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Datasheet for the decision of 2 March 2016

Case Number: T 2292/14 - 3.2.02

Application Number: 10075546.1

Publication Number: 2314333

IPC: A61M1/16, G06F19/00, A61M1/28

Language of the proceedings: EN

Title of invention:
Dialysis system comprising a display device

Patent Proprietor:
Baxter International Inc.
Baxter Healthcare S.A.

Opponent:
Fresenius Medical Care Deutschland GmbH

Headword:

Relevant legal provisions:
EPC Art. 52(1), 54, 56, 99(1), 100(a), 101(2), 101(3), 111(1), 114(2)
RPBA Art. 12(1), 12(2), 12(4)

Keyword:

Late-submitted material - submitted with the statement of grounds of appeal, justification for late filing (yes), admitted (yes)
Appeal decision - remittal to the department of first instance (no)
Novelty - main request (no), auxiliary request 1 (no)
Inventive step - auxiliary requests 2, 3 and 4 (no)

Decisions cited:

T 1002/92, J 0005/11

Catchword:

Europäisches Patentamt
European Patent Office
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Case Number: T 2292/14 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 2 March 2016

Appellant: (Opponent)	Fresenius Medical Care Deutschland GmbH Else-Kröner-Strasse 1 61352 Bad Homburg (DE)
Representative:	Laufhütte, Dieter Lorenz Seidler Gossel Rechtsanwälte Patentanwälte Partnerschaft mbB Widenmayerstraße 23 80538 München (DE)
Respondent: (Patent Proprietor 1)	Baxter International Inc. One Baxter Parkway, DF3-3E Deerfield, IL 60015 (US)
Respondent: (Patent Proprietor 2)	Baxter Healthcare S.A. Thurgauerstrasse 130 8154 Glattpark (Opfikon) (CH)
Representative:	Potter Clarkson LLP The Belgrave Centre Talbot Street Nottingham NG1 5GG (GB)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 14 November 2014 rejecting the opposition filed against European patent No. 2314333 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	E. Dufrasne
Members:	D. Ceccarelli
	M. Stern

Summary of Facts and Submissions

I. The opponent has appealed the Opposition Division's decision to reject the opposition. The decision was dispatched on 14 November 2014.

II. The patent was opposed on the grounds of lack of novelty and lack of inventive step. The documents filed at first instance included:

D1: "sleep·safe Gebrauchsanweisung", Software-Version 1.1, Art. Nr. 677 804 1, Stand 2/12.01, Fresenius Medical Care;
D1': "sleep·safe Operating Instructions", Software-Version 1.0, Part no. 677 805 1, Status 2/10.00, Fresenius Medical Care;
D1'': "sleep·safe Gebrauchsanweisung", Software-Version 0.9, Art. Nr. 677 804 1, Stand 1/08.00, Fresenius Medical Care.

The Opposition Division held that the availability to the public of D1, D1' and D1'' before the priority date of the patent was not proven.

III. The notice of appeal was received on 11 December 2014. The appeal fee was paid on the same day. The statement setting out the grounds of appeal was received on 24 March 2015.

IV. With the statement of grounds, the appellant filed, inter alia, the following documents:

D1''': "sleep·safe Gebrauchsanweisung", Software-Version 1.0, Art. Nr. 677 804 1, Stand 2/10.00, Fresenius Medical Care;
D3i: Affidavit Mr Clemens Jung, 2 January 2015;

D3j: Affidavits
Ms Elke Oberdorf, 10 January 2015;
Ms Marianne Merten, 12 January 2015;
Ms Brigitte Zweschper, 15 January 2015.

V. The respondent replied to the statement of grounds of appeal by letter dated 7 August 2015.

VI. The Board summoned the parties to oral proceedings and set out its provisional opinion in a communication dated 21 December 2015.

VII. Both the appellant and the respondent filed further submissions by letters dated respectively 2 February 2016 and 19 February 2016.

VIII. Oral proceedings took place on 2 March 2016.

The appellant requested that the decision under appeal be set aside and that the patent be revoked.

The respondent requested that the appeal be dismissed or, in the alternative, that the decision under appeal be set aside and that the patent be maintained on the basis of one of auxiliary requests 1 to 4, all filed with letter dated 7 August 2015.

IX. The following documents are also referred to in the present decision:

D3e: "Gebrauchsanweisung Änderungsindex";
D3g: "Übersicht Gerätelieferung Sleep safe Okt. 2001 bis Jan. 2002";

D3h: Affidavit Mr Klaus Wolf, 10 December 2014;
"Gebrauchsanweisung Änderungsindex";
"Übersicht Gerätelieferung Sleep safe Jan. 2001 bis Sept. 2001";
"Übersicht Gerätelieferung Sleep safe Okt. 2001 bis Jan. 2002".

X. Claim 1 of the patent as granted reads as follows:

"A dialysis system (10, 100) for a user to run a dialysis therapy over a therapy session, the system comprising:

a display device (40); and
a controller (30) including a processor (34), a memory device (32) and software that is operable with the display device to:

display a plurality of dialysis therapy set-up procedure screens; and
require an input by the user to proceed through the dialysis therapy set-up procedure screens,
characterized in that the controller is operable with the display device after a dialysis therapy set-up procedure is complete to display a plurality of dialysis treatment screens that graphically illustrate steps in the dialysis therapy and that do not require an input by the user to proceed through the dialysis treatment screens; and
after the therapy session is complete, the controller is operable with the display device to display a plurality of dialysis therapy disconnection screens and require

an input by the user to proceed through the dialysis therapy disconnection screens."

Compared with claim 1 of the patent as granted, claim 1 of auxiliary request 1 comprises the following additional features at the end of the claim:

"wherein the dialysis system includes:

(i) an input device (124) that operates to stop proceeding through the dialysis therapy set-up procedure screens, and
(ii) an input device (127) that operates to cause a display of a previously displayed screen of the dialysis therapy set-up procedure screens."

Compared with claim 1 of the patent as granted, claim 1 of auxiliary request 2 comprises the following additional features at the end of the claim:

"wherein the plurality of dialysis therapy set-up screens have a first coloration and the plurality of dialysis treatment screens have a second coloration."

Compared with claim 1 of the patent as granted, claim 1 of auxiliary request 3 comprises the following additional features at the end of the claim:

"wherein the controller (30) is further operable with the display device (40) to display a category selection screen having different parameter categories available for selection and to allow the user to navigate between therapy screens, parameter

changes screens and log information screens."

Compared with claim 1 of the patent as granted, claim 1 of auxiliary request 4 comprises the following additional features at the end of the claim:

"wherein the controller (30) is further operable with the display device (40) to display a category selection screen having different parameter categories available for selection and to allow the user to navigate between therapy screens, parameter changes screens and log information screens; and
wherein the therapy screens includes graphics and text pertaining to at least one of: supply gathering, line clamping, hygienic operation, patient fill, patient dwell and line disconnection."

XI. The appellant's arguments, as far as relevant for the present decision, may be summarised as follows:

(a) D1''', D3i and D3j had been filed with the statement of grounds of appeal as a reaction to the Opposition Division's finding in the impugned decision that D1, D1' and D1'' did not belong to the state of the art. Like D1, D1' and D1'', D1''' was an operating instruction manual of a dialysis machine produced and sold by the appellant. The only differences between these documents were the software versions or status, or the language. The technical content was identical. As a consequence, D1''' could not come as a surprise to the respondent. D3i and D3j made it clear that D1'''

had been made available to the public before the priority date of the patent. In particular, in D3i, in a sworn statement, Mr Jung unambiguously identified D1''' and testified that it had been shown and used as the basis for a training course on the related dialysis machine, in which members of the public participated. This was confirmed in D3j by course participants, who had no relationship with the appellant. The evidence of D3i and D3j was not contradicted by D3e, D3g and D3h, since the latter exclusively concerned deliveries of dialysis systems and corresponding instruction manuals outside Germany, while D1''', D3i and D3j concerned a delivery and a training course in Germany. Moreover, the technical content of D1''' was very relevant in the assessment of patentability of the respondent's requests, since it clearly concerned a peritoneal dialysis machine (page 1-3, chapter 1.1.1) of the kind claimed in all requests. For these reasons, D1''', D3i and D3j should be admitted into the proceedings and it should be acknowledged that D1''' belonged to the state of the art.

(b) *Patent as granted*

The subject-matter of claim 1 of the patent as granted lacked novelty over D1'''.

D1''' disclosed a peritoneal dialysis system in particular for home use (page 1-3, chapter 1.1.1) comprising a display device embodied in a touch screen (chapter 1.3) and hence, implicitly, also a controller with a processor, a memory device and related software to operate the display device. The system displayed a plurality of dialysis therapy

set-up procedure screens requiring an input by the user to proceed through the dialysis therapy set-up procedure screens (chapter 2.4 starting on page 2-8), after completion of a dialysis therapy set-up procedure a plurality of dialysis treatment screens that graphically illustrate steps in the dialysis therapy and that do not require an input by the user to proceed through the dialysis treatment screens (chapter 3.3 starting on page 3-18), and after completion of the therapy session a plurality of dialysis therapy disconnection screens and require an input by the user to proceed through the dialysis therapy disconnection screens (chapter 4.1 starting on page 4-3). In particular, as far as proceeding through the dialysis treatment screens was concerned, D1''' did not describe that any input was required for that purpose.

(c) *Auxiliary request 1*

The subject-matter of claim 1 of auxiliary request 1 also lacked novelty over D1'''.

D1''' disclosed an input device that operated to stop proceeding through the dialysis therapy set-up procedure screens (virtual button "?" as explained on page 2-7) and an input device that operated to cause a display of a previously displayed screen of the dialysis therapy set-up procedure screens (virtual button "<-" as explained from page 2-9).

(d) *Auxiliary request 2*

The subject-matter of claim 1 of auxiliary request 2 lacked an inventive step in view of D1'''

alone.

D1''' disclosed that its touch screen displayed different colours (page 1-4). If one were to consider that the claimed features relating to the first coloration of the dialysis therapy set-up procedure screens and the second coloration of the dialysis treatment screens possessed a technical character - which the appellant also challenged - then, due to their breadth, which they derived from the fact that no specific colorations were defined, they would simply address the problem of providing an alternative identification of the respective screens, which, in D1''', were identified by their colour and written information content. Using generic first and second colorations for that purpose was common in the field of computers and would be obvious.

(e) *Auxiliary requests 3 and 4*

The subject-matter of claim 1 of auxiliary requests 3 and 4 also lacked an inventive step over D1''' alone.

D1''' disclosed the possibility of displaying a selection screen having different parameters available for selection (by pressing the virtual button leading to the menu "*Optionen*" as disclosed in chapter 3.4 starting on page 3-21) and to allow the user to navigate between therapy screens, parameter changes screens and log information screens; and wherein the therapy screens includes graphics and text pertaining to at least one of: supply gathering, line clamping, hygienic operation, patient fill, patient dwell and line

disconnection.

Grouping the different parameters in categories available for selection in a category selection screen, as required by claim 1 of auxiliary requests 3 and 4, would be performed by the skilled person, who would provide folders for parameters of the same kind as an obvious design measure in order to optimise the selection procedure of a particular parameter.

XII. The respondent's arguments, as far as relevant for the present decision, may be summarised as follows:

(a) D1''', D3i and D3j had been filed extremely late. They could and should have been filed before. There was no causal relation with the findings in the impugned decision. Rather, a sequential filing of documents beyond the opposition period amounted to an abuse of procedure. According to decision T 1002/92 such late-filed documents should only very exceptionally be admitted if they are prima facie highly relevant in the sense that it could reasonably be expected that they would change the final outcome of the case, i.e. that they are likely to prejudice the maintenance of the opposed patent. The criteria for exceptionally admitting D3i and D3j were not fulfilled. D3i and D3j concerned the alleged delivery of D1''' and a corresponding "sleep·safe" dialysis system to a hospital on 3 January 2002. However, they simply consisted of sworn statements, whereas the appellant had not provided any order, checklist, invoice or delivery/shipping note. D3g and D3h, providing lists of deliveries of "sleep·safe" dialysis systems in particular from October 2001 to

January 2002 indicated that no "sleep·safe" dialysis system was delivered to anyone on 3 January 2002. Hence, they contradicted the assertions in D3i and D3j. D3e and D3h, showing a history of the current software versions of "sleep·safe" dialysis systems, indicated that on 3 January 2002 the current software version was 1.1, status 2/12.01 and not 1.0, status 2/10.00, as alleged in D3i. Hence, D3e and D3h, too, contradicted the assertions in D3i. Due to these contradictions, D3i and D3j could not be considered prima facie highly relevant. Furthermore, the technical content of D1''' was not prima facie relevant either, as also observed in the preliminary opinion of the Opposition Division accompanying the summons to oral proceedings at first instance. Moreover, according to decision J 5/11, evidence like D3i and D3j, lying within the private sphere of the appellant, which the latter could have submitted during first instance proceedings but did not, should not be admitted into appeal proceedings. For all of these reasons D3i, D3j and D1''' should not be admitted in the appeal proceedings.

If they were admitted, then a remittal of the case to the Opposition Division was requested, in order for the parties to have two degrees of jurisdiction.

(b) *Patent as granted*

The subject-matter of claim 1 of the patent as granted was novel over D1'''.

The dialysis system disclosed in D1''' did not

display, after a dialysis therapy set-up procedure was complete, a plurality of dialysis treatment screens that graphically illustrate steps in the dialysis therapy and that do not require an input by the user to proceed through the dialysis treatment screens. More particularly, even considering that D1''' disclosed a plurality of dialysis treatment screens, at best there was only one dialysis treatment screen that could be considered not to require input by the user. That was the screen displaying the message "*Angenehme Nacht*" on page 3-16. There was no disclosure in D1''' that, for displaying other dialysis treatment screens such as the ones disclosed in chapter 3.3 starting on page 3-18, no input by the user was required.

(c) *Auxiliary request 1*

The subject-matter of claim 1 of auxiliary request 1 was novel over D1'''.

D1''' did not disclose an input device that operates to stop proceeding through the dialysis therapy set-up procedure screens, and an input device that operates to cause a display of a previously displayed screen of the dialysis therapy set-up procedure screens. In view of paragraph [0306] of the patent, that implied stopping and resuming a set-up procedure, which was not possible with the dialysis system of D1'''.

(d) *Auxiliary request 2*

The subject-matter of claim 1 of auxiliary request 2 was novel and inventive in view of D1'''.

D1''' failed to disclose a plurality of dialysis therapy set-up screens having a first coloration and a plurality of dialysis treatment screens having a second coloration. This feature made it possible to establish at first glance whether the dialysis system was in a set-up status or in a treatment status. In particular, in accordance with paragraph [0042] of the patent, the second coloration could be optimised for night conditions, typical for the dialysis treatment, so as to minimise disruption of a user's sleep. That would address the problem of improving the dialysis treatment in a non-obvious way.

(e) *Auxiliary requests 3 and 4*

The subject-matter of claim 1 of auxiliary requests 3 and 4 was novel and inventive in view of D1'''.

D1''' did not disclose the possibility of displaying a category selection screen having different parameter categories available for selection. Such a feature resulted in a more user-friendly system.

Reasons for the Decision

1. The appeal is admissible.

2. The invention

The invention as defined in claim 1 of all requests concerns a dialysis system.

According to the description it may relate specifically to automated peritoneal dialysis (APD).

Together with hemodialysis, peritoneal dialysis is a commonly employed therapy to treat loss of kidney function (paragraph [0004]). Peritoneal dialysis utilises a dialysate which is infused via an implanted catheter and then left dwelling in the patient's peritoneal cavity for a certain period of time. There, the dialysate contacts the peritoneal membrane, through which waste, toxins and water from the bloodstream are transferred to the dialysate due to diffusion and osmosis. After the dwelling time the spent dialysate together with the substances transferred to it are drained from the peritoneal cavity and disposed of (paragraph [0005]).

Automated peritoneal dialysis (APD) is a particular kind of peritoneal dialysis in which a dialysis machine automatically performs several drain, fill and dwell cycles overnight, while the patient sleeps. A "last fill" is typically performed at the end of the treatment, such that, when the patient disconnects from the dialysis machine, the dialysate remains in the peritoneal cavity during the day (paragraphs [0008] to [0010]). Automated peritoneal dialysis (APD) is a convenient treatment for the patient who does not have to go to hospital regularly for hemodialysis and does not need to perform the drain, fill and dwell steps manually.

According to the invention, the dialysis system comprises a display device and a controller with software that makes the display device display a plurality of set-up screens requiring an input by a

user in order for the user to proceed through those set-up screens, after set-up display a plurality of treatment screens that do not require an input by the user and, after therapy, display a plurality of disconnection screens requiring an input by a user in order for the user to proceed through those disconnection screens.

As a result, a simplified APD system could be provided, which is ergonomically improved and hence easier for the patient to use and operate (paragraph [0011]).

The parts of the patent as granted which are most relevant for the illustration of the claimed invention are paragraphs [0001] to [0011], [0038] to [0051], [0054] to [0059] and [0293] to [0325] of the description, as well as figures 1 to 3B and 30A to 30M.

3. *Admissibility of D1''', D3i and D3j*

3.1 D1''' is an operating instruction manual for a dialysis machine called "sleep·safe" produced and sold by the appellant. D3i and D3j are affidavits according to which D1''' was made available in a training course on the related dialysis machine, in which members of the public participated.

These documents were filed by the appellant together with the statement of grounds of appeal, and thus well after the period for filing an opposition according to Article 99(1) EPC.

Article 114(2) EPC states that "the European Patent Office may disregard facts or evidence which are not submitted in due time by the parties concerned". Therefore, in the present case, the admission of D1''',

D3i and D3j is at the Board's discretion.

Article 12 RPBA provides guidance on how such discretion should be applied. According to Article 12(1) and (4) RPBA, "without prejudice to the power of the Board to hold inadmissible [...] evidence [...] which could have been presented [...] in the first instance proceedings, everything presented by [...the appellant in the statement of grounds of appeal] shall be taken into account by the Board if and to the extent it relates to the case under appeal and meets the requirements in [Article 12(2) RPBA]". As far as the present case is concerned, Article 12(2) RPBA prescribes that the statement of grounds of appeal must contain the appellant's complete case, setting out clearly and concisely the reasons why it is requested that the decision under appeal be reversed and should specify, in particular, all evidence relied on, with the documents referred to to be attached as annexes.

3.2 By filing D1''', D3i and D3j and basing a reasoned novelty objection on them, the appellant fulfilled the requirements of Article 12(2) RPBA.

However, it has to be established whether the appellant could have presented these documents in the first instance proceedings and, if so, whether its failure to do so would lead the Board to hold them inadmissible.

The Board agrees with the respondent that, as a rule, the documents on which an opposition is based should be presented within the time limit for filing the opposition specified in Article 99(1) EPC. However, the Board also notes that appeal proceedings should give the appealing party, adversely affected by a decision at first instance, a fair chance and the means to argue

against the findings in that decision. That may include the possibility of filing further relevant evidence, if it is done in reaction to those findings.

The appellant argued that the filing of D1''', D3i and D3j with the statement of grounds of appeal was justified as it constituted a legitimate reaction to the Opposition Division's finding in the impugned decision that D1, D1' and D1'' did not belong to the state of the art. The respondent disputed this.

The Board shares the appellant's view. In essence, D1''' has the same technical content as D1, D1' and D1'' and relates to the same series of "sleep·safe" dialysis systems commercialised by the appellant. It can reasonably be assumed that, at first instance, the appellant expected that the Opposition Division would conclude that at least one of D1, D1' and D1'' belonged to the state of the art, so that there was no need to provide yet further evidence concerning the same series of dialysis systems. However, the Opposition Division decided otherwise, on the ground that the evidence on file was not sufficient to establish beyond any reasonable doubt that the subject-matter of these documents had been made available to the public before the priority date of the patent. The filing of D3i and D3j is an appellant's attempt to address this ground, as they are affidavits aiming at establishing the public availability of, in essence, the same subject-matter. It follows that, from a procedural point of view, the filing of D1''', D3i and D3j with the statement of grounds is justified, and the appellant could not reasonably have been expected to file them at first instance.

3.3 As argued by the respondent in the present case and held in decision T 1002/92, a further requisite for late-filed evidence to be admitted is its prima facie relevance, in the sense that it could reasonably be expected that such evidence would change the final outcome of the case, i.e. that it is likely to prejudice the maintenance of the patent.

The Board notes that, in the present case, such relevance is to be assessed from two different perspectives. The first concerns establishing the public availability of D1''', while the second relates to the relevance of its technical content with respect to the subject-matter claimed in the patent.

3.3.1 As regards establishing the public availability of D1''', the Board notes that D3i and D3j are affidavits, in which the declarants swore under oath that the statements made were true and correct to the best of their knowledge. The Board considers that such statements should be given a high probative value, unless other evidence casts doubts on them. As argued by the appellant, in D3i Mr Jung precisely identified D1''' as the document shown and used as a basis of a training course, which took place before the priority date of the patent, on the related "sleep·safe"dialysis system, delivered to a hospital in Nuremberg, Germany, on 3 January 2002. In D3j Ms Oberdorf, Ms Merten, and Ms Zweschper confirmed that they participated in that training. It is not disputed that these three persons belonged to the public. The alleged contradictions with D3e and D3h, according to which no delivery of a "sleep·safe" dialysis system was made to anyone on 3 January 2002, do not arise, since these documents relate to deliveries outside Germany, as the appellant convincingly argued. It follows that, on a prima facie

assessment of this evidence, the availability to the public of D1''' before the priority date of the patent might be established.

As far as the respondent's argument that the appellant did not provide any order, checklist, invoice or delivery/shipping note itemising D1''', the Board notes that such documents do not constitute an exhaustive list of evidence which would be needed to prove the public availability of devices or documents. The appellant is free to provide the evidence at its disposal which may serve that purpose.

As far as decision J 5/11 is concerned, the Board notes that it related to the admissibility of new evidence from within the private sphere of the appellant, submitted during appeal proceedings in the context of an application for re-establishment of rights under Article 122 EPC. The present opposition case is clearly different. Moreover, contrary to the respondent's assertion, it cannot be affirmed that D3j is derived from the private sphere of the appellant, since it was produced by three persons with no apparent relationship with the appellant. It follows that the conclusions in decision J 5/11 are not relevant for the present case.

3.3.2 As regards the technical content of D1''', the Board shares the appellant's view that it is prima facie highly relevant for the subject-matter claimed, since it clearly relates to a dialysis system of the same kind, with a display device showing a plurality of dialysis therapy set-up procedure screens (chapter 2.4), a plurality of dialysis treatment screens (chapter 3.3) and a plurality of dialysis therapy disconnection screens (chapter 4.1), as defined

in claim 1 of all requests.

3.4 For these reasons, the Board's decision is to admit D1''', D3i and D3j into the proceedings.

4. *Remittal to the Opposition Division*

The respondent requested that the case be remitted to the Opposition Division if D1''' is admitted.

According to Article 111(1) EPC, for the examination of the appeal, "the Board of Appeal may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution".

The respondent argued that the case should be remitted in order for the parties to have two degrees of jurisdiction. However, the Board notes that, according to that article, a party has no absolute right to have two degrees of jurisdiction. Rather, a decision to remit the case is within the Board's discretion.

The Board agrees with the respondent that, in principle, it may be appropriate to allow the parties to have their case examined at two instances. However, this is not the only criterion to be considered when deciding upon remittal. In the present case, as noted above, the technical content of D1''' was available to the parties well before the appeal proceedings started through similar documents already cited in the proceedings. As pointed out by the respondent, its relevance was even assessed by the Opposition Division, albeit preliminarily, in the communication accompanying the summons to oral proceedings at first instance. Moreover, the present case relates to a patent derived

from a divisional application with a priority dating back to May 2002, i.e. almost 14 years ago. In view of the present workload at the EPO, a remittal, which may even be followed by a further appeal, will likely result in a further delay of several years, before a final decision is taken. That will lead to an undesirably long time before legal certainty is eventually established.

For these reasons the Board's decision is not to remit the case.

5. *Availability to the public of D1'''*

As observed in paragraph 3.3.1 above, Mr Jung's sworn statement in D3i precisely identifies D1''', since it clearly refers to a user manual of a "sleep·safe" dialysis system with the Article No. 677 804 1 and the Software Version 1.0, Status 2/10.00, which corresponds to D1'''. According to D3i in conjunction with D3j, D1''' was made available before the priority date of the patent at least to Ms Oberdorf, Ms Merten, and Ms Zweschper, who undisputedly belonged to the public.

The Board is satisfied that this evidence is sufficient to establish that D1''' belongs to the state of the art for the purpose of assessing the novelty and inventive step of the subject-matter claimed in the patent.

6. Patent as granted

D1''' discloses a dialysis system for a user to run a dialysis therapy over a therapy session (page 1-3, chapter 1.1.1). The system comprises a display device included in a touch screen (3 in the figure on page 1-8). It was not disputed that such a display

device implies the presence of a suitable controller including a processor, a memory device and software for operating the display device. The latter is operated to display a plurality of dialysis therapy set-up procedure screens (chapter 2.4, starting on page 2-8) and to require an input by the user to proceed through the dialysis therapy set-up procedure screens (by pressing the virtual button "->" on the dialysis therapy set-up procedure screens). After the dialysis therapy set-up procedure is complete, the controller is operable with the display device to display a plurality of dialysis treatment screens that graphically illustrate steps in the dialysis therapy and that do not require an input by the user to proceed through the dialysis treatment screens (chapter 3.3 starting on page 3-18). After the therapy session is complete, the controller is operable with the display device to display a plurality of dialysis therapy disconnection screens (chapter 4.1 starting on page 4-3) and to require an input by the user to proceed through the dialysis therapy disconnection screens (by pressing the virtual button "->" on the dialysis therapy disconnection screens).

Concerning the respondent's argument that D1''' failed to disclose the display of a plurality of dialysis treatment screens that do not require an input by the user to proceed through them, the Board notes that, on page 3-18, first sentence, D1''' explicitly mentions that each treatment cycle is displayed during the treatment:

> "*Jeder Behandlungszyklus wird während der Behandlung auf dem Bildschirm angezeigt.*"

Since there is no specific mention that any action is needed from the user for such a display to take place, the skilled person, in the specific context of a treatment consisting of a sequence of cycles, can only conclude that such a display will take place sequentially, cycle after cycle. The Board agrees with the appellant that the author of D1''' would have explicitly mentioned the requirement of a user action only if such an action had been needed.

If follows that D1''' discloses all the features of claim 1 of the patent as granted. As a consequence, the subject-matter of the claim is not novel.

Hence, the ground for opposition according to Article 100(a) EPC in conjunction with Articles 52(1) and 54 EPC prejudices the maintenance of the patent as granted.

7. *Auxiliary request 1*

D1''' further discloses an input device of the dialysis system, included in touch screen 3 as virtual button "?" on the dialysis therapy set-up procedure screens (chapter 2.3), that operates to stop proceeding through the dialysis therapy set-up procedure screens (as explained on page 2-7), and an input device of the dialysis system, included in touch screen 3 as virtual button "<-" on successive dialysis therapy set-up procedure screens (chapter 2.4), that operates to cause a display of a previously displayed screen of the dialysis therapy set-up procedure screens (as explained for example on page 2-10).

The respondent argued that the additional features of claim 1 of auxiliary request 1 implied the capability

of the claimed system of stopping and resuming a set-up procedure, which was not possible with the system according to D1'''. However, the Board does not share this view, since in the system according to D1''', by pressing the "?" button a user enters a help mode which interrupts the set-up procedure until the user exits that mode. Hence, with the system according to D1''' the set-up procedure can also be stopped and resumed by the user.

As a consequence, D1''' anticipates the subject-matter of claim 1 of auxiliary request 1 too.

Hence, the patent cannot be maintained on the basis of auxiliary request 1 due to non-compliance with Article 52(1) EPC in conjunction with Article 54 EPC.

8. *Auxiliary request 2*

As the respondent argued, D1''' fails to disclose that the plurality of dialysis therapy set-up screens have a first coloration and the plurality of dialysis treatment screens have a second coloration.

However, the Board notes that no specific colorations, in particular dependent on day or night conditions, are defined in claim 1 of auxiliary request 2. Hence, the problem of improving the dialysis treatment by minimising disruption of a user's sleep, as formulated by the respondent, is not solved over the whole scope of the claim.

Two arbitrarily chosen different colorations as claimed may at most serve the purpose of somehow differentiating the dialysis therapy set-up screens from the dialysis treatment screens. In D1''' this is

already achieved by providing a different layout and different written information (figures in chapters 2.4 and 3.3).

It follows that the problem solved by the differentiating feature of claim 1 of auxiliary request 2 may be seen as an alternative or additional way of identifying the dialysis therapy set-up screens and the dialysis treatment screens.

As the appellant argued, D1''' discloses that touch screen 3 is in colour (page 1-4, second paragraph). The Board also agrees with the appellant that providing different colorations for different screens relating to different processes was commonly done in the field of computer displays. This could even be inferred in D1''', comparing the coloration of the help mode screens in the figures on page 2-7 with the coloration of the dialysis therapy set-up screens and the dialysis treatment screens. The skilled person would therefore implement two different colorations as claimed in the system of D1''' in an obvious way, according to circumstances.

As a consequence, the subject-matter of claim 1 of auxiliary request 2 lacks an inventive step.

Hence, the patent cannot be maintained on the basis of auxiliary request 2 due to non-compliance with Article 52(1) EPC in conjunction with Article 56 EPC.

9. *Auxiliary requests 3 and 4*

As the appellant argued, D1''' discloses that the controller is operable with the display device to display a selection screen having different parameters

available for selection (by pressing the virtual button leading to the menu "*Optionen*" as disclosed in chapter 3.4 starting on page 3-21) and to allow the user to navigate (second half of page 3-21) between therapy screens (screens reached by pressing virtual buttons "*Verweilen Überspringen*" and "*Behandlung abbrechen*") , parameter changes screens (screens reached by pressing virtual buttons "*Lautstärke ändern*" and "*Bildschirmeinstellungen ändern*") and log information screens (screens reached by pressing virtual button "*Momentane Behandlungsergebnisse anzeigen*"), wherein the therapy screens include graphics and text pertaining to at least patient dwell (virtual button "*Verweilen Überspringen*").

D1''' does not disclose that the parameters available for selection in the selection screen are grouped in categories.

As the respondent submitted, grouping the different parameters in categories available for selection in a category selection screen, as required by claim 1 of auxiliary requests 3 and 4 may be considered to address the problem of providing a more user-friendly system, since the selection of a particular parameter from amongst several could be facilitated.

However, grouping similar parameters in a category and making them accessible by first selecting the specific category is no more than an obvious design measure. This is also taught in D1''' in relation to the display of different log information screens, where a specific screen relating to a certain parameter is displayed by first selecting a more general parameter category (by pressing virtual button "*Momentane Behandlungsergebnisse anzeigen*") and then selecting the

specific parameter (by pressing the related virtual button as explained in chapter 4.2).

As a consequence, the subject-matter of claim 1 of auxiliary requests 3 and 4 lacks an inventive step too.

Hence, the patent cannot be maintained on the basis of auxiliary requests 3 or 4 due to non-compliance with Article 52(1) EPC in conjunction with Article 56 EPC.

10. Since none of the respondent's requests can form a basis for the maintenance of the patent, the patent has to be revoked pursuant to Article 101(2) and (3) EPC.

11. Having reached that conclusion, the Board need not elaborate on further objections raised by the appellant, in particular based on lack of novelty over D1 and on Article 100(c) EPC.

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:

D. Hampe E. Dufrasne

Decision electronically authenticated