

**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 November 2013**

**Case Number:** T 0163/13 - 3.2.07  
**Application Number:** 03773225.2  
**Publication Number:** 1567425  
**IPC:** B65D81/26, B65D69/00,  
B65D73/00, B65D1/24, B65D51/18  
**Language of the proceedings:** EN

**Title of invention:**

RESEALABLE MOISTURE TIGHT CONTAINERS FOR STRIPS AND THE LIKE

**Patent Proprietor:**

CSP Technologies, Inc.

**Opponent:**

Clariant Produkte (Deutschland) GmbH

**Headword:**

**Relevant legal provisions:**

EPC Art. 54(1), 84, 123(2)  
EPC R. 139  
RPBA Art. 12(4), 13(1), 13(3)

**Keyword:**

Novelty - main request (no)  
Late filed auxiliary requests: auxiliary request 1 admitted (yes); clarity (no)  
Late filed auxiliary requests: auxiliary requests 2 to 8 admitted (no): added features lead to new objections contrary to procedural economy

**Decisions cited:**

T 0718/89, T 1705/07, T 0253/06, T 0356/08, T 1067/08,  
T 0144/09, T 1408/04, T 1582/08, T 0219/09, T 1397/09,  
T 2085/09, T 2359/09

**Catchword:**



**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 0163/13 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 6 November 2013**

**Appellant I:**  
(Patent Proprietor)

CSP Technologies, Inc.  
1030 Riverfront Center  
P.O. Box 710  
Amsterdam  
New York 12010 (US)

**Representative:**

Maiwald Patentanwalts GmbH  
Elisenhof  
Elisenstrasse 3  
80335 München (DE)

**Appellant II:**  
(Opponent)

Clariant Produkte (Deutschland) GmbH  
Am Unisys-Park 1  
65843 Sulzbach (DE)

**Representative:**

HOFFMANN EITLE  
Patent- und Rechtsanwälte  
Arabellastrasse 4  
81925 München (DE)

**Decision under appeal:**

**Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
18 January 2013 concerning maintenance of the  
European Patent No. 1567425 in amended form.**

**Composition of the Board:**

**Chairman:** H. Meinders  
**Members:** G. Patton  
E. Kossonakou

## **Summary of Facts and Submissions**

I. Appellant I (patent proprietor) lodged an appeal against the interlocutory decision of the Opposition Division maintaining European patent N° 1 567 425 in amended form.

Appellant II (opponent) likewise lodged an appeal against this interlocutory decision.

II. In the opposition proceedings, appellant I requested that the patent be maintained on the basis of a main request (patent as granted) or one of the three auxiliary requests filed during the oral proceedings held on 16 October 2012. The Opposition Division held that the subject-matter of the main request and first auxiliary request did not fulfil the requirements of Article 54(1) EPC and the subject-matter of the second auxiliary request did not comply with the requirements of Article 84 EPC. The version of the patent according to the third auxiliary request was found to meet the requirements of the EPC.

III. With its statement of grounds of appeal appellant I requested the maintenance of the patent on the basis of the requests underlying the impugned decision and, subsidiarily, oral proceedings.

IV. In the course of the appeal proceedings, the Board provided its preliminary non-binding opinion annexed to the summons for oral proceedings that the claims of the requests of appellant I did not fulfil the requirements of Articles 54(1), 56, 123(2) and/or 84 EPC.

In reaction, appellant I filed with letter of 4 October 2013 new auxiliary requests 1 to 8 replacing all

auxiliary requests on file. It also filed the following document:

D10: The United States Pharmacopeial Convention, Inc., Revision Bulletin Official, 1 December 2007, 4 pages

At the oral proceedings, held on 6 November 2013, appellant I submitted the following document as illustrative of the relevant common general knowledge:

D10': The United States Pharmacopeia & The National Formulary, "USP 24 - NF 19", 1 January 2000, pages 1936-1938; and supplement pages 2695-2696.

During these oral proceedings the following issues, *inter alia*, were discussed:

- Claim 1 of appellant I's main request was discussed for compliance with the requirements of Article 54 EPC in the light of the teachings of D1, D2, D3 and D4.
- Admissibility of the auxiliary requests 1 to 8 was discussed, in particular in light of the provisions of Articles 12(4), 13(1) and 13(3) RPBA and Articles 84 and 123(2) EPC, whereby the correction undertaken in claim 1 of auxiliary request 1 was assessed in the light of Rule 139 and Article 123(2) EPC.
- Claim 1 of the sole admitted auxiliary request 1 was more extensively discussed for compliance with Article 84 EPC.

The present decision was announced at the end of the oral proceedings.

V. Appellant I requests that the decision under appeal be set aside and that the patent be maintained as granted or in accordance with one of the auxiliary requests 1 to 8. The version of the patent as maintained by the department of first instance was stated to be no longer pursued.

Appellant II requests that the decision under appeal be set aside and that the European patent be revoked.

VI. Claim 1 of the **main request** reads as follows:

"A substantially moisture tight container and cap assembly for storing and packaging moisture-sensitive items comprising an assembly with a container portion (14) and a cap portion (12) that are attached by a hinge (16),  
wherein the container portion (14) has a container base (13), and sidewalls (11) depending upwardly from the base (13), a top container surface (17) extends inward from the sidewalls (11), the top container surface (17) is provided with an opening (20) that permits access to the interior of the container portion (14) and the opening (20) is bounded by a lip (22) that extends upward from the top container surface (17),  
wherein the cap portion (12) has a base portion (24) with an outer periphery (25) that extends over at least a portion of the container portion (14), the base portion (24) is provided with a skirt (26) that depends downwardly from the base portion (24), the skirt (26) is positioned at a location on the base portion (24) that allows the skirt (26) to enter into a sealing relationship with the lip (22) of the container portion (14)

characterized in that the skirt (26) fits over the periphery of the lip (22) and in that the cap portion (12) further, includes a lip seal member (30) that depends downwardly and extends around the inside of the cap portion (12), wherein the lip seal member (30) is configured to abut at least a portion of the interior side of the lip (22) when the cap portion (12) is in the closed position such that the lip seal member (30) provides a sealing position, in addition to the one between the skirt (26) and the lip (22), and applies pressure on the lip (22) from the inside out, which in turn applies pressure on the skirt (26), thereby tightening the seal between the skirt (26) and the lip (22) and resulting in a substantially moisture tight seal between the cap portion (12) and the container portion (14)."

Claim 1 of **auxiliary request 1** reads as follows (in bold the amendments with respect to claim 1 of the main request; emphasis added by the Board):

"A substantially moisture tight container and cap assembly for storing and packaging moisture-sensitive items comprising an assembly with a container portion (14) and a cap portion (12) that are attached by a hinge (16), wherein the container portion (14) has a container base (13), and sidewalls (11) depending upwardly from the base (13), a top container surface (17) extends inward from the sidewalls (11), the top container surface (17) is provided with an opening (20) that permits access to the interior of the container portion (14) and the opening (20) is bounded by a lip (22) that extends upward from the top container surface (17), wherein the cap portion (12) has a base portion (24) with an outer periphery (25) that extends over at least

a portion of the container portion (14), the base portion (24) is provided with a skirt (26) that depends downwardly from the base portion (24), the skirt (26) is positioned at a location on the base portion (24) that allows the skirt (26) to enter into a sealing relationship with the lip (22) of the container portion (14),

~~characterized in that wherein~~ the skirt (26) fits over the periphery of the lip (22), ~~and in that wherein~~ the cap portion (12) further, includes a lip seal member (30) that depends downwardly and extends around the inside of the cap portion (12), wherein the lip seal member (30) is configured to abut at least a portion of the interior side of the lip (22) when the cap portion (12) is in the closed position such that the lip seal member (30) provides a sealing position, in addition to the one between the skirt (26) and the lip (22), and applies pressure on the lip (22) from the inside out, which in turn applies pressure on the skirt (26), thereby tightening the seal between the skirt (26) and the lip (22) and resulting in a substantially moisture tight seal between the cap portion (12) and the container portion (14),

**characterized in that the moisture ingress of the container after three days is less than about 750 micrograms of water determined by the following test method: (a) place one gram plus or minus 0.25 grams of molecular sieve in the container and record the weight; (b) fully close the container; (c) place the closed container in an environmental chamber at conditions of 80% relative humidity and 22.2°C; (d) after one day, weigh the container containing the molecular sieve; (e) after four days, weigh the container containing the molecular sieve; and (f) subtract the first day sample from the fourth day sample to calculate the moisture**



**ingress of the container in units of micrograms of water."**

Claim 1 of **auxiliary request 2** reads as follows (in bold the amendments with respect to claim 1 of the main request; emphasis added by the Board):

"A substantially moisture tight container and cap assembly for storing and packaging moisture-sensitive items comprising an assembly with a container portion (14) and a cap portion (12) that are attached by a hinge (16), wherein the container portion (14) has a container base (13), and sidewalls (11) depending upwardly from the base (13), a top container surface (17) extends inward from the sidewalls (11), the top container surface (17) is provided with an opening (20) that permits access to the interior of the container portion (14) and the opening (20) is bounded by a lip (22) that extends upward from the top container surface (17),

wherein the cap portion (12) has a base portion (24) with an outer periphery (25) that extends over at least a portion of the container portion (14), the base portion (24) is provided with a skirt (26) that depends downwardly from the base portion (24), the skirt (26) is positioned at a location on the base portion (24) that allows the skirt (26) to enter into a sealing relationship with the lip (22) of the container portion (14),

~~characterized in that wherein~~ the skirt (26) fits over the periphery of the lip (22), ~~and in that~~ **wherein** the cap portion (12) further, includes a lip seal member (30) that depends downwardly and extends around the inside of the cap portion (12), wherein the lip seal member (30) is configured to abut at least a portion of the interior side of the lip (22) when the

cap portion (12) is in the closed position such that the lip seal member (30) provides a sealing position, in addition to the one between the skirt (26) and the lip (22), and applies pressure on the lip (22) from the inside out, which in turn applies pressure on the skirt (26), thereby tightening the seal between the skirt (26) and the lip (22) and resulting in a substantially moisture tight seal between the cap portion (12) and the container portion (14),

**characterized in that:**

**the lip seal member (30) has a distal end with a tapered edge, which is adapted to lie against a surface of the lip (22), when the cap portion (12) is in a closed position."**

Claim 1 of **auxiliary request 3** reads as follows (in bold the amendments with respect to claim 1 of the main request; emphasis added by the Board):

"A substantially moisture tight container and cap assembly for storing and packaging moisture-sensitive items comprising an assembly with a container portion (14) and a cap portion (12) that are attached by a hinge (16), wherein the container portion (14) has a container base (13), and sidewalls (11) depending upwardly from the base (13), a top container surface (17) extends inward from the sidewalls (11), the top container surface (17) is provided with an opening (20) that permits access to the interior of the container portion (14) and the opening (20) is bounded by a lip (22) that extends upward from the top container surface (17),

wherein the cap portion (12) has a base portion (24) with an outer periphery (25) that extends over at least a portion of the container portion (14), the base portion (24) is provided with a skirt (26) that depends

downwardly from the base portion (24), the skirt (26) is positioned at a location on the base portion (24) that allows the skirt (26) to enter into a sealing relationship with the lip (22) of the container portion (14),

~~characterized in that wherein~~ the skirt (26) fits over the periphery of the lip (22), ~~and in that~~ **wherein** the cap portion (12) further, includes a lip seal member (30) that depends downwardly and extends around the inside of the cap portion (12), wherein the lip seal member (30) is configured to abut at least a portion of the interior side of the lip (22) when the cap portion (12) is in the closed position such that the lip seal member (30) provides a sealing position, in addition to the one between the skirt (26) and the lip (22), and applies pressure on the lip (22) from the inside out, which in turn applies pressure on the skirt (26), thereby tightening the seal between the skirt (26) and the lip (22) and resulting in a substantially moisture tight seal between the cap portion (12) and the container portion (14),

**characterized in that:**

**at least a portion of the interior side of the lip (22) comprises an angled portion adapted to abut the lip seal member (30) when the cap portion (12) is in a closed position."**

Claim 1 of **auxiliary request 4** reads as follows (in bold the amendments with respect to claim 1 of the main request; emphasis added by the Board):

"A substantially moisture tight container and cap assembly for storing and packaging moisture-sensitive items comprising an assembly with a container portion (14) and a cap portion (12) that are attached by a hinge (16), wherein the container portion (14) has a

container base (13), and sidewalls (11) depending upwardly from the base (13), a top container surface (17) extends inward from the sidewalls (11), the top container surface (17) is provided with an opening (20) that permits access to the interior of the container portion (14) and the opening (20) is bounded by a lip (22) that extends upward from the top container surface (17),

wherein the cap portion (12) has a base portion (24) with an outer periphery (25) that extends over at least a portion of the container portion (14), the base portion (24) is provided with a skirt (26) that depends downwardly from the base portion (24), the skirt (26) is positioned at a location on the base portion (24) that allows the skirt (26) to enter into a sealing relationship with the lip (22) of the container portion (14),

~~characterized in that wherein~~ the skirt (26) fits over the periphery of the lip (22), ~~and in that~~ **wherein** the cap portion (12) further, includes a lip seal member (30) that depends downwardly and extends around the inside of the cap portion (12), wherein the lip seal member (30) is configured to abut at least a portion of the interior side of the lip (22) when the cap portion (12) is in the closed position such that the lip seal member (30) provides a sealing position, in addition to the one between the skirt (26) and the lip (22), and applies pressure on the lip (22) from the inside out, which in turn applies pressure on the skirt (26), thereby tightening the seal between the skirt (26) and the lip (22) and resulting in a substantially moisture tight seal between the cap portion (12) and the container portion (14);

**characterized in that:**

**at least a portion of the lip seal member (30) comprises a curved portion adapted to abut the lip (22) when the cap portion (12) is in closed position."**

Claim 1 of **auxiliary request 5** reads as follows (in bold the amendments with respect to claim 1 of the main request; emphasis added by the Board):

"A substantially moisture tight container and cap assembly for storing and packaging moisture-sensitive items comprising an assembly with a container portion (14) and a cap portion (12) that are attached by a hinge (16), wherein the container portion (14) has a container base (13), and sidewalls (11) depending upwardly from the base (13), a top container surface (17) extends inward from the sidewalls (11), the top container surface (17) is provided with an opening (20) that permits access to the interior of the container portion (14) and the opening (20) is bounded by a lip (22) that extends upward from the top container surface (17),

wherein the cap portion (12) has a base portion (24) with an outer periphery (25) that extends over at least a portion of the container portion (14), the base portion (24) is provided with a skirt (26) that depends downwardly from the base portion (24), the skirt (26) is positioned at a location on the base portion (24) that allows the skirt (26) to enter into a sealing relationship with the lip (22) of the container portion (14),

~~characterized in that wherein~~ the skirt (26) fits over the periphery of the lip (22), ~~and in that~~ **wherein** the cap portion (12) further, includes a lip seal member (30) that depends downwardly and extends around the inside of the cap portion (12), wherein the lip seal member (30) is configured to abut at least a

portion of the interior side of the lip (22) when the cap portion (12) is in the closed position such that the lip seal member (30) provides a sealing position, in addition to the one between the skirt (26) and the lip (22), and applies pressure on the lip (22) from the inside out, which in turn applies pressure on the skirt (26), thereby tightening the seal between the skirt (26) and the lip (22) and resulting in a substantially moisture tight seal between the cap portion (12) and the container portion (14);

**characterized in that:**

**at least a portion of the lip seal member (30) comprises a curved portion adapted to abut an angled portion of the lip (22) when the cap portion (12) is in a closed position."**

Claim 1 of **auxiliary request 6** reads as follows (in bold the amendments with respect to claim 1 of the main request; emphasis added by the Board):

"A substantially moisture tight container and cap assembly for storing and packaging moisture-sensitive items comprising an assembly with a container portion (14) and a cap portion (12) that are attached by a hinge (16), wherein the container portion (14) has a container base (13), and sidewalls (11) depending upwardly from the base (13), a top container surface (17) extends inward from the sidewalls (11), the top container surface (17) is provided with an opening (20) that permits access to the interior of the container portion (14) and the opening (20) is bounded by a lip (22) that extends upward from the top container surface (17),  
wherein the cap portion (12) has a base portion (24) with an outer periphery (25) that extends over at least a portion of the container portion (14), the base

portion (24) is provided with a skirt (26) that depends downwardly from the base portion (24), the skirt (26) is positioned at a location on the base portion (24) that allows the skirt (26) to enter into a sealing relationship with the lip (22) of the container portion (14),

~~characterized in that wherein~~ the skirt (26) fits over the periphery of the lip (22), ~~and in that~~ **wherein** the cap portion (12) further, includes a lip seal member (30) that depends downwardly and extends around the inside of the cap portion (12), wherein the lip seal member (30) is configured to abut at least a portion of the interior side of the lip (22) when the cap portion (12) is in the closed position such that the lip seal member (30) provides a sealing position, in addition to the one between the skirt (26) and the lip (22), and applies pressure on the lip (22) from the inside out, which in turn applies pressure on the skirt (26), thereby tightening the seal between the skirt (26) and the lip (22) and resulting in a substantially moisture tight seal between the cap portion (12) and the container portion (14),

**characterized in that:**

**the cap portion (12) comprises an elastomeric liner positioned on the interior surface of the cap portion (12) lying inside the skirt (26) and lining the lip seal member (30)."**

Claim 1 of **auxiliary request 7** reads as follows (in bold the amendments with respect to claim 1 of the main request; emphasis added by the Board):

"A substantially moisture tight container and cap assembly for storing and packaging moisture-sensitive items comprising an assembly with a container portion (14) and a cap portion (12) that are attached by a

hinge (16), wherein the container portion (14) has a container base (13), and sidewalls (11) depending upwardly from the base (13), a top container surface (17) extends inward from the sidewalls (11), the top container surface (17) is provided with an opening (20) that permits access to the interior of the container portion (14) and the opening (20) is bounded by a lip (22) that extends upward from the top container surface (17),

wherein the cap portion (12) has a base portion (24) with an outer periphery (25) that extends over at least a portion of the container portion (14), the base portion (24) is provided with a skirt (26) that depends downwardly from the base portion (24), the skirt (26) is positioned at a location on the base portion (24) that allows the skirt (26) to enter into a sealing relationship with the lip (22) of the container portion (14),

~~characterized in that wherein~~ the skirt (26) fits over the periphery of the lip (22), ~~and in that~~ **wherein** the cap portion (12) further, includes a lip seal member (30) that depends downwardly and extends around the inside of the cap portion (12), wherein the lip seal member (30) is configured to abut at least a portion of the interior side of the lip (22) when the cap portion (12) is in the closed position such that the lip seal member (30) provides a sealing position, in addition to the one between the skirt (26) and the lip (22), and applies pressure on the lip (22) from the inside out, which in turn applies pressure on the skirt (26), thereby tightening the seal between the skirt (26) and the lip (22) and resulting in a substantially moisture tight seal between the cap portion (12) and the container portion (14),

**characterized in that:**

**the lip seal member (30') is a hollowed out member."**



Claim 1 of **auxiliary request 8** reads as follows (in bold the amendments with respect to claim 1 of the main request; emphasis added by the Board):

"A substantially moisture tight container and cap assembly for storing and packaging moisture-sensitive items comprising an assembly with a container portion (14) and a cap portion (12) that are attached by a hinge (16), wherein the container portion (14) has a container base (13), and sidewalls (11) depending upwardly from the base (13), a top container surface (17) extends inward from the sidewalls (11), the top container surface (17) is provided with an opening (20) that permits access to the interior of the container portion (14) and the opening (20) is bounded by a lip (22) that extends upward from the top container surface (17),

wherein the cap portion (12) has a base portion (24) with an outer periphery (25) that extends over at least a portion of the container portion (14), the base portion (24) is provided with a skirt (26) that depends downwardly from the base portion (24), the skirt (26) is positioned at a location on the base portion (24) that allows the skirt (26) to enter into a sealing relationship with the lip (22) of the container portion (14),

~~characterized in that wherein~~ the skirt (26) fits over the periphery of the lip (22), ~~and in that~~

~~wherein~~ the cap portion (12) further, includes a lip seal member (30) that depends downwardly and extends around the inside of the cap portion (12), wherein the lip seal member (30) is configured to abut at least a portion of the interior side of the lip (22) when the cap portion (12) is in the closed position such that the lip seal member (30) provides a sealing position,

in addition to the one between the skirt (26) and the lip (22), and applies pressure on the lip (22) from the inside out, which in turn applies pressure on the skirt (26), thereby tightening the seal between the skirt (26) and the lip (22) and resulting in a substantially moisture tight seal between the cap portion (12) and the container portion (14);

**characterized in that:**

**at least a portion of the lip seal member (30) comprises a curved portion adapted to abut an angled portion of the lip (22) when the cap portion (12) is in a closed position; and the container comprises an elastomeric liner positioned on the interior surface of the cap portion lying inside the skirt and lining the lip seal member."**

VII. The following documents of the opposition proceedings are of relevance for the present decision:

- D1: US-A-5 842 486
- D2: EP-A-0 328 809
- D3: EP-A-0 208 413
- D4: US-A-5 108 029

VIII. Appellant I argued essentially as follows:

*General discussion on admissibility of auxiliary requests 1 to 8*

The auxiliary requests were filed as quickly as possible and when needed during the opposition and appeal proceedings, in accordance with what appellant I considers usual practice before the opposition divisions and the Boards. This cannot be regarded as a tactical manoeuvre.

For the substantiation of all amendments the publication of the patent (B-publication) was relied upon, the corresponding parts of the application as originally filed (WO-A-2004/033339) are however easy to retrieve.

The auxiliary requests consist in narrowing down the scope of claim 1 of the patent as granted by adding features from the description and/or the drawings in accordance with said usual practice. All added features relate to the very core of the invention, i.e. the double seal skirt-lip-lip seal member. These limitations were to be expected by appellant II.

In any case, the auxiliary requests were filed within the time limit set by the Board for reacting to the appeal of appellant II.

*Admissibility of auxiliary request 1*

The only possible correction of "72EF" with a technical meaning is the temperature, so that the skilled person will immediately understand that 72EF is in fact "72°F".

The skilled reader will realise that the container to be tested as mentioned in claim 1 is closed and comprises the features of the cap as well as the seal, specified in said claim as an assembly. Therefore, the claimed limit for the moisture ingress, which is given as an absolute value, applies to the claimed assembly and *a fortiori* to the seal. This claimed absolute value clarifies the term "substantially" as used in the claim. The word "about" could, if deemed necessary, be deleted from claim 1 and, hence, should not be seen as hindering admissibility.

In the opposition proceedings the patentee reacted to the objections against the then valid auxiliary request 2 by filing the auxiliary request 3, now no longer pursued. Therefore, the conditions set in T 144/09 for the application of Article 12(4) RPBA are not met and, hence, the conclusions therein do not apply.

As a result, auxiliary request 1 does not result in new objection(s) which have not been raised so far in the opposition/appeal proceedings.

*Admissibility of auxiliary requests 2 to 8*

Claim 1 of each of the auxiliary requests 2-8 is properly based on the description and/or the figures of the application as originally filed, so that the requirements of Article 123(2) EPC are fulfilled.

*Main request*

Claim 1 is defined in a dynamic state, not in a static state as evidenced by the expressions used in combination with the active voice. The expression "such that" only refers to the abutment of the lip seal member **such that** it provides a sealing position, but not to the rest of the sentence. This view is fully supported by the description. The skilled person would have no reason to interpret claim 1 otherwise than usual, i.e. in a dynamic state, as shown for instance by D1 and D2. Furthermore, if claim 1 were to be directed to a closed assembly in its static state, it would not be drafted that extensively since it would not be necessary to describe all the closing steps.

Claim 1 excludes a configuration where the skirt biases the lip inwards towards the lip seal member since the seal between the lip and the lip seal member comes first in the closing process of claim 1, pushing the lip radially outwards. As a result, the lip bends from the inside out towards the skirt before any contact between the skirt and the lip occurs. This is a difference with respect to any of D1 to D4 which disclose that the seal skirt-lip comes first, leading to a necessary (compressing) force for closing the assembly which is higher than the (stretching) force needed in the claimed assembly. Since the steps for opening are reversed to those of closing, the claimed assembly will be easier to open than those of the prior art, while still being moisture tight.

In view of the above, none of the features of the characterising portion of claim 1 after "such that the lip seal member provides a sealing position,..." are disclosed in the prior art documents D1 to D4. The subject-matter of claim 1 is therefore novel.

*Auxiliary request 1*

The method for testing the moisture ingress in the characterising portion of claim 1 is clear. A patent proprietor is entitled to define its own testing method which has only to be understandable and applicable by the skilled person.

In such a test, he will naturally select the best possible desiccant together with a size of the container according to that of the patent. As the claimed assembly is for medical products, the tested container is to be small.

The claimed absolute limit for the moisture ingress does not lead to a lack of clarity. As a matter of fact, any tested container and cap assembly with a moisture ingress above the claimed limit will unambiguously fall outside the scope of the claim.

This claimed limit applies to the container and cap assembly as a whole, i.e. *a fortiori* to the seal. Consequently, it also enables the evaluation of the seal quality.

IX. Appellant II argued essentially as follows:

*General discussion on admissibility of auxiliary requests 1 to 8*

The late filing of these auxiliary requests is contrary to Article 12(2) RPBA since the case should have been complete with the statement of grounds of appeal. No reason was given for the late filing, which appears to be a tactical manoeuvre already used in the opposition proceedings. This is an abuse of the procedure.

Article 13(1) and (3) RPBA also applies. The case is complex, firstly due to the high number of new auxiliary requests and secondly due to the fact that each of the new auxiliary requests comprises features which have never been discussed so far. Furthermore, the substantiation of the amendments is insufficient since reference is made only to the publication of the patent as granted (B-publication) but not to the original application. The submissions are also contrary to procedural economy since the features introduced into the claims of the auxiliary requests have now to be discussed for the first time in the appeal proceedings and lead to new objections based on

Articles 84 and/or 123(2) EPC. The remittal to the department of first instance for dealing with these new aspects, would be contrary to procedural economy as well. Finally, the added features imply that a further search would have to be carried out, for which reason they should not be allowed at this stage of the proceedings.

*Admissibility of auxiliary request 1*

The skilled reader will realise that "72EF" is an obvious error but will have the choice between many parameters for its correction. Therefore, the correction contravenes Rule 139 and Article 123(2) EPC.

It is not clear which of the seal, the whole assembly or only the container itself has to be moisture tight. The use of the relative terms "substantially" and "about" also renders claim 1 unclear (Article 84 EPC).

The new auxiliary request 1 should have been filed before the opposition division in reaction to the then existing objections or at least with the statement of grounds of appeal (Article 12(4) RPBA).

*Admissibility of auxiliary requests 2 to 8*

The amendments to claim 1 of each of the auxiliary requests 2 to 8 do not find any direct basis in the application as originally filed, leading to new objection(s) with respect to Article 123(2) EPC which have never been raised nor discussed so far in the opposition/appeal proceedings.

*Main request*

The subject-matter of claim 1 is not novel over each of the documents D1 to D4.

There is nothing in claim 1 or in the description, specifying that the assembly is defined in a closing process. Claim 1 explicitly refers to the claimed assembly "...when the cap portion is **in the closed position** such that...". This expression "such that" also applies directly to all features afterwards, i.e. not only to the lip seal member being mentioned as providing a sealing position.

The wording of claim 1 is based on the description of WO-A-2004-033339, which unambiguously describes the assembly only in the closed state as shown in figure 3. Therefore, no interpretation can be given to claim 1 other than that of the original description, i.e. in a closed state.

There is in the whole application as originally filed, *a fortiori* in claim 1, not a single disclosure specifying in which direction and to which extent the parts of the assembly are to bend.

Appellant I's argument that the feature "thereby tightening the seal between the skirt (26) and the lip (2)" of claim 1 would not be disclosed by the prior art does not apply. Indeed, in view of the material used in the assemblies of the prior art, their skirt, their lip and their lip seal member unambiguously exhibit flexibility to some extent, so that they will act as a spring. The assembly of D2 will in any case function in the manner attributed by appellant I to the assembly of claim 1.



The above applies with respect to each of the documents D1-D4.

*Auxiliary request 1*

The testing method for measuring the moisture ingress as mentioned in the characterising portion of claim 1 is unusual in view of the prior art, in particular the standard testing method as disclosed in D10'. Consequently, no meaningful comparison of the claimed subject-matter with the prior art can be made (Article 84 EPC).

Essential parameters, such as the volume of the tested container and the type of desiccant, are also missing from the testing method. Consequently, the skilled person is left to select these parameters on his own with the risk that the same tested assembly would fall within the claimed scope for some parameters and outside it for others. Therefore, no meaningful comparison with the prior art can be made for this reason as well (Article 84 EPC).

Selecting "the best possible desiccant" is not in claim 1 and does not provide any further indications to the skilled person for its selection, which further implies an undue burden on him to test all possible combinations.

The patent does not mention any specific size of the container or length of the seal, so that the skilled person has no information for their selection. The intended use of the claimed assembly is not specified in claim 1 and is clearly not restricted to "small"

containers for medical products, "small" being in any case a relative term which is unclear in itself.

## **Reasons for the Decision**

### 1. *Admissibility of the auxiliary requests 1 to 8*

The additional features of claim 1 of each of the auxiliary requests 1 to 8 with respect to claim 1 of the patent as granted are shown in bold under point VI above.

#### 1.1 General considerations on admissibility

##### 1.1.1 Appellant II holds the view that the late filing of auxiliary requests is contrary to Article 12(2) RPBA since appellant I's case should have been complete when filing its statement of grounds of appeal.

Appellant II further argues that none of the auxiliary requests should be admitted in the proceedings since no reasons were given for their late filing. As a matter of fact, the auxiliary requests were filed 10 weeks after the summons to oral proceedings and its annex were sent to the parties and were therefore received only 3 weeks before the date scheduled for the oral proceedings. This appears to be the same tactic as used in the opposition proceedings, i.e. filing auxiliary requests at a very late stage. For appellant II, this behaviour is an abuse of procedure, constituting a procedural violation (T 718/89 not published in OJ EPO). Even negligence cannot be an excuse for the late filing, as a party cannot benefit from a better position due to its own negligence (T 1705/07 not published in OJ EPO).

Appellant II also considers that Articles 13(1) and (3) RPBA apply.

It argues that the case becomes more complex, firstly due to the high number of new auxiliary requests and secondly due to the fact that each of the new auxiliary requests comprises features which have never been discussed so far, i.e. they were covered neither by the dependent claims of the patent as granted nor by the former auxiliary requests, as they are based on the description and/or the figures. Furthermore, the substantiation of the amendments is insufficient since reference is only made to the publication of the patent as granted (B-publication) instead of the original application (WO-A-2004-033339). Due to the extensive amendments made to the description by which many of the originally disclosed embodiments were excluded from the patent as granted, the B-publication differs considerably from the application as originally filed and, hence, it is not clear whether the features added to the claims 1 of the new auxiliary requests are still based on embodiments according to the invention (T 253/06 not published in OJ EPO).

Appellant II also considers that the resulting case is contrary to procedural economy since new aspects, i.e. new features taken from the description and/or the figures are introduced into the claims which have thus to be discussed for the first time in appeal proceedings, shifting the case entirely to the second instance. These added features lead to new objections based on Article 123(2) EPC, more in particular inadmissible intermediate generalisations, constituting a fresh case which should not be allowed for the sake of procedural economy (T 356/08 not published in OJ EPO). The latter would also be at stake if the case had

to be remitted to the department of first instance for dealing with these new aspects (T 1067/08 not published in OJ EPO).

Appellant II further holds the view that the added features in any case imply that a further search has to be carried out for obtaining any relevant prior art. This should not be allowed at this stage of the proceedings.

- 1.1.2 Appellant I argues that, due to the fact that the preliminary opinion of the opposition division given in the summons to oral proceedings was positive, it did not consider it necessary to file auxiliary requests before the opposition oral proceedings, in accordance with what is usual practice. However, as soon as it realised at the oral proceedings that the opposition division had surprisingly changed its mind, it reacted and filed auxiliary requests. This is also usual practice.

Appellant I further argues that it was convinced that it could challenge the impugned decision on its main request, but once again was surprised, this time by the negative preliminary opinion of the Board provided in the annex to the summons to oral proceedings. It reacted as quickly as possible by filing these new auxiliary requests 1 to 8. However, since its client is based in the United States, 10 weeks time for agreeing on new requests is normal. In any case, a one month notice before the oral proceedings for filing new requests also corresponds to usual practice before the boards. For appellant I the filing of the new auxiliary requests 1 to 8 cannot therefore be regarded as a tactical manoeuvre but rather as usual practice in opposition-appeal proceedings. It further argues that

it interpreted point 8 of the preliminary opinion of Board as an invitation to file new requests.

With respect to the substantiation of the support for the amendments, the descriptions in the publications of the application as filed (WO-A-2004-033339) and of the patent as granted (B-publication) are identical for the relevant features, so that it is not a burden to find the corresponding passage in the original application when reference is made to paragraphs of the B-publication.

For appellant I, the new requests do not change the nature of the invention since they consist in adding features, i.e. narrow down the scope of claim 1 of the patent as granted. Taking features from the description and/or the drawings also belongs to usual practice and the EPC does not oblige a patent proprietor to limit an independent claim exclusively on the basis of the subject-matter of its sub-claims. In addition, all features added to claims 1 of the auxiliary requests relate to further specifying the very core of the invention, i.e. the double seal skirt-lip-lip seal member. These restrictions were to be expected by appellant II, so that it could have performed the relevant additional searches.

There can be no question of inadmissible intermediate generalisations by the claims as none of the claims currently on file encompasses undisclosed embodiments.

Appellant I further argues that an auxiliary request should not be denied admission if it has patentability merits.

Finally, the requests were filed within the time limit set by the Board for replying to the appeal of appellant II.

- 1.1.3 Starting from this last argument, that the auxiliary requests should in any case be admitted since they are filed within the time limit to reply to the appeal of appellant II, the Board notes that it can clearly not hold.

The content of these requests is not a reply to that appeal but forms part of appellant I's own appeal, because it aims at improving appellant I's position over the version of the patent as maintained by the impugned decision. The auxiliary requests do not constitute support for that maintained version nor are they further fall-back positions to a more limited version.

- 1.1.4 The Board agrees with appellant II that the case of each party should be complete when filing the statement setting out the grounds of appeal in accordance with Article 12(2) RPBA. Article 13(1) and (3) RPBA, however, gives the Boards discretion in admitting any further submissions. Point 8 of the annex to the summons to oral proceedings is specifically there to draw the parties' attention to this discretionary power. It is not an invitation nor an instruction of the Board to file new submissions, see Case Law of the Boards of Appeal, 7th Edition, 2013, chapter IV.E. 4.4.11.

- 1.1.5 In view of the course of the opposition-appeal proceedings the Board is of the opinion that appellant I did not abuse its procedural rights. Further, there is no general principle systematically not to admit new

(auxiliary) requests nor is there a general rule that the patent proprietor cannot select features from the description and/or drawings for amending the claims.

The Board is also of the opinion that the substantiation of the support for the amendments is sufficient in the present case and that it can easily be retrieved from the corresponding parts of WO-A-2004-033339. Finally, a high number of new auxiliary requests and the fact that features are taken from the description and/or drawings is not sufficient in itself to render this particular case complex.

The Board considers, however, that it would be contrary to the principle of procedural economy (Article 13(1) RPBA), if admission of the amended requests were *prima facie* to lead to new objections or raise new issues which were not raised or discussed so far in the opposition/appeal proceedings. The discussion on the patentability merit of these requests is relevant only if the auxiliary requests are first admitted in the proceedings. An adjournment of the oral proceedings, as proposed by appellant I, in order to give more time to appellant II for considering these requests and, if necessary, perform a further search, would be even more contrary to the aforementioned principle and even subject to the application of Article 13(3) RPBA.

Consequently, in view of the above, it appears necessary to assess whether the new auxiliary requests 1 to 8 *prima facie* lead to valid new objection(s) or raise new issues.

1.2 *Admissibility of auxiliary request 1*

1.2.1 Claim 1 of auxiliary request 1 is based on claim 1 of the former auxiliary request 2 filed with the statement of grounds of appeal and discussed in both the impugned decision (point 7) and the Board's annex to the summons for oral proceedings (point 6).

1.2.2 Appellant II admits that a skilled reader will realise that "72EF" in paragraph [0035] of the description is an obvious error, but contests that "72°F (22.2°C)" now introduced in claim 1 of auxiliary request 1 is the only possible correction. It considers that instead of the temperature the correction could for instance concern the pressure or any other parameter the skilled person could think of in the technical field of testing moisture ingress of containers. Therefore, the correction would not be admissible as it clearly contravenes Rule 139 and Article 123(2) EPC.

The Board, however, shares appellant I's view that the only possible correction having a technical meaning in the present context is the temperature as it is an essential parameter for such a test. This appears clearly for instance from D10, 1st page, top of right-hand column (see also D10', page 1937, left-hand column, "Procedure"). Consequently, the skilled person will immediately consider that "F" means "Fahrenheit" and make the correction accordingly. Hence, the correction complies with Rule 139 and Article 123(2) EPC.

1.2.3 Appellant II further holds the view that there is an inconsistency between "substantially moisture tight container and cap **assembly**" and "substantially moisture tight **seal**" in the preamble of claim 1. It is not clear



whether only the seal or the assembly has to be moisture tight. The test of the amended characterising portion is even directed to the **container** as such, i.e. without mention of the cap or seal nor of the assembly, thus adding to the lack of clarity (Article 84 EPC).

The use of the word "substantially" seems even to imply that the moisture tightness of the assembly and seal is less than that of the tested container (Article 84 EPC).

Further, the claimed limit for the container is unclear as the word "about" is used (Article 84 EPC).

The Board, however, shares appellant I's view that the test mentioned in the characterising portion explicitly specifies that the container is in the closed state when tested. This implies for the skilled reader that the container and cap assembly are tested in a closed state with the features of the cap and the seal as specified in said claim. Any other interpretation would not make technical sense. Therefore, the moisture ingress which is given as an absolute value applies to the claimed assembly of container, cap and *a fortiori* the seal. The Board further agrees that the claimed absolute value for the moisture ingress enables to clarify the word "substantially" used in the claim and also that the word "about" cannot hinder admissibility of the auxiliary request 1.

- 1.2.4 Appellant II also argues that the new auxiliary request 1 should not be admitted on the basis of Article 12(4) RPBA since it should have been filed before the opposition division as a proper reply to the objections based on Articles 123(2) and 84 EPC raised against former auxiliary request 2, which forms the basis for

this auxiliary request (T 144/09 not published in OJ EPO). It was however not even filed with the statement of grounds of appeal.

The Board cannot share appellant II's view since the objection of lack of clarity raised in the opposition proceedings against the former auxiliary request 2 was based on undefined structural features for achieving the claimed result. Appellant I reacted by filing the former auxiliary request 3, which indeed comprises a structural feature (desiccant).

Further, the Board cannot identify a valid objection on the basis of Article 123(2) EPC against former auxiliary request 2 either. Therefore, the conditions set out in decision T 144/09 are not met and, hence, its conclusions do not apply.

1.2.5 In view of the above, auxiliary request 1 does not *prima facie* lead to a new and valid objection never raised and discussed so far in the opposition/appeal proceedings, so that it is admitted in the proceedings.

### 1.3 *Admissibility of auxiliary request 2*

The objections against auxiliary request 2 concern the features added in the characterising portion of its claim 1 that the lip seal member (30) has a distal end with a tapered edge, which is adapted to lie against a surface of the lip (22), when the cap portion (12) is in a closed position.

Appellant I argues that claim 1 of auxiliary request 2 is based on claim 1, on paragraphs [0025] and [0026] of the description and, more particularly, on figures 2, 3 and 4 of the patent as granted.

The Board, however, shares appellant II's view that figures 2, 3 and 4 cannot serve as basis since they do not disclose that the **distal end** of the lip seal member has a **tapered edge** nor that the latter lies against a surface of the lip. The cited paragraphs of the patent description [0025] and [0026] (corresponding to page 8, lines 5 to 14 of WO-A-2004/033339) cannot help in this respect, since for the claimed feature "lip seal member" it is referred instead to a "lip", and for the claimed feature "lip" to an "edge".

As a result, there is no *prima facie* basis in the application as originally filed for the amendments to claim 1 of auxiliary request 2 (Article 123(2) EPC). Further, these paragraphs refer to figures 7 and 7a which in the patent in suit are declared to be for an embodiment no longer forming part of the invention.

#### 1.4 *Admissibility of auxiliary requests 3, 4 and 5*

The following features, added in the characterising portion of claims 1 of the auxiliary requests, are considered:

- at least a portion of the interior side of the lip (22) comprises an angled portion adapted to abut the lip seal member (30) when the cap portion (12) is in a closed position (auxiliary request 3);
- at least a portion of the lip seal member (30) comprises a curved portion adapted to abut the lip (22) when the cap portion (12) is in closed position (auxiliary request 4); and

- at least a portion of the lip seal member (30) comprises a curved portion adapted to abut an angled portion of the lip (22) when the cap portion (12) is in a closed position (auxiliary request 5).

Appellant I argues that claim 1 of each of the auxiliary requests 3, 4 and 5 is based on claim 1 of the patent as granted and the disclosure of figures 2, 3 and 4.

The Board, however, shares appellant II's view as put forward during the oral proceedings that the added features are selectively picked from figures 2, 3 and 4 and thus make claim 1 of each of the auxiliary requests 3, 4 and 5 encompass embodiments which are not derivable from the application as originally filed.

In fact, the added features have been isolated from the combination of features as disclosed in figures 2, 3 and 4 for the closed position of the cap, which - as will be seen in the discussion of the main request - is considered by appellant I as the essence of the invention since it concerns the moisture ingress. Said features are, however, clearly functionally linked with other features for keeping the container and cap assembly closed. These other features, such as the angled portion of the lip being fixed to the upper part of lip 22 and having a free end, if it is to cooperate with the lip seal member, are not included in the amendment. This also leads to embodiments now being encompassed which lack a direct and unambiguous disclosure, as argued by appellant II, such as the angled portion not having a free end (auxiliary requests 3 and 5) or the straight lip seal member having a free end with a section in the form of a

curved knob (auxiliary request 4 and 5) (see in this respect T 1408/04, reasons 1, third paragraph and the decisions specifically referring to T 1408/04 in connection with undisclosed encompassed embodiments: T 1582/08; reasons 11 to 13; T 219/09, reasons 3.3; T 1397/09, reasons 5.3; T 2085/09, reasons 2.2.3. and T 2359/09, reasons 2.4.2, all not published in OJ EPO). This leads *prima facie* to an inadmissible intermediate generalisation (Article 123(2) EPC).

#### 1.5 *Admissibility of auxiliary request 6*

The features concerned are those added in the characterising portion of claim 1 of auxiliary request 6, namely that the cap portion (12) comprises an elastomeric liner positioned on the interior surface of the cap portion (12) lying inside the skirt (26) and lining the lip seal member (30).

Appellant I argues that claim 1 of auxiliary request 6 is based on claim 1, on paragraph [0019], lines 27-32, and on figure 1 of the patent as granted.

The Board shares appellant II's view as expressed in the oral proceedings that the reference (36) is not shown in any of the figures, *a fortiori* not in figure 1. Where it is discussed in respect of an embodiment (page 6, lines 21-25 of WO-A-2004-033339), it is mentioned in connection with "lip seals", i.e. a plurality of lip seals, contrary to present claim 1 which refers to the "lip seal **member**" for the application of the liner, i.e. in the singular. The amendment has therefore *prima facie* no support in the application as originally filed (Article 123(2) EPC).

1.6 *Admissibility of auxiliary request 7*

The features concerned are those added in the characterising portion of claim 1 of auxiliary request 7, namely that the lip seal member (30') is a hollowed out member.

Appellant I argues that claim 1 of auxiliary request 7 is based on claim 1, on paragraph [0012], lines 32-33, and on figure 4 of the patent as granted.

The Board agrees that a literal basis for the amendment can be found on page 5, line 21 of WO-A-2004/033339. The Board shares appellant II's opinion, however, that the skilled person will not interpret this passage of the description in such an isolated manner as does appellant I and see this as a disclosure of any hollowed out shape for the lip seal member, as is now claimed. Indeed, this mention of the hollowed out member in the description is explicitly linked to figure 4 showing that the hollow is provided from the outside of the cap and follows the inner contour of the lip seal member. These features are not included in the amendment. Therefore, as mentioned above for auxiliary requests 3 to 5, the claim now encompasses embodiments, e.g. with the lip seal member having a hollow opposite its contact area with the lip, for which there is no unambiguous basis. Such an intermediate generalisation of this passage of the description to any possible hollow shape for the lip seal member is *prima facie* inadmissible (Article 123(2) EPC)

1.7 *Admissibility of auxiliary request 8*

The features concerned are those added in the characterising portion of claim 1 of auxiliary request 8, namely that:

at least a portion of the lip seal member (30) comprises a curved portion adapted to abut an angled portion of the lip (22) when the cap portion (12) is in a closed position; and  
the container comprises an elastomeric liner positioned on the interior surface of the cap portion lying inside the skirt and lining the lip seal member.

Since claim 1 of auxiliary request 8 comprises the added features of claims 1 of the auxiliary requests 5 and 6, the same objections as raised against said auxiliary requests also hold true against auxiliary request 8 (Article 123(2) EPC).

1.8 In view of the above, each of the auxiliary requests 2 to 8 leads *prima facie* to new valid objection(s) and issues with respect to Article 123(2) EPC which have never been raised or discussed so far in the opposition/appeal proceedings, so that said requests are not admitted in the proceedings (Articles 13(1) RPBA).

2. *Main request*

2.1 The opponent had raised an objection of lack of novelty against claim 1 of the main request vis-à-vis each of the documents D1 to D4 (impugned decision, point 5 of the reasons).

2.2 For ease of reference, the Board will use the following feature designation for the characterising portion of

claim 1 of the main request, which are the features essentially contested:

- f10 the skirt (26) fits over the periphery of the lip (22)
- f11 the cap portion (12) further includes a lip seal member (30) that depends downwardly and extends around the inside of the cap portion (12),
- f12 wherein the lip seal member (30) is configured to abut at least a portion of the interior side of the lip (22) when the cap portion (12) is in the closed position
- f13a such that the lip seal member (30) provides a sealing position, in addition to the one between the skirt (26) and the lip (22),
- f13ba and applies pressure on the lip (22) from the inside out,
- f13bb which in turn applies pressure on the skirt (26),
- f13bc thereby tightening the seal between the skirt (26) and the lip (22)
- f13bd and resulting in a substantially moisture tight seal between the cap portion (12) and the container portion (14).



2.3 Novelty vis-à-vis D2

2.3.1 Document D2 (column 1, lines 1-4; column 2, line 40 to column 3, line 24; figures 1-5) discloses a tight sealed container and cap assembly, i.e. a "substantially" moisture tight assembly, which the Board considers to be suitable for storing and packaging moisture-sensitive items, comprising an assembly with a container portion (first part 11) and a cap portion (second part 12) that are attached by a hinge (30),

wherein the container portion (11) has a container base (bottom of container C), and sidewalls (peripheral skirt 15) depending upwardly from the base (bottom of container C), a top container surface (base wall 14) extends inward from the sidewalls (peripheral skirt 15), the top container surface (14) is provided with an opening (outlet) that permits access to the interior of the container portion (11) and the opening is bounded by a lip (spout 17) that extends upward from the top container surface (14),

wherein the cap portion (12) has a base portion (base wall 21) with an outer periphery (peripheral skirt 22) that extends over at least a portion of the container portion (11), the base portion (21) is provided with a skirt (outer wall 25) that depends downwardly from the base portion (21), the skirt (outer wall 25) is positioned at a location on the base portion (21) that allows the skirt (outer wall 25) to enter into a sealing relationship with the lip (spout 17) of the container portion (14).

In the assembly of D2, the skirt (outer wall 25) fits over the periphery of the lip (spout 17) due to the fact that "the inner diameter of the outer wall 25 is slightly less than the outer diameter of the spout 17

near the rim 18 such that the wall 25 **engages and seals** against the outer surface of the spout 17" (column 3, lines 16-19).

Furthermore, the cap portion (12) includes a lip seal member (inner wall 24) that depends downwardly and extends around the inside of the cap portion (12), wherein the lip seal member (inner wall 24) is configured to abut at least a portion of the interior side of the lip (spout 17) when the cap portion (12) is **in the closed position** such that the lip seal member (inner wall 24) provides a sealing position as a result of the bead 19 on the lip (spout 17) "providing a **friction fit** for innermost wall 24" (column 3, lines 20-24).

The latter sealing position is in addition to the one between the skirt (outer wall 25) and the lip (spout 17), and applies pressure on the lip (spout 17) from the inside out, which in turn applies pressure on the skirt (outer wall 25), thereby tightening the seal between the skirt (outer wall 25) and the lip (spout 17) and resulting in a tight seal between the cap portion (12) and the container portion (11).

Consequently, the subject-matter of claim 1 is not novel over D2 (Article 54(1) EPC).

- 2.3.2 Appellant I contests that D2 discloses features f13ba to f13bd. It considers that claim 1 is defined in a dynamic state, i.e. in the closing process, not in a static state, i.e. not in the closed position (see also impugned decision, point 5.10 of the reasons).

It argues that this is apparent from the expressions used, such as "allows ... to enter into a sealing

relationship", "configured to abut", "in turn" and "thereby" combined with the use of the active voice, such as "applies", "tightening" and "resulting in", which make clear that there is a causal sequence and that the features refer to the closing process. "Tightening", in particular, is not a static concept but rather a dynamic one since it requires a force to increase over time. The last feature of the claim (f13bd) further explicitly gives the final result of the closing process ("resulting in").

Furthermore, the expression "such that" (feature 13a) is to be interpreted in that the lip seal member is configured to abut **such that** it provides a sealing position and, hence, is not to be linked to the rest of the claim (features f13a and f13ba to f13bd). It only explains the abutment of feature f12, not the rest of that feature referring to the "closed position".

The description of the patent, [0011] and [0012], also fully supports this view. These paragraphs of the description are understood by the skilled reader to explain how to get to the closed position shown in figure 3, not how it is when closed.

In fact, a similar disclosure is made in D1 (column 5, lines 40-60) and D2 (column 3, line 52 to column 4, line 21) which unambiguously shows that it is usual to describe such containers and cap assemblies in dynamic terms. As a result, the skilled person reading the contested patent would have no reason to interpret claim 1 otherwise than is usual practice, i.e. see it only in its dynamics.

Appellant I further alleges that a closed position is not even disclosed in the application as a whole and,

if the claim were to be directed to a closed assembly, it would not be drafted as extensively as it is. In a closed position the forces are balanced and, hence, it would make no sense to describe all the steps, i.e. actions and reactions in terms of forces, as is the case in claim 1.

Features **f13ba, f13bb, f13bc and f13bd** are therefore not disclosed in the prior art. This applies to each of the documents D1 to D4.

- 2.3.3 The Board cannot share the appellant I's interpretation of claim 1 since there is nothing in claim 1 or in the description, specifying that the assembly is defined in **a closing process**.

There is no sequential order to be found in features f13ba to f13bd. On the contrary, the said features merely describe the functionalities and consequences of the lip seal member, how it interacts with the other parts of the assembly **in the closed position**. Indeed, claim 1 explicitly refers to the claimed assembly having a lip seal member configured to abut "...when the cap portion is **in the closed position** such that..." (feature f12). Not only does this expression "such that" include the fact that the cap portion is in the closed position, it also applies directly to features f13a and f13ba-f13bd, contrary to appellant I's interpretation.

As put forward by appellant II, the wording used in claim 1, such as "tightening", is not limited to a dynamic closing process but also fully applies to the state after the cap has been closed, its actual meaning depending on the context. Therefore, there is no reason

to depart from the reasoning and conclusion given in the impugned decision, point 5.11 of the reasons.

The skilled person would find no reason in the whole application of the contested patent as originally filed to understand and interpret claim 1 differently than by the wording used, i.e. **in the closed position**.

As put forward by appellant II, the wording of claim 1 stems from page 5, lines 12-21 of WO-A-2004/033339 ([0012] of the contested patent), which unambiguously describes the assembly in the closed state. Indeed, the passage explicitly mentions "this arrangement, as shown in figure 3"; this figure shows the assembly in the closed position. Even the preceding paragraph (corresponding to [0011] of the contested patent) refers to what happens in the closed position ("when the cap portion is closed on the container portion"), not in a closing process. Therefore, there cannot be any interpretation given to claim 1 which is different from that of the original description.

2.3.4 Appellant I further considers that claim 1 excludes configurations where the skirt biases the lip inwards towards the lip seal member (see page 7 of its statement of grounds of appeal).

It considers that it is clear from features f13a to f13bb that the lip seal member biases the lip toward the skirt ("from the inside out") and refers to figures 2, 3 and 4 for support. Consequently, the subject-matter of claim 1 is novel since none of D1 to D4 discloses directly and unambiguously that the pressure is applied by the lip seal member on the lip from the inside out during the closing process (distinguishing features f13ba to f13bc).

As a matter of fact, appellant I holds the view that due to the wording of claim 1, which defines the assembly functionally in a closing process as discussed under point 2.3.2 above, the seal lip-lip seal member comes first in the closing process of the present patent, stretching the lip radially outwards, the seal skirt-lip coming afterwards. As a result of this sequence, the lip bends from the inside out towards the skirt before any contact between the skirt and the lip occurs. This would be different from the prior art D1-D4 which disclose that the seal skirt-lip comes first (D1, column 5, lines 50-54; D2, column 3, lines 10-13; D3, column 3, lines 3-7; D4, figure 4).

As a result of this, the force needed for closing the assembly in the prior art is higher than that in the claimed assembly, since compressing a ring of material inwardly, i.e. the lip, requires a higher force than for stretching it outwardly as in the invention (see paragraph 3.1.4 of its statement of grounds of appeal, in particular the figure on top of page 9). Since the steps for opening the assembly are reversed to those of closing, the claimed container and cap assembly will be easier to open than that of the prior art. The technical problem solved by claim 1 is to make the container and cap assemblies of the prior art easier to open while still being moisture tight.

2.3.5 The Board, however, shares appellant II's view that in the application as originally filed there is not a single disclosure specifying in which direction and to which extent the parts of the assembly are to bend, either in the closed position or during closing for that matter.

Claim 1, which relates to the closed state as mentioned under point 2.3.3 above, is obviously silent on which of the sealing actions - skirt-lip or lip-lip seal member - comes first in the closing process.

Appellant I seems to interpret into claim 1 features which are not included therein and in actual fact not even disclosed in the original application as a whole. Indeed, the lip might well bend in the other direction, i.e. towards the lip seal member, if the contact between the skirt and the lip takes place first, while still fulfilling the claimed feature that the lip seal member applies pressure on the lip "from the inside out".

Only pressures in the closed position are specified in claim 1, which, however, do not allow to conclusively decide on any biasing direction for any part. How each of the interconnected parts of the seal (skirt-lip and lip-lip seal member) is to be biased in the closed position or even in the closing process, depends on their own stiffness as a result of their shape, the material they are made of and also where they contact each other.

Consequently, appellant I's interpretation of claim 1 and its corresponding arguments are not convincing.

- 2.3.6 The Board agrees with appellant I's interpretation that the lip seal member could be considered as a spring in claim 1. So could also be understood the lip as well as the skirt.

However, the assembly of D2 is made of plastic such as polypropylene (column 2, lines 40-45), so that the lip seal member (inner wall 24) unambiguously exhibits

flexibility to some extent and can act as a spring, like the skirt (outer wall 25) and the lip (spout 17) of the assembly of D2, thereby tightening the seal between the skirt and the lip and resulting in a moisture tight seal between the cap portion and the container portion.

As a result, appellant I's argument that this feature f13bc would not be disclosed by D2 cannot hold.

The structural arrangement of D2 is indeed unambiguously adapted for transferring the pressure, at least partially, in the closed position between both sides of the lip (spout 17), reaching that way a static equilibrium of the forces. Therefore, features f13ba to f13bd are inherent to the assembly of D2 in the closed position.

In this context, it is noted that the transfer of pressure (ratio of the applied force over a surface) is not different from the transfer of force.

#### 2.4 Novelty vis-à-vis documents D1, D3 and D4

- 2.4.1 D1 (column 3, line 38 to column 6, line 12; figures 2-8) discloses an air tight container and cap assembly (compact 10 with insert 22), i.e. "substantially" moisture tight, suitable for storing and packaging moisture-sensitive items comprising an assembly with a container portion (14, 26) and a cap portion (12, 24) that are attached by a hinge (28), wherein the container portion (14, 26) has a container base (13, 14), and sidewalls depending upwardly from the base (13, 14), a top container surface (35) extends inward from the sidewalls, the top container surface (35) is provided with an opening that permits access to



the interior (32) of the container portion (14, 26) and the opening is bounded by a lip (38) that extends upward from the top container surface (35), wherein the cap portion (12, 24) has a base portion with an outer periphery that extends over at least a portion of the container portion (14, 26), the base portion is provided with a skirt (33) that depends downwardly from the base portion, the skirt (33) is positioned at a location on the base portion that allows the skirt (33) to enter into a sealing relationship with the lip (36) of the container portion (14, 26).

In the assembly of D1, the skirt (33) fits over the periphery of the lip (38).

Furthermore, the cap portion (12, 24) includes a lip seal member (44) that depends downwardly and extends around the inside of the cap portion (24), wherein the lip seal member (44) is configured to abut at least a portion of the interior side of the lip (36) when the cap portion (12, 24) is in the closed position such that the lip seal member (44) provides a sealing position, in addition to the one between the skirt (33) and the lip (36), and applies pressure on the lip (36) from the inside out, which in turn applies pressure on the skirt (33), thereby tightening the seal between the skirt (33) and the lip (36) and resulting in a substantially moisture tight seal between the cap portion (12, 24) and the container portion (14, 26).

- 2.4.2 Document D3, which has a disclosure similar to D2, discloses (column 2, line 28 to column 3, line 12; figures 2 and 3) a tight container and cap assembly, i.e. "substantially" moisture tight, suitable for storing and packaging moisture-sensitive items

comprising an assembly with a container portion (first part 11) and a cap portion (second part 12) that are attached by a hinge (13), wherein the container portion (11) has a container base (container), and sidewalls (peripheral skirt 15) depending upwardly from the base (container), a top container surface (base wall 14) extends inward from the sidewalls (15), the top container surface (14) is provided with an opening (outlet) that permits access to the interior of the container portion (11) and the opening (outlet) is bounded by a lip (spout 17) that extends upward from the top container surface (14), wherein the cap portion (12) has a base portion (base wall 20) with an outer periphery (peripheral skirt 21) that extends over at least a portion of the container portion (11), the base portion (20) is provided with a skirt (outer wall 23) that depends downwardly from the base portion (20), the skirt (23) is positioned at a location on the base portion (20) that allows the skirt (23) to enter into a sealing relationship with the lip (17) of the container portion (11).

In the assembly of D3, the skirt (23) fits over the periphery of the lip (17). Furthermore, the cap portion (12) includes a lip seal member (inner wall 22) that depends downwardly and extends around the inside of the cap portion (12), wherein the lip seal member (22) is configured to abut at least a portion of the interior side of the lip (17) when the cap portion (12) is in the closed position such that the lip seal member (22) provides a sealing position, in addition to the one between the skirt (23) and the lip (17), and applies pressure on the lip (17) from the inside out, which in turn applies pressure on the skirt (23), thereby tightening the seal between the skirt (23) and the lip (17) and resulting in a substantially moisture tight

seal between the cap portion (12) and the container portion (11).

- 2.4.3 Document D4 (column 5, line 34 to column 7, line 17; figures 1, 3-4, 11-12, 17 and 19) discloses an air and liquid tight container and cap assembly (10), i.e. "substantially" moisture tight, suitable for storing and packaging moisture-sensitive items comprising an assembly with a container portion (12, 80) and a cap portion (14) that are attached by a hinge (18), wherein the container portion (12, 80) has a container base (base of container 60, 80, 90), and sidewalls depending upwardly from the base (see figures 11-13), a top container surface (20, 82) extends inward from the sidewalls, the top container surface (20, 82) is provided with an opening that permits access to the interior of the container portion (12, 80) and the opening is bounded by a lip (24) that extends upward from the top container surface (20, 80), wherein the cap portion (14) has a base portion (32, 48) with an outer periphery that extends over at least a portion of the container portion (12), the base portion (32, 48) is provided with a skirt (41) that depends downwardly from the base portion (32, 48), the skirt (41) is positioned at a location on the base portion (32, 48) that allows the skirt (41) to enter into a sealing relationship with the lip (24) of the container portion (12, 80).

In the assembly of D4 the skirt (41) fits over the periphery of the lip (24). Furthermore, the cap portion (14) includes a lip seal member (annular seal 34) that depends downwardly and extends around the inside of the cap portion (14), wherein the lip seal member (34) is configured to abut at least a portion of the interior side of the lip (24) when the cap portion (14) is in

the closed position such that the lip seal member (34) provides a sealing position, in addition to the one between the skirt (41) and the lip (24), and applies pressure on the lip (24) from the inside out, which in turn applies pressure on the skirt (41), thereby tightening the seal between the skirt (41) and the lip (24) and resulting in a substantially moisture tight seal between the cap portion (14) and the container portion (12).

2.4.4 Therefore, for similar reasons as put forward vis-à-vis D2 under point 2.3 above, the subject-matter of claim 1 lacks novelty over each of the documents D1, D3 and D4 (Article 54(1) EPC).

3. *Auxiliary request 1*

3.1 The opponent has raised a lack of clarity objection against claim 1 of auxiliary request 1 (impugned decision, point 7 of the reasons).

3.2 Claim 1 corresponds to claim 1 of the main request with the additional feature:

- (ii) **the moisture ingress of the container after three days is less than about 750 micrograms of water determined by the following test method: (a) place one gram plus or minus 0.25 grams of molecular sieve in the container and record the weight; (b) fully close the container; (c) place the closed container in an environmental chamber at conditions of 80% relative humidity and 22.2°C; (c) after one day, weigh the container containing the molecular sieve; (d) after four days, weigh the container containing the molecular sieve; and (e) subtract the first day**

**sample from the fourth day sample to calculate the moisture ingress of the container in units of micrograms of water.**

3.3 Since feature (ii) is the sole distinguishing feature for the purpose of acknowledging novelty over the container and cap assemblies of D1 to D4, it must clearly fulfil the requirements of Article 84 EPC.

3.4 The Board concurs with appellant II that the method of measuring the moisture ingress in accordance with feature (ii) is unusual. None of the available prior art directed to a container and cap assembly refers to a measuring procedure of the moisture ingress. Not even the standard test for pharmaceutical containers (which according to appellant I are those to which the claimed assembly is essentially directed), as given in D10', discloses a procedure in this general manner (page 1937, left-hand column, sections "Desiccant" and "Procedure"). Indeed, the procedure disclosed in D10' does not mention 1 gram of desiccant nor the measurement after 1 and 4 days as in claim 1. It rather considers a test lasting as long as 14 days, with an amount of desiccant that depends on the size of the container, i.e. its volume. Such features are not at all comprised in the claimed test.

Essential parameters are missing from the testing method. Indeed, neither the volume of the tested container nor the type of desiccant and its prior preparation is specified in the method, contrary to the standard test as disclosed in D10'. In said standard test both the **desiccant**, i.e. dried and cooled anhydrous calcium chloride of 4 to 8 mesh, and the **volume of the tested container**, i.e. limits of 20 or 200 ml, are specified. The results of the measurements

are furthermore given relative to the volume V of the container (see equation, page 1937, left-hand column). This is not the case for the mere absolute limit of 750 micrograms as claimed.

The Board also shares appellant II's view, not disputed by appellant I, that a larger container will imply a higher amount of moisture ingress and, similarly, a more efficient desiccant will also imply a higher amount of moisture uptake, i.e. ingress.

Consequently, the sole distinguishing feature (ii) over the prior art is an unclear feature (Article 84 EPC) leading to the impossibility of a meaningful comparison with the prior art.

3.5 Appellant I argues that a patent proprietor is entitled to define its own testing method. This is usual practice. The testing method has only to be applicable with clear indications for the skilled person on how to perform it. This is unambiguously the case here with the presently claimed method. The skilled reader understands this testing method and would find no difficulty to perform it. In a natural way, he will select the best possible desiccant together with a container size according to the patent in order to obtain results allowing a meaningful comparison. As it is apparent from the description ([0007]), the claimed assembly is for medical products and, hence, the container is to be small.

Mentioning only the absolute limit for the moisture ingress results from a choice of the patent proprietor in order to draft a clear claim. As a matter of fact, thanks to this claimed limit, any tested container and cap assembly with a moisture ingress above the

mentioned value would unambiguously fall outside the scope of the claim. This is easy to assess and, hence, makes clear what is and what is not within the scope of the claim.

The claimed absolute limit for the moisture ingress applies to the container and cap assembly as a whole, i.e. *a fortiori* to the seal. Consequently, it enables the evaluation of the seal quality.

- 3.6 The Board cannot share appellant I's view for the reasons already given under point 3.4 above. The skilled person is indeed left with the choice of the desiccant and of the size of the container, i.e. including a choice for the length of seal, when comparing the assembly of claim 1 with an assembly of the prior art, i.e. for testing whether an assembly of the prior art falls or not within the scope of claim 1.

As put forward by appellant II, selecting "the best possible desiccant" as proposed by appellant I, firstly, is not in claim 1 and, secondly, does not give any hint to the skilled reader on which to choose. As it appears from D10', page 1937, top of left-hand column, not only the composition of the desiccant but also the size of the particles (mesh) with their method of preparation (drying temperature and time) have to be selected. The skilled person is therefore already faced with the undue burden of cross testing any composition with any particle size and any method of preparation.

Concerning the size of the container, the patent does not mention any specific size or length of the seal so that the skilled person is left without any information for their selection. The intended use of the claimed assembly, which is in any case not specified in

claim 1, is not restricted to medical products as explicitly mentioned in the description ([0007]). Consequently, the skilled person will have no reason to select "small" containers to be tested, contrary to appellant I's view, "small" being in any case a relative term.

3.7 As a result, the auxiliary request 1 cannot be allowed.

4. In view of the appeal of appellant I being unsuccessful and as a result of appellant I no longer pursuing the version of the patent as maintained by the department of first instance (see point V above), there is no allowable request on file and, hence, its appeal is to be dismissed.

## 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:



G. Nachtigall

H. Meinders

Decision electronically authenticated