involved in providing the type of package disclosed in D26 as a vacuum skin package, i.e. by removing air from the package prior to sealing.

A distinction between sealing under vacuum and sealing under application of positive pressure as far as concerns the sealing points/areas themselves is an artificial one. In order to seal a lid to a tray it is

always necessary to press the lid against the tray (or vice versa). Hence the direction of the force or pressure is always the same; i.e. it is always a positive force or pressure.

The allegation that a skilled person would not have been able to conclude from the information about sealing pressure provided in D26 that the same combination of lid and tray would also be suitable for vacuum skin packaging is not correct. D26 exemplifies a sealing pressure of 1.38×10^5 Pa. The patent in suit teaches an upper limit for the sealing pressure of about 1×10^5 Pa. A skilled person would recognise immediately that the sealing pressure used in the examples of D26 is of the same order of magnitude as the upper limit for the sealing pressure used in VSP. Since no dimensions of the package, e.g. its depth, or of the product to be packaged, e.g. its thickness, are claimed in claim 1, the skilled person would see no obstacle to considering the film of D26 as being suitable for VSP.

Claim 1 according to the first auxiliary request – inventive step, Articles 52(1) and 56 EPC

The arguments presented above in respect of claim 1 according to the main request apply *mutatis mutandis* also to claim 1 according to the first auxiliary request.

Admissibility of document D36

Only one day before the oral proceedings appellant II realised that D36, said last being referred to in paragraph 37 of D20, was relevant for the lack of inventive step discussion of the subject-matter of

claim 1 according to the second auxiliary request. D36, although being filed late, should be introduced into the appeal proceedings since it is *prima facie* relevant for assessing inventive step for the claimed subject-matter.

Claim 18 according to the second auxiliary request – inventive step, Articles 52(1) and 56 EPC

Neither the presence of a vacuum nor the presence of a peelable seal are features of the kit of claim 18. D26, representing the closest prior art, does not disclose for the thermoplastic film an interior layer of ionomer or a blend thereof.

The objective technical problem can be seen in the provision of an alternative thermoplastic film for a packaging kit comprising a thermoplastic film and a polyester substrate.

The above-mentioned problem is solved by selecting an ionomer resin or blend thereof for the interior layer adhering to the sealing layer of the thermoplastic film of the packaging kit (consisting of a thermoplastic film and a polyester substrate) in accordance with D26.

D22 discloses a thermoplastic film useful for VSP and comprising a first peelable layer based on ethylene/ unsaturated ester copolymer and a second layer adhering thereto comprising ionomer, see title, paragraph 1 and claims 32 and 48.

According to D22 it is an advantage to have an ionomer layer adhering to a layer comprising ethylene/ unsaturated ester copolymer because the bond strength

between the two layers can be controlled via the level of unsaturated ester comonomer, see paragraph 38.

Since the objective technical problem with regard to the kit is the provision of an alternative, the appropriate test in examining for inventive step is whether it would be "obvious to try" for the person skilled in the art. Having regard to the disclosure of D22, it was clearly obvious to try the use of a layer comprising an ionomer resin or a blend thereof as an interior layer of the thermoplastic film and adhering to the sealing layer comprising ethylene/unsaturated ester copolymer.

Claim 1 according to the second auxiliary request – inventive step, Articles 52(1) and 56 EPC

Having regard to the combination of D26 with D22, see the arguments presented above in respect of claim 18, it was obvious to a skilled person to use the thermoplastic film of D26 (modified by inclusion of an interior ionomer layer adhering to the peelable layer as discussed above) in a vacuum skin package.

Reasons for the Decision

1. *Claim 1 according to the main request – inventive step, Articles 52(1) and 56 EPC*

1.1 D26, considered by both parties to represent the closest prior art, discloses in the wording of claim 1 a package comprising
(a) a thermoplastic film, see column 2, line 65, to column 3, line 7;
(b) a polyester substrate, see column 2, lines 6 and 18, and column 4, lines 18 to 26 and 52 to 68;

wherein said thermoplastic film comprises at least a first polymer layer having a first surface and an opposing second surface, wherein said first surface has to have a surface tension of between 35—50, preferably 37-45 dynes/cm, which anticipates the claimed range of 36—60 dynes/cm as measured in accordance with the ASTM D—2578—84 Test Method, wherein said first layer is an exterior film layer comprising an ethylene/unsaturated ester copolymer and is free of both polybutylene and ionomer resin, see column 3, lines 1 to 3, 17 to 19 and 24 to 29; and
wherein said thermoplastic film is adapted to form a peelable seal between said first surface of said first layer of said thermoplastic film and said polyester substrate, wherein said peelable seal has to have a seal strength of between 30 and 75 kg/m, which anticipates the claimed 8.93 — 107.15 kg/m seal strength measured in accordance with the ASTM F-904 Test Method, see column 2, lines 29 to 32 and 56 to 61.

1.2 The board considers in this respect that the range of 30 to 75 kg/m, see column 2, lines 29 to 32 and 56 to 61 of D26, for the peel strength of the seals according to the invention of D26 is obviously achieved by the peelable seals between a thermoplastic film having a first exterior film layer comprising an ethylene-vinyl acetate copolymer free of both polybutylene and ionomer resin and a polyester substrate according to the general teaching of D26, see column 3, lines 32 to 54, and column 4, lines 18 to 26. The fact that tables I and VIII showing the concrete peel strength values of specific film-substrate combinations do not show peel strengths for peelable seals between a film layer comprising an ethylene-vinyl acetate copolymer free of both polybutylene and ionomer resin and a polyester substrate does not alter the above-mentioned

conclusion. The peel strength values of table X of D26 further provide evidence that polyester and rigid polyvinyl chloride, said last being present in example 4 in combination with ethylene-vinyl acetate copolymer free of both polybutylene and ionomer resin, possess the same peel strength over the same film material, said last being polyethylene.

Differences

1.3 D26 therefore fails to disclose the features of claim 1 concerning the production of the package via **vacuum skin packaging**, wherein the peelable seal between the modified surface tension of the first layer of the thermoplastic film and the polyester substrate **is formed by pressure of less than 1 x 10^5 Pa applied therebetween**.

Effects

1.4 It is common ground that D26 already addresses the issue of perishability of food products for which its packaging can be used, see column 13, lines 7 to 40. Therefore, the board considers that through the above-mentioned differentiating features an alternative package suitable for packaging *inter alia* perishable food has been provided.

Problem to be solved

1.5 The problem to be solved can therefore be seen in the provision of an alternative package suitable for packaging *inter alia* perishable food.

Discussion of inventive step

1.6 The above-mentioned problem has been solved according to claim 1 by applying a pressure of less than 1 x 10^5 Pa between the thermoplastic film and the polyester substrate, i.e. a pressure below atmospheric pressure, thereby removing the air between the thermoplastic film and the polyester substrate, i.e. from the inside of the package known from D26.

1.7 The board, following appellant II's corresponding argument, considers that given that vacuum skin packaging was in wide commercial use at the priority date of the patent in suit (see hereto also paragraph 2 of the patent in suit), said vacuum skin packaging leading to a tightly packaged article, it is obvious in view of the specific reference in D26 to ensuring the tightness of the package (see column 4, lines 52 to 68) to provide the type of package disclosed in D26 as a vacuum skin package, i.e. to remove air from the package prior to sealing.

1.8 Furthermore, given that FLS and VSP are considered by the person skilled in the art to be two well-known alternative packaging methods, the board considers that the skilled person seeking to produce the package known from D26 via an alternative packaging method would consider it obvious to try the vacuum skin packaging method for said package. This would inherently result in the application of a vacuum, which means on the other hand that a pressure of less than 1 x 10^5 Pa would be present. In such a case, appellant I's argument that the requirements in D26 for the presence of a higher positive sealing stress are not met is inevitably moot.

1.9 In spite of the uncertainties which always characterise the application of materials known for a specific

method to an alternative method, the board considers that the skilled person would have a reasonable expectation based on general experience that the materials used in an FLS process at a sealing pressure not very far above atmospheric pressure would also be sealable in a VSP process at a sealing pressure just below atmospheric pressure, especially because a skilled person would recognise immediately that the sealing pressure of 1.38×10^5 Pa used in the examples of D26 is of the same order of magnitude as the upper limit of about 1×10^5 Pa for the sealing pressure used in VSP. The skilled person had no particular reasons in the case of VSP to expect these materials to fail. The skilled person would thus envisage the application of VSP to the film and the substrate known from D26.

1.10 According to the Case Law of the Boards of Appeal, 8th edition 2016, I.D.9.18.7, an arbitrary selection of a solution from a number of possibilities in the absence of a hint to do so is not inventive if not justified by a hitherto unknown technical effect that distinguishes the claimed solution from the other solutions. In D26 no unknown or surprising effects are referred to in respect of the film materials and the four substrate materials mentioned therein. The choice of one out of the two materials proposed in D26 as film materials, namely of the ethylene-vinyl acetate copolymer (which is explicitly disclosed in example 4), and the choice of one out of the four materials proposed in D26 as substrate materials, namely of the polyester, cannot therefore be considered inventive.

1.11 Claim 1 due to the expression "comprises" does not exclude the presence of small amounts of polystyrene. In D26, column 3, line 57, a lower polystyrene limit of 5 weight% is given. The board follows appellant II in

arguing that such a small amount of styrene cannot be considered detrimental for VSP. In the absence of any evidence in this regard the board sees no reason to accept the appellant I's unsubstantiated allegation that before the priority date of the patent in suit the use of polystyrene in VSP was prohibited.

1.12 Given that the sealing pressure of 1.38 x 10^5 Pa mentioned in the examples of D26 refers to the pressure existing between the film and the substrate during sealing and that the pressure of 1 x 10^5 Pa mentioned in claim 1 is the pressure existing between the film and the substrate ("therebetween") also during sealing, the board follows appellant II's argument that the sealing pressure used in the examples of D26 is of the same order of magnitude as the upper limit of the sealing pressure used in VSP.

1.13 Since on the one hand the claimed seal strength is already known, i.e. achievable with the film and substrate materials known from D26 (see column 2, lines 29 to 32 and 56 to 61), and on the other hand FLS is also applied to substrates having rims of different widths, the board cannot accept appellant I's argument that, since in VSP there is a large-area connection between the film and the substrate, the films used there are implicitly required to have different elasticity, stretchability and sealability than the films used in FLS. In particular, claim 1 does not specify any requirements for the dimensions of the package, e.g. its depth, nor for the size of the product to be packaged, e.g. its thickness. Therefore, the skilled person will certainly consider the films of D26 to be suitable for VSP when elasticity and/or stretchability of the film are less of an issue, such as for thin products and/or nearly flat packages. In

these conditions the skilled person would certainly envisage and try VSP as an alternative to FLS, especially with a view to packaging perishable food for which the contact with air should be reduced in order to increase its lifetime.

1.14 For these reasons, the subject-matter of claim 1 of the main request is found to lack an inventive step. Accordingly, this request is not allowable under Articles 52(1) and 56 EPC.

2. *Claim 1 according to the first auxiliary request – inventive step, Articles 52(1) and 56 EPC*

Given that both parties argued that their arguments presented in respect of claim 1 according to the main request apply *mutatis mutandis* also to claim 1 according to the first auxiliary request, the board sees no reason not to consider that the subject-matter of claim 1 of the first auxiliary request likewise lacks an inventive step. Accordingly, this request is not allowable under Articles 52(1) and 56 EPC.

3. *Admissibility of document D36*

3.1 According to Article 13(1) RPBA it is at the Board's discretion to admit any amendment to the appellant's case after it has filed its statement of grounds of appeal.

3.2 In such a case, factors such as the complexity of the new subject-matter submitted, the state of the proceedings at the time of the submission and the need for procedural economy are to be taken into account.

3.3 An explanation or proper justification in the present case could exist if for example the late submission were in response to amended requests which were not part of the response to the appeal or if it resulted from a direction by the board or if the board itself had raised the issue.

3.4 In this respect the board notes the following:

(a) Appellant II filed D36 in order to challenge the inventive step of the subject-matter of claim 1 of the second auxiliary request. In respect with this subject-matter (the then fifth auxiliary request which was upheld by the opposition division), the decision under appeal dealt only with the combination of the teachings of D26 and D22, and so did appellant II in its statement setting out the grounds of appeal.

The filing of D36 took place only at the last possible stage of the appeal proceedings, namely during the oral proceedings, and constitutes a change in appellant II's case on inventive step.

The present second auxiliary request is identical to the fifth auxiliary request upheld by the opposition division, and the board can see no reason why said document could not have been filed earlier.

The argument that appellant II realised the relevance of document D36 only one day before the oral proceedings cannot be considered an adequate and acceptable reason for admitting said late-filed document.

(b) The current state of the proceedings and the need for procedural economy do not allow this late-filed

document to be admitted, since this would require at least further preparation time for appellant I as well as for the board, if not an adjournment of the oral proceedings for that purpose.

3.5 In the light of these considerations, the board exercises its discretion according to Article 13(1) RPBA and decides not to admit document D36 into the appeal proceedings.

4. *Claim 18 according to the second auxiliary request – inventive step, Articles 52(1) and 56 EPC*

4.1 It is undisputed that D26, representing the closest prior art, does not disclose a thermoplastic film having in addition to its first polymer layer a second interior polymer layer of ionomer or a blend thereof adhered to said first layer.

4.2 The board follows appellant II in arguing that the problem to be solved can be seen in the provision of an alternative thermoplastic film for a packaging kit comprising a thermoplastic film and a polyester substrate in accordance with D26 and that the skilled person seeking to solve the above-mentioned problem would take the teaching of D22 into consideration.

4.3 The board notes that **all** the peelable films disclosed in D22 contain within their polymer blend polybutylene and ionomer polymers, both of which materials are explicitly excluded from the thermoplastic film of claim 1, i.e. of claim 18, see claims 1 and 32 of D22. Furthermore, claim 48 of D22 does not state that the second layer of that claim is "adhering" to the thermoplastic film of claim 32, and there is no reference in D22 to any polyester substrate (the

substrates in the D22 examples are all LLDPE or ionomer).

4.4 It follows that the skilled person cannot derive from D22 any teaching concerning the provision of a thermoplastic film comprising a **second** interior polymer **layer of ionomer** or a blend thereof **adhered to** its first polymer layer, said **first layer** comprising an ethylene/unsaturated ester copolymer and being **free** of both **polybutylene** and **ionomer** resin.

In particular, when combining the teaching of D22 regarding the composition of the layers with the FLS of D26, the skilled person will come up with both first and second layers comprising polybutylene and ionomer resin, i.e. falling outside the scope of claim 18.

4.5 Accordingly, the teaching of D22 cannot render the subject-matter of claim 18 obvious to the person skilled in the art. The requirements of Articles 52(1) and 56 EPC are therefore met.

5. *Claim 1 according to the second auxiliary request – inventive step, Articles 52(1) and 56 EPC*

5.1 Given that the thermoplastic film and the polyester substrate being the parts disclosed in the kit claimed in claim 18 were defined via cross-reference to and are identical with those claimed in claim 1, and that claim 1 is directed to a vacuum skin package comprising said thermoplastic film and said polyester substrate, the inventive step arguments presented above in respect of claim 18 apply *mutatis mutandis* also to claim 1.

5.2 Therefore, the board considers that the subject-matter of claim 1 likewise involves an inventive step and that

the requirements of Articles 52(1) and 56 EPC are met.

Order

For these reasons it is decided that:

The appeals of appellant I and appellant II are dismissed.

The Registrar: The Chairman:

G. Nachtigall G. Patton

Decision electronically authenticated