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**Datasheet for the decision  
of 8 March 2019**

**Case Number:** T 2255/14 - 3.2.07

**Application Number:** 09075436.7

**Publication Number:** 2130778

**IPC:** B65D33/16, B65D30/20,  
B65D37/00, B31B19/90,  
B31B19/94, B31B19/36

**Language of the proceedings:** EN

**Title of invention:**

Package having reclosable pour spout and method of forming same

**Applicant:**

The Hudson-Sharp Machine Company

**Headword:**

**Relevant legal provisions:**

EPC Art. 56  
EPC R. 115(2)  
RPBA Art. 12(4), 15(3)

**Keyword:**

Inventive step - main request (no)

Late-filed auxiliary requests - requests could have been filed  
in the first instance proceedings (yes)

Oral proceedings - held in absence of appellant

**Decisions cited:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

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Case Number: T 2255/14 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 8 March 2019**

**Appellant:** The Hudson-Sharp Machine Company  
(Applicant) 975 Lombardi Avenue  
Green Bay, WI 54304 (US)

**Representative:** Algemeen Octrooi- en Merkenbureau B.V.  
P.O. Box 645  
5600 AP Eindhoven (NL)

**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 23 May 2014  
refusing European patent application No.  
09075436.7 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** I. Beckedorf  
**Members:** K. Poalas  
V. Bevilacqua

## **Summary of Facts and Submissions**

- I. The appellant (applicant) lodged in due time and form an appeal against the decision of the examining division refusing European patent application No. 09 075 436.7.
- II. The examining division held that the subject-matter of claim 1 of the main request filed with letter of 6 March 2014, does not involve an inventive step in view of the teaching of D1 (US 4 332 344 A) in combination with the teaching of D2 (US 6 352 365 A).
- III. In the statement setting out the grounds of appeal, the appellant requested
- that the decision under appeal be set aside and that a patent be granted on the basis of one of the sets of claims filed with the statement setting out the grounds of appeal dated 2 October 2014 as main request and as auxiliary requests 1 to 4.
- IV. In its communication pursuant to Article 15(1) RPBA dated 20 December 2018, annexed to the summons for oral proceedings arranged upon the appellant's request for 8 March 2019, the Board expressed its preliminary conclusions in respect of
- non-compliance of claim 1 of the main request with Articles 76(1), 123(2) and 84 EPC (see points 4 and 5 thereof);
  - lack of inventive step of the subject-matter of claim 1 of the main request (see point 6 thereof);
  - objections to the admittance into the appeal

proceedings of auxiliary requests 1 to 4  
(Article 12(4) RPBA) (see point 7 thereof).

- V. With its submission dated 7 March 2019, the appellant informed the Board that it will not attend the scheduled oral proceedings but did not comment on the aforementioned preliminary opinion of Board.
- VI. Oral proceedings before the Board took place as scheduled on 8 March 2019 in the absence of the appellant in accordance with Rule 115(2) EPC and Article 15(3) RPBA. For the course of the oral proceedings, reference is made to the minutes.

### **Reasons for the Decision**

1. Although the appellant did not attend the oral proceedings to which the appellant was duly summoned, the principle of the right to be heard pursuant to Article 113(1) EPC is observed since that provision only affords the opportunity to be heard and, by absenting itself from the oral proceedings, a party gives up that opportunity (see Case Law of the Boards of Appeal, 8th edition 2016, section IV.E.4.2.6.d). In accordance with Article 15(3) RPBA, the appellant's written submissions have been taken into account by the Board and are discussed in the following reasons.

2. *Allowability of the main request*

2.1 Under point 6 of its above-mentioned communication the Board stated the following:

*"6. Main request - Inventive step; Article 56 EPC*

*Claim 1*

*6.1 D1 discloses inter alia a single foldable reclosable fastener strip having staggered ribs, see column 2, line 23. It discloses further a sealed header adjacent the fastener strip, see figure, column 3, lines 15 to 17.*

*6.2 The Board considers therefore that the subject-matter of claim 1 differs from the package of D1 in that it includes*

- a) at least one **weakened region** to facilitate removal of said portion of said header,*
- b) a **pair of side gussets** joining respective opposite edges of said front and rear panel.*

*6.3 Feature a) seems to facilitate the opening of the package. Feature a) is considered to belong to the general technical knowledge of the person skilled in art, see for example D2, figures 1, 3 and column 2, line 21 and also D8, figure 19, page 15, line 24.*

*6.4 Feature b) seems to provide an easy continuous bag forming process. The provision of a second side gusset for reasons of symmetry, facilitating thereby the continuous bag forming process does not seem to involve an inventive step, since such a package construction seems to belong also to the general technical knowledge of the person skilled in art, see for example D2,*

*figures 1 to 7, D8, figure 42, D9, figures 8 and 9.*

*6.5 Accordingly, it seems that the skilled person starting from D1, seeking to solve the two above-mentioned partial problems, which are not interrelated, and being guided by its general technical knowledge as documented in documents D2, D8 and D9 would arrive to the subject-matter of claim 1 without the exercise of an inventive activity.*

*6.6 It seems further, that a combination of the teachings of documents D9 and D8 may render the subject-matter of claim 1 not inventive, see hereto the observations filed by a third party on 8 August 2011 according to Article 115 EPC, points 1d) and 2).*

*6.7 From the above-mentioned reasons the main request seems to be not allowable".*

- 2.2 The above-mentioned preliminary finding of the Board has not been commented on, nor has it been contested by the appellant, see point V above.
- 2.3 Under these circumstances, the Board - having once again taken into consideration all the relevant aspects concerning said issue - sees no reason to deviate from its above-mentioned finding.
- 2.4 As a consequence, the main request is considered to be not allowable already for lack of inventive step of the subject-matter of claim 1 of the main request, with no need to discuss and decide on also the other objections mentioned in the Board's communication pursuant to Article 15(1) RPBA (see points 4 and 5 thereof).

3. *Admittance into the proceedings of auxiliary requests 1 to 4*

3.1 Under point 7 of its above-mentioned communication the Board stated the following:

*"7. Admissibility of auxiliary requests 1 to 4*

*7.1 In respect of auxiliary requests 1 to 6 [sic] the Board notes that these request had neither been filed during the examination proceedings nor had they been decided upon by the examining division in the decision under appeal. There were filed for the first time in appeal proceedings together with the statement setting out the grounds of appeal. The Board notes further, that the appellant's reasoning for the allowability (patentability) of the claimed subject-matter was rather brief, in particular concerning auxiliary requests 3 and 4.*

*7.2 Product claim 1 of the first auxiliary request discloses the additional feature over claim 1 of the main request that the single foldable reclosable fastener strip is defined as a hook-and-loop fastener.*

*Method claim 4 of the first auxiliary request is identical with claim 4 of the main request.*

*7.3 Product claim 1 of the second auxiliary request discloses the additional feature over claim 1 of the main request that the package is made with high-speed form, fill, and seal (FFS) packaging machinery. Method claim 4 of the second auxiliary request is identical with claim 4 of the main request.*

*7.4 Method claim 1 of the third auxiliary request is*



*identical with claim 4 of the main request.*

*7.5 Method claim 1 of the fourth auxiliary request discloses the additional feature over claim 4 of the main request that the the fastener strip is defined as a hook-and-loop fastener and that a form, fill and seal (FFS) machine is used.*

*7.6 The appellant is made aware of the fact that the Board has a discretionary power under Article 12(4) RPBA not to admit these auxiliary requests into the proceedings. In the absence of any reasons submitted by the appellant justifying the late filing of these requests, the examination of subject-matter which was not decided upon during examination proceedings goes beyond the primary purpose of the appeal proceedings".*

- 3.2 Since the appellant's submission dated 7 March 2019 disclosed only the information that the appellant will not be attending the scheduled oral proceedings, see point V above, no reasoning was submitted by the appellant justifying the late filing of said four auxiliary requests.
- 3.3 Under these circumstances, the Board - having once again taken into consideration all the relevant aspects concerning said issue - exercises its discretionary power under Article 12(4) RPBA in the sense of not admitting said auxiliary requests into the proceedings.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated