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**Datasheet for the decision  
of 23 February 2018**

**Case Number:** T 1724/13 - 3.2.07

**Application Number:** 06027067.5

**Publication Number:** 1939106

**IPC:** B65D75/58

**Language of the proceedings:** EN

**Title of invention:**

Reclosable package

**Patent Proprietor:**

Kraft Foods R & D, Inc.

**Opponents:**

Alfred Ritter GmbH & Co. KG  
Cadbury Holdings Limited  
BASF SE

**Headword:**

**Relevant legal provisions:**

EPC Art. 54, 84, 113(1)  
RPBA Art. 15(3)

**Keyword:**

Novelty - main request and auxiliary requests I, IX and X (no)  
Claims - clarity - auxiliary requests II to VII (no)  
Sufficiency of disclosure - auxiliary request VIII (no)  
Late-filed auxiliary request X - admitted (yes)

**Decisions cited:**

T 1704/06

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
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Case Number: T 1724/13 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 23 February 2018**

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**Decision under appeal:**      **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
13 June 2013 concerning maintenance of the  
European Patent No. 1939106 in amended form.**

**Composition of the Board:**

**Chairman**                    G. Patton  
**Members:**                    V. Bevilacqua  
                                      C. Brandt

## **Summary of Facts and Submissions**

I. Both appellant I (opponent 3) and appellant II (patent proprietor) lodged an appeal against the interlocutory decision of the opposition division maintaining European patent No. 1 939 106 in amended form.

The following grounds of opposition were raised:

-Article 100(a) EPC (lack of novelty, lack of inventive step); and

-Article 100 (b) EPC (insufficiency of disclosure).

Opponent 2 withdrew its opposition with letter dated 3 February 2010 and hence is no longer a party to the proceedings.

Opponent 1 did not appeal against the interlocutory decision.

II. The present decision refers to the following documents mentioned in the appealed decision:

O9: WO 2005/014 406 A;

O15: EP 0 338 304 A;

O18: US 5 691 052 A; and

O22: Appellant I's test report ("Versuchsbericht"), 1 page.

III. Appellant II requested that the decision under appeal be set aside and the patent be maintained as granted (main request), or as amended according to one of auxiliary requests I-VII submitted with its statement setting out the grounds of appeal.

Appellant I requested with its statement setting out the grounds of appeal that the decision under appeal be set aside and the patent in suit be revoked.

- IV. In the annex to the summons to oral proceedings, the board provided the parties with its preliminary opinion on the above requests.
- V. By letter of 16 January 2018, appellant II replaced all the previously submitted auxiliary requests with new auxiliary requests I-IX, and subsequently, with letter of 15 February 2018, submitted an additional auxiliary request X.
- VI. Oral proceedings were held on 23 February 2018, in the absence of opponent 1, as announced by its letter dated 26 January 2018.

For the further course of the oral proceedings, in particular the issues discussed with the parties, reference is made to the minutes.

At the end of the oral proceedings, appellant II requested that the decision under appeal be set aside and that the patent be maintained as granted (main request), or, alternatively, that the patent be maintained in amended form according to any of auxiliary requests I to IX filed with letter dated 16 January 2018, or on the basis of auxiliary request X filed with letter dated 15 February 2018.

Appellant I requested that the decision under appeal be set aside and that the European patent in suit be revoked.

VII. The wording of independent claim 1 of the **main request** and **auxiliary request I** is as follows:

"A reclosable package having a cold seal formed between a first and a second sealing portion and sealing the package in an initial, unopened state, in which the bonding force of the cold seal to the first and the second sealing portion is greater than the bonding force within the cold seal, so that the cold seal is separated and partly adheres to the first, and partly adheres to the second sealing portion when the seal is opened, the cold seal also sealing the package in a reclosed state, wherein the sealing force in the reclosed state is lower than the initial sealing force."

Claim 1 of **auxiliary request II** and claim 1 of **auxiliary request III** correspond to claim 1 of the main request, with the following features added at the end:

", and wherein the cold seal is a hard cold seal".

Claim 1 of **auxiliary request IV** and claim 1 of **auxiliary request V** correspond to claim 1 of auxiliary request II, with the following features added at the end:

", and wherein at least one of the first and second sealing portions is coated with an acrylic coating or a primer".

Claim 1 of **auxiliary request VI** and claim 1 of **auxiliary request VII** correspond to claim 1 of auxiliary request II, with the following features added at the end (the features added with respect to claim 1 of auxiliary request IV are shown in bold; emphasis added by the board):

**"and contains at least one acrylic polymer or copolymer,** and wherein at least one of the first and second sealing portions is coated with an acrylic coating or a primer".

Claim 2 of **auxiliary request VIII** reads as follows:

"A reclosable package in accordance with claim 1, having a seal with an initial opening force of 2, preferably 2.5, to 4 N/15mm, and opening forces for one or more reclosings of 0.5 to 2 N/15 mm, preferably 1 to 1.5 N/15 mm."

Claim 1 of **auxiliary request VIII** and claim 1 of **auxiliary request IX** correspond to claim 1 of auxiliary request II, with the following features added at the end:

"and contains at least one acrylic polymer or copolymer, said cold seal having a polymer/copolymer content of above 50%, and wherein at least one of the first and second sealing portions is coated with an acrylic coating or a primer."

Claim 1 of **auxiliary request X** corresponds to claim 1 of auxiliary request II, with the following features added at the end (amendments over claim 1 of auxiliary request IX are in bold, emphasis added by the board):



"and contains at least one acrylic polymer or copolymer, said cold seal having an **acrylic** polymer/copolymer content of above 50%, and wherein at least one of the first and second sealing portions is coated with an acrylic coating or a primer."

VIII. Insofar as relevant to the present decision, appellant I argued essentially as follows.

The subject-matter of claim 1 of the main request and auxiliary request I was not novel over the content of the disclosure of either of documents O9 and O18 because said claims did not specify where the cold seal fractured upon opening.

There were no criteria available to clearly distinguish between a "hard cold seal" and a conventional cold seal. Consequently, it was unclear to a skilled person what the claimed hard cold seal was.

As a consequence, claim 1 of auxiliary requests II, III, IV and V contravened the requirements of Article 84 EPC.

This feature was not clarified by further claiming that the seal contained at least one acrylic polymer or copolymer because this statement did not give to the skilled person any guidance on which acrylic polymer/copolymer to select.

As a consequence, claim 1 of auxiliary requests VI and VII also contravened the requirements of Article 84 EPC.

The subject-matter of claim 2 of auxiliary request VIII was not sufficiently disclosed because there was no guidance in the patent in suit on how the specific values of opening force claimed therein could be achieved without undue burden.

The subject-matter of claim 1 of auxiliary request IX lacked novelty over the content of the disclosure of documents 09.

Auxiliary request X was late-filed and not to be admitted into appeal proceedings because it raised new issues of added subject-matter and clarity.

The subject-matter of claim 1 of auxiliary request X lacked clarity, contravened the requirements of Article 123(2) EPC and also lacked novelty over the content of the disclosure of document 018.

IX. Insofar as relevant to the present decision appellant II argued essentially as follows.

The decision under appeal was based on the wrong interpretation of claim 1, by taking into account only that "the bonding force of the cold seal to the first and to the second sealing portion was greater than the bonding force within the cold seal with a cohesive split" and by disregarding that "the sealing force in the reclosed state was lower than the initial sealing force".

These two features, in combination, defined a cohesive split. Only in a cohesive split was the sealing force in the reclosed state reliably lower than the initial sealing force.

A cohesive split taking place within a layer of cold seal material was substantially different from a split occurring at the interface between two layers of adhesive material, referred to as adhesive split.

O9 and O18 both described adhesive splits, and for this reason were not novelty-destroying.

There was also no evidence in O9 and O18 that the pressure applied to the adhesive materials used therein had an impact on the sealing force, and that therefore there was a difference between initial opening and opening after resealing.

The expression "hard cold seal" was clear to a skilled person reading the claims in the light of the description, as it was defined in paragraph 18, lines 41-52 of the patent. A hard cold seal was made of a sealing material that, in contrast to the soft cold seals, did not lead to any stringing or webbing.

The selection of an appropriate adhesive to obtain the desired properties in the final product as claimed in claim 2 of auxiliary request VIII was a matter of choice by a person skilled in the art selecting amongst available materials and processing conditions.

O9 was not prejudicial to the novelty of the subject-matter of claim 1 of auxiliary request IX in particular because it failed to disclose a polymer/copolymer content of above 50% and that a sealing portion was coated with an acrylic coating or a primer.

Auxiliary request X had been submitted as a reaction to a clarity objection formulated by appellant II, and was therefore to be admitted.

O18 was not prejudicial to the novelty of the subject-matter of claim 1 of auxiliary request X, in particular because it failed to disclose that the sealing portions were coated with an acrylic coating or a primer.

## **Reasons for the Decision**

### *1. Right to be heard*

Although opponent 1 did not attend the oral proceedings, the principle of the right to be heard pursuant to Article 113(1) EPC is observed, since that article only affords the opportunity to be heard and, by absenting itself from the oral proceedings, the respondent gave up that opportunity (see the explanatory note to Article 15(3) RPBA cited in T 1704/06, not published in OJ EPO; see also Case Law of the Boards of Appeal, 8th edition 2016, sections III.B.2.7.3 and IV.E.4.2.6.d).

### *2. Main request, auxiliary request I - claim 1*

#### *2.1 Interpretation*

##### *2.1.1 Appellant II argues that claim 1 of the main request refers implicitly to a "cohesive split" because only in a cohesive split is the sealing force in the reclosed state reliably lower than the initial sealing force.*

Appellant II adds that such a cohesive split, taking place within a layer, is substantially different from an adhesive split which occurs at the interface between two layers.

- 2.1.2 The board disagrees. The cold seal is as an element of the claimed package, and claim 1 is restricted to neither a cold seal formed by only a single homogeneous layer of cold seal material which is split upon opening, nor a plurality of layers of cold seal material which are separated upon opening.

The patent in suit also explains, see column 2, lines 46-52, that to provide a "good basis for the desired cohesive split" cold seal material can be applied to both the first and the second sealing portion of a package.

Consequently, any separation within a cold seal found in the prior art, irrespective of whether upon opening the fracture propagates within a layer of cold seal material, or partially or totally along an interface between two layers of cold seal material, is considered by the board as falling within the terms of claim 1.

- 2.2 09 - Content of the disclosure

- 2.2.1 09 discloses a reclosable package (see claim 1) having a cold seal (called cohesive reclosure in claim 1, and being a cold seal, as explained at page 3, line 4, page 4 lines 25-32, and page 5, lines 25-31) formed between a first and a second sealing portion (the two opposing surfaces of the container mentioned at page 5, lines 2-6) and sealing the package in an initial, unopened state, in which the bonding force of the cold seal to the first and the second sealing portion is greater than the bonding force within the cold seal (see claim 1), so that the cold seal is separated and partly adheres to the first, and partly adheres to the second sealing portion when the seal is opened (as explained at page 2, lines 29-30, and as clearly visible in

Figures 2B and 3B; see also page 12, lines 2-14), the cold seal also sealing the package in a reclosed state (as in the packages of Figures 5-7).

O9 also implicitly discloses that the sealing force in the reclosed state (by finger pressure, see page 3, line 4) is lower than the initial sealing force, because the strength of the sealing force in the reclosed state results from the pressure applied manually by the user and, more particularly, since the surfaces of the opened seal will interact with the surrounding atmosphere. In this respect, the board concurs with the impugned decision, page 7, last paragraph.

- 2.2.2 Appellant II argues that, even if the above-mentioned features of claim 1 may be identified in embodiments of O9, none of these embodiments contains the combination thereof.

The board disagrees, because, apart from referring to claim 1 of O9, the passages of the description mentioned by appellant I in its novelty attack (claim 1, from page 2 line 29 to page 3, line 4, page 4 lines 25-32, and page 5, lines 2,3) all belong to the general description of the invention of document O9.

- 2.2.3 Appellant II also argues that O9 does not contain any explicit disclosure that the package is initially closed by a machine, and subsequently reclosed by hand, and that, as a consequence, the skilled person cannot derive unambiguously from this document that the sealing force in the reclosed state is lower than the initial sealing force.

The board disagrees again, because O9 clearly states that the package is produced on automated machines (see page 1, lines 29-30), and adds that the original package cold seal bonding requires a bonding force which is enough to prevent inadvertent opening and to keep the content fresh during handling and shipment (see page 2, lines 3-8). In this respect, as put forward by appellant I, O9 also concerns food products, e.g. potato chips and cereal (see page 31, lines 24-25), which have unambiguously to be packaged on automated machines.

The feature that the sealing force in the reclosed state is lower than the initial sealing force is therefore considered by the board as being implicitly disclosed in this document.

### 2.3 O18 - Content of the disclosure

2.3.1 O18 discloses a reclosable package (see Figures 4-10 and column 2, lines 29-41) having a cold seal (71, see figures 4 and 5, column 2, line 17 and column 5, lines 7-25) formed between a first and a second sealing portion (60, 55, 65, 66; see Figures 6 and 7) and sealing the package in an initial, unopened state (depicted at Figure 6; see reference 70, from column 5 line 63 to column 6 line 2, as well as column 3 lines 11-16), in which the bonding force of the cold seal to the first and the second sealing portion is greater than the bonding force within the cold seal, so that the cold seal is separated and partly adheres to the first, and partly adheres to the second sealing portion when the seal is opened (as clearly shown in Figure 7, see column 6 lines 16-39), the cold seal also sealing the package in a reclosed state (column 6, lines 24-26).

2.3.2 Appellant II argues that O18 cannot be detrimental to novelty because it discloses a completely different type of package, as the cold seal (71) is attached to a tape (72) which is subsequently heat sealed to the package material.

The board disagrees, as claim 1 of the main request is not formulated in such a way to exclude packages in which a tape is comprised between the cold seal material and the sealing portion of the package.

2.3.3 Appellant II also refers to column 6, lines 2-5 of O18, and argues that, as only manual closure of the cold seal is mentioned in this passage, it is not correct to assume that the first closure was done by pressing with a machine, and that as a consequence of that the skilled person cannot derive unambiguously from this document that the sealing force in the reclosed state is lower than the initial sealing force.

The board disagrees with this interpretation of O18, because a skilled person in this technical field (see the reference at column 6, line 10 to "consumer products") would not consider it feasible to first close such packages manually in a factory and immediately read from the context of this document that sealing jaws (mentioned at column 1, lines 13-15) or a similar apparatus are to be used.

2.4 Lack of novelty

2.4.1 As discussed above, based on the interpretation of claim 1 of the main request discussed under point 2.1 above, the board comes to the conclusion that the subject-matter of claim 1 of the main request lacks



novelty over the content of the disclosure of each of documents 09 and 018 pursuant to Article 54(1) EPC.

Thus, the main request cannot be allowed.

2.4.2 As claim 1 of auxiliary request I corresponds to claim 1 of the main request, auxiliary request I cannot be allowed either.

3. *Auxiliary requests II and III - clarity*

3.1 The board follows appellant I's view that the expression "hard cold seal" introduced in claims 1 of these requests renders said claims unclear pursuant to Article 84 EPC (see point VII above). As a matter of fact, the expression "hard cold seal" taken alone is not clear to a skilled person, because it has no commonly recognised meaning in this technical field.

3.2 Appellant II argues that the expression "hard cold seal" is clear to a skilled person reading the claims in the light of the description, as it is defined in paragraph 18, lines 41-52 of the contested patent as being made of a sealing material that, in contrast to the soft cold seal, does not lead to any stringing or webbing.

3.3 The board does not find this argument persuasive, since amended claims should be clear in themselves when read by the person skilled in the art (see Case Law of the Boards of Appeal, 8th Edition 2016, II.A.3.1). In the present case, claim 1 does not define the meaning of the expression "hard cold seal", and a person skilled in the art, using his common general knowledge, will not clearly understand from the wording of this claim

alone which features of a cold seal are implied by the adjective "hard".

Thus, auxiliary requests II and III cannot be allowed.

4. *Auxiliary requests IV and V - clarity*

The feature "wherein at least one of the first and second sealing portions is coated with an acrylic coating or a primer" does not relate to the feature "hard cold seal" discussed above, and is therefore not suitable to clarify it (see point VII above).

As a consequence, the clarity objection discussed at point 3 above and directed against the expression "hard cold seal" also applies to claim 1 of auxiliary requests IV and V, which therefore cannot be allowed (Article 84 EPC).

5. *Auxiliary requests VI and VII - clarity*

The board follows appellant I's view that claim 1 of these auxiliary requests still contravenes the requirements of Article 84 EPC because the features introduced in said claims 1 with respect to claim 1 of auxiliary request II do not allow the expression "hard cold seal" to be clarified (see point VII above).

As "acrylic polymer or copolymer" relates to a multitude of possible materials, having an extremely wide range of viscosity, tackiness and mechanical properties, the skilled reader is again unable to determine what is meant by the adjective "hard" in the expression "hard cold seal", and therefore to understand for which object protection is sought.

The above was already provided in the annex to the summons to oral proceedings, point 7, as the board's preliminary opinion. It has not been subsequently commented on or contested, neither in writing nor orally. At the oral proceedings, appellant II explicitly stated that it did not wish to make any further submissions regarding these auxiliary requests.

Thus, auxiliary requests VI and VII cannot be allowed.

6. *Auxiliary requests VIII and IX, claim 1 - clarity*

According to appellant I, claim 1 of these auxiliary requests also contravenes the requirements of Article 84 EPC, because the feature "said cold seal having a polymer/copolymer content of above 50%" does not refer to the acrylic polymer or copolymer contained in the cold seal.

The board disagrees. The skilled person is now able to identify from the text of the claim the technical features of the subject-matter for which protection is sought, as the hard cold seal is defined as being a seal containing a polymer/copolymer in a quantity of above 50%, and also containing at least one acrylic polymer or copolymer.

The board does, however, agree with appellant I on the point that this definition is very broad, as "acrylic polymer or copolymer" relates to a multitude of possible materials.

7. *Auxiliary request VIII, claim 2 - lack of sufficient disclosure*

7.1 Appellant I notes that there is no explanation in the patent in suit as to how the specific values claimed in claim 2 of the auxiliary request VIII can be achieved, and that experimental report O22 shows that none of the materials mentioned in the patent in suit is able to achieve these values. Based on that, appellant I argues that claim 2 of the main request is not sufficiently disclosed.

Appellant II replies that the selection of an appropriate adhesive to obtain the desired properties in the final product as claimed in claim 2 is simply a matter of choice made by a person skilled in the art selecting from the available materials (composition) and processing conditions (sealing force and amount of material). Appellant II also argues that the skilled person is able to measure peel force, by using well-known procedures.

7.2 The board is of the opinion that the skilled person is able to select a cold seal composition which is appropriate to seal the package of **claim 1** of this request by using only their common knowledge and without the need of a large amount of experimentation, and acknowledges that there are tests available for measuring peel strength, but considers that the subject-matter of **claim 2** of auxiliary request VIII is not sufficiently disclosed.

In the present case, the question of whether or not the invention of claim 2 is sufficiently disclosed turns on the question of whether or not the person skilled in

the art would be able to choose a pressure-sensitive adhesive satisfying the parameters specified therein **without undue burden.**

The board notes that the description of the patent in suit (see paragraphs 13 and 28) is largely concerned with elucidation of the desired bonding forces, but provides only generic directions with respect to the selection of a suitable cold seal material (see paragraph 18 and claims 5-7).

The person skilled in the art is thus left with the task of selecting possible suitable candidates and carrying out a series of tests with varying parameters, e.g. at least the amount of material and sealing force. Furthermore, the patent in suit does not provide any information which would enable the person skilled in the art to evaluate failures in such a manner as to lead towards success in subsequent trials. Accordingly, adhesives satisfying the parameters of claim 2 can only be found by a cumbersome process of trial and error.

The person skilled in the art intending to practise the invention will thus be faced with carrying out a considerable number of tests in order to find a suitable adhesive satisfying the properties specified in claim 2, which will constitute an undue burden.

Hence, auxiliary request VIII cannot be allowed pursuant to Article 83 EPC.

8. *Auxiliary request IX, claim 1 - novelty*

8.1 Appellant I argued that the subject-matter of claim 1 of this request lacks novelty over the content of the disclosure of 09.

The board agrees, for the following reasons.

- 8.2 O9 generally relates to cold seals substantially made from polymers of different nature (see page 5, line 25).

It therefore discloses cold seal having a polymer/copolymer content of above 50%.

An embodiment of O9 (see page 11, line 5) contains an acrylic polymer.

O9 therefore discloses the "hard cold seal" defined in claim 1 of this request.

The passage at page 13, lines 6-21 teaches that materials may be used to adhere the cohesive layer to the sealing portion of the package.

This teaching amounts to the disclosure of the feature that at least one of the first and second sealing portions is coated with a primer.

- 8.3 Appellant II argues that, even if polymers are mentioned at page 5, no quantities are given, and as consequence of that it is not possible to conclude that the cold seal disclosed in O9 has a polymer/copolymer content of at least 50%.

The board disagrees, because O9, made exception for some non polymeric additives in very small quantities (less than 5%, see page 10, lines 29-32), only mentions polymers as being the constituents of the cold seal ("cohesive materials").

8.4 Appellant II then argues that it is not possible to conclude that the cold seal comprising acrylic polymer disclosed at page 11 also comprises the feature that at least one of the first and second sealing portions is coated with an acrylic coating or a primer, because not all the embodiments of 09 have the carrier layer mentioned at page 13.

The board disagrees, because the passage at page 13, lines 6-21 relating to the use of a primer layer would be seen by a skilled reader as a general teaching, not limited to any particular embodiment.

8.5 Appellant II finally argues that novelty is given because at page 11 acrylic polymers are mentioned as members of a list, and acrylic coating is mentioned at page 13 as a member of a second list.

The board disagrees. The subject-matter of claim 1 of auxiliary request IX can be straightforwardly derived from 09, without operating a selection from two lists. This is because said claim requires the presence of an acrylic coating or **primer**, and the passage at page 13, lines 6-21 where a coating to improve adhesion of the cold seal is discussed amounts to the discussion of a primer.

8.6 The above analysis shows that 09 discloses all the features added to claim 1 of auxiliary request IX with respect to claim 1 of the main request.

The subject-matter of claim 1 of this request therefore lacks novelty over 09 (see also point 2.2 above).

Thus, auxiliary request IX cannot be allowed pursuant to Article 54(1) EPC.

9. *Auxiliary request X - admissibility*

9.1 According to Article 13(3) RPBA, amendments sought to be made after oral proceedings have been arranged may not be admitted if they raise issues which the board or the other party or parties cannot reasonably be expected to deal with **without adjournment of the oral proceedings**.

9.2 Appellant I argues that auxiliary request X is not admissible, as claim 1 of this request has been amended at a very late stage of the procedure by adding a feature from the description ("cold seal having an **acrylic** polymer/copolymer content of above 50%"; see point VII above), thereby raising completely new issues of clarity and added subject-matter.

9.3 The board disagrees. The clarity issues raised by this amendment are not unexpected, because they were already foreseen and discussed by appellant I in its letter dated 10 October 2013 (see page 2, last paragraph), claim 1 of auxiliary request X having been submitted (see appellant II's letter dated 15 February 2018, page 1, fourth paragraph) as a reaction thereto.

These clarity issues are also not of such a complexity as to require an adjournment of the oral proceedings, as they are strictly related to the clarity objections raised against the previous auxiliary requests (as will become evident from point 10 below).

With respect to the objection of added subject-matter, the board does not follow appellant I's interpretation of paragraph 16 of the original description (published version) that the feature 50% would be for the polymer/



copolymer content only, i.e. not specifically for an **acrylic** polymer/copolymer content. For the board, such feature added to claim 1 of auxiliary request X is indeed disclosed in said paragraph 16. The discussion of this issue does not require the oral proceedings to be adjourned.

In view of the above, the board decides, in accordance with Articles 13(1) and 13(3) RPBA, to admit auxiliary request X into the proceedings.

10. *Auxiliary request X, claim 1 - clarity*

As already discussed in relation to the clarity of claim 1 of auxiliary requests VIII and IX , the skilled person is unambiguously able to identify from the text of claim 1 of auxiliary request X the features of the claimed subject-matter, as the hard cold seal is defined as being a seal containing an acrylic polymer/ copolymer in a quantity of above 50%. Hence, claim 1 of auxiliary request X is clear (Article 84 EPC).

11. *Auxiliary request X, claim 1 - compliance with the requirements of Article 123(2) EPC*

Appellant I argued that the feature that the cold seal contains an acrylic polymer/copolymer in a quantity in excess of 50% cannot be considered as having been originally disclosed, as it would be the result of the selection from a first list of possible polymers or copolymers and a second list of possible (acrylic) polymer/copolymer contents (see paragraph 16 of the published application).

The board disagrees. Selection from two lists is not necessary, because this paragraph does not contain a

list of possible polymers/copolymers, as the only examples mentioned therein are acrylic polymers/copolymers, and the board considers that the disclosed content of "above 50%" for the generic expression "polymer or copolymers" applies to these examples.

12. *Auxiliary request X, claim 1 - novelty*

12.1 Appellant I argued that the subject-matter of claim 1 of auxiliary request X lacks novelty over the content of the disclosure of O18.

The board agrees, for the following reasons.

12.2 O18 discloses a cold seal material made by a mix of "tacky" and "non tacky resins". The passage at column 3, lines 40- 65 clarifies that both "tacky" and "non tacky resins" are polymeric materials, contrary to appellant II's view that the term "resin" would not inevitably mean "polymer".

One non tacky resin used is for instance ethylene acrylic acid (EAA, see from column 3, line 66 to column 4, line 1).

At column 5, lines 7-25, the composition of the cold seal for a particular embodiment, also shown in Figures 4-7, is given. This cold seal comprises up to 60% of a non tacky resin, whereby said resin may be an acrylic polymer (EAA, see line 25).

O18 therefore discloses an embodiment with a "hard" cold seal having an acrylic polymer/copolymer content in excess of 50%.

Figure 5 shows that the layer 73 adheres to the sealing portion of the container, and the passage at column 5, lines 31-38 explains that this layer is used to adhere the strip carrying the cold seal to the sealing portion.

O18 therefore discloses the feature that at least one of the first and second sealing portions is coated with a primer.

- 12.3 Appellant II notes that the cold seal 71 of the embodiment shown in Figures 4-6 is put on a strip 72 which is then adhered to the package, and argues on this basis that O18 cannot be detrimental to novelty because said strip 72 carrying the cold seal cannot be considered as a coating of the sealing portion by the skilled person, as coatings are normally applied in a liquid state.

The board disagrees. The feature "coating" is to be interpreted broadly as referring to a covering that is applied to the surface of the sealing portion, without any restriction as to its physical state before application or chemical nature.

As a consequence, the board does not see any reason why the layers 73 and 72 (see Figure 4), once applied on the sealing portions, as shown in Figures 5 and 6, should not be considered as coatings of said sealing portion.

- 12.4 The above analysis shows that O18 discloses all the features added to claim 1 of auxiliary request X with respect to claim 1 of the main request.

Thus, in view of point 2.3 above, the subject-matter of claim 1 of auxiliary request X is not novel over O18 and, hence, auxiliary request X cannot be allowed (Article 54(1) EPC).

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. European patent No. 1 939 106 is revoked.

The Registrar:

The Chairman:



G. Nachtigall

G. Patton

Decision electronically authenticated