

**Internal distribution code:**

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

**Datasheet for the decision  
of 14 January 2022**

**Case Number:** T 0745/17 - 3.2.07

**Application Number:** 11157224.4

**Publication Number:** 2327637

**IPC:** B65D81/26, B65D69/00,  
B65D73/00, B65D1/24, B65D51/18

**Language of the proceedings:** EN

**Title of invention:**  
A substantially moisture tight container and cap assembly

**Patent Proprietor:**  
CSP Technologies, Inc.

**Opponent:**  
Clariant Production (France) S.A.S.

**Headword:**

**Relevant legal provisions:**  
EPC Art. 100(a), 56, 111(1)  
RPBA 2020 Art. 11, 13(1), 15(1)

**Keyword:**  
Inventive step - auxiliary request (yes)  
Late-filed objection - admitted (no)

**Decisions cited:**

T 0617/16, T 2603/18, T 1361/18

**Catchword:**



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

Boards of Appeal of the  
European Patent Office  
Richard-Reitzner-Allee 8  
85540 Haar  
GERMANY  
Tel. +49 (0)89 2399-0  
Fax +49 (0)89 2399-4465

Case Number: T 0745/17 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 14 January 2022**

**Appellant:** Clariant Production (France) S.A.S.  
(Opponent) 6, rue Louise Michel  
94603 Choisy le Roi (FR)

**Representative:** Hoffmann Eitle  
Patent- und Rechtsanwälte PartmbB  
Arabellastraße 30  
81925 München (DE)

**Respondent:** CSP Technologies, Inc.  
(Patent Proprietor) 1030 Riverfront Center  
Amsterdam, NY 12010 (US)

**Representative:** Maiwald Patent- und Rechtsanwaltsgesellschaft mbH  
Elisenhof  
Elisenstraße 3  
80335 München (DE)

**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 3 February 2017  
rejecting the opposition filed against European  
patent No. 2327637 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairman** I. Beckedorf  
**Members:** A. Pieracci  
A. Cano Palmero

## Summary of Facts and Submissions

- I. The opponent (appellant) lodged an appeal in the prescribed form and within the prescribed time limit against the decision of the opposition division to reject the opposition against European patent No. 2 327 637.
- II. The opposition had been filed against the patent as a whole based on the grounds for opposition pursuant to Article 100(a) and (c) EPC (lack of novelty and inventive step; added subject-matter). The opposition division found that the grounds for opposition raised by the opponent did not prejudiced the maintenance of the patent as granted and rejected the opposition.
- III. In the present decision reference is made to the following documents:
- D2: WO 96/33108 A1;  
D6: EP 0 208 413 A2;  
D10: US 5,842,486 A;  
D17: US 5,788,064 A;  
D18: US 4,717,018 A.
- IV. In preparation for oral proceedings scheduled upon both parties' requests, the Board communicated its preliminary assessment of the case to the parties by means of a communication pursuant to Article 15(1) RPBA 2020.

The Board indicated *inter alia* that the subject-matter of claim 1 of the patent as granted appeared not to be inventive in view of D6 in combination with the common general knowledge and that auxiliary requests 1 to 8

appeared to be either not admissible and/or not allowable.

- V. With letter dated 16 November 2020 the patent proprietor (respondent) submitted further arguments in support of its main and auxiliary requests.
- VI. Oral proceedings before the Board took place on 14 January 2022 at the end of which the decision was announced and for further details of which reference is made to the minutes thereof.
- VII. The final requests of the appellant are
- that the decision under appeal be set aside and that the European patent No. 2 327 637 be revoked.
- VIII. The final requests of the respondent are
- that the appeal be dismissed and that the patent be maintained as granted,  
or, in the alternative, when setting aside the decision under appeal,  
that the patent be maintained in amended form on the basis of the set of claims according to auxiliary requests 1 to 8 filed with the reply to the statement setting out the grounds of appeal.
- IX. The lines of argument of the parties are dealt with in detail in the reasons for the decision.
- X. Independent claim 1 according to the patent as granted (main request), which is identical to claim 1 of auxiliary request 1, reads as follows:

"A substantially moisture tight container and cap assembly (10) for storing moisture sensitive items, the cap comprising:

a base portion (24) with an outer periphery (25) adapted to extend over at least a portion of the container (14), the base portion (24) being provided with a skirt (26) depending downwardly from the base portion (24),  
the cap further comprising a lip seal member (30) positioned interior to the skirt and depending downwardly from the base portion (24),  
wherein the container (14) has a container base (13) and a sidewall (11) depending upwardly from the base (13), a top container surface (17) extends inward from the sidewall (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 skirt (26) is configured at a location on the base portion (24) that allows the skirt to enter into a closing relationship with the lip (22) in which the skirt (26) fits over a periphery of the lip (22), wherein the lip seal member (30) is adapted to abut an interior side of the lip (22), thereby tightening the seal between the skirt (26) and the lip (22), when the cap (12) is in a closed position;  
characterized in that the assembly contains a desiccant."

XI. Independent claim 1 according to auxiliary request 2 reads as follow (the amendments with respect to claim 1 of the patent as granted are highlighted by the Board):

"Use of aA substantially moisture tight container and cap assembly (10) for storing diagnostic test strips or

drug delivery strips~~moisture-sensitive items~~, the cap comprising:

a base portion (24) with an outer periphery (25) adapted to extend over at least a portion of the container (14), the base portion (24) being provided with a skirt (26) depending downwardly from the base portion (24),  
the cap further comprising a lip seal member (30) positioned interior to the skirt and depending downwardly from the base portion (24),  
wherein the container (14) has a container base (13) and a sidewall (11) depending upwardly from the base (13), a top container surface (17) extends inward from the sidewall (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 skirt (26) is configured at a location on the base portion (24) that allows the skirt to enter into a closing relationship with the lip (22) in which the skirt (26) fits over a periphery of the lip (22), wherein the lip seal member (30) is adapted to abut an interior side of the lip (22), thereby tightening the seal between the skirt (26) and the lip (22), when the cap (12) is in a closed position;  
characterized in that the assembly contains a desiccant."

- XII. The wording of claim 1 according to auxiliary requests 3 to 8 is not reported here as these requests are not relevant for the decision.

## **Reasons for the Decision**

1. The present proceedings are governed by the revised version of the Rules of Procedure which came into force on 1 January 2020 (Articles 24 and 25(1) RPBA 2020), except for Articles 12(4) to (6) and 13(2) RPBA 2020 instead of which Articles 12(4) and 13 RPBA 2007 remain applicable (Article 25(2) and (3) RPBA 2020).
2. Exclusion of documents D10, D17 and D18 from the proceedings
  - 2.1 The respondent requested the exclusion of documents D10, D17 and D18 from the proceedings.
  - 2.2 The Board notes that documents D10 and D17 were filed with the notice of opposition and are addressed in the statement setting out the grounds of appeal so that they are part of the proceedings and cannot be excluded by the Board.
  - 2.3 The same applies to document D18, which was admitted into the opposition proceedings by the opposition division without any obvious error in the exercise of discretion and on which the decision under appeal is based (see points 6 and 7 of the reasons for the decision under appeal and the fifth full paragraph at page 2 of the minutes before the opposition division together with T 617/16, point 1.1.1 of the reasons, and T 2603/18, point 1 of the reasons).
  - 2.4 The Board thus cannot allow the request of the respondent.



3. Inventive step of the subject-matter of claim 1 of the patent as granted in view of D6 in combination with the common general knowledge (Articles 100(a) and 56 EPC)

3.1 The respondent argued in point I of its letter dated 16 November 2020 and at the oral proceedings that document D6 does not disclose the features of claim 1 of

"A substantially moisture tight container and cap assembly for storing moisture sensitive items"

in which

"the assembly contains a desiccant"

3.2 The Board however shares the view of the appellant that since document D6 discloses that a "tight seal of the spout opening is provided" (see column 1, line 44, to column 2, line 2) and that the "spout is self-cleaning and provides a moisture seal" (see column 1, lines 25 to 26) the container and cap assembly shown in figure 6 of D6 can be seen as a "substantially moisture tight container and cap assembly for storing moisture sensitive items" in the broadest sense of the term, since a specific quantitative indication of the level of moisture tightness required is not provided by the claim.

3.3 The Board agrees with the respondent that in D6 nothing is said about the moisture tightness of the container and of the thread connection between the cap and the container. The Board however concurs with the appellant that the person skilled in the art would understand that some kind of moisture tightness has also to be provided by the container and by its connection with

the cap, otherwise the use of a cap with a moisture tight seal of the spout would not be effective.

- 3.4 The argument of the respondent, that the moisture seal provided by the spout is directed to avoid moisture or liquid exiting from the container and not to avoid moisture entering the container contrary to what is required by claim 1, is not convincing. It is not derivable from document D6 that the seal is only effective as an outward and not as an inward barrier. Furthermore such a limitation is also not derivable from claim 1.
- 3.5 The Board cannot follow the argument of the respondent that document D18, when referring to further prior art represented by aluminium or glass containers with circular cross section having a flat seal cooperating with a screw locking (see D18, column 1, line 62 and following), provides an indication that the container and cap assembly of D6 is not substantially moisture tight as required by claim 1. There is no basis either in D6 or in D18 for using any part of D18 for interpreting the teaching of D6. This argument is therefore not convincing. The objection of the appellant to the admittance of the respondent's reference to D18 thus does not need to be addressed.
- 3.6 The Board also cannot follow the argument of the respondent that, since the cap of D6 is provided with a self-cleaning spout, the corresponding container and cap assembly is intended to be used only with liquids and the person skilled in the art would thus not consider D6 as describing a container and cap assembly for storing moisture sensitive items.

- 3.7 As correctly noted by the appellant, it is not disclosed in D6 that only liquids are to be used nor that only liquids are foreseen for the container and cap assembly therein disclosed. The fact that a self-cleaning spout is shown in D6 does not render the corresponding container and cap assembly unsuitable for containing moisture sensitive items. The argument of the appellant can thus only be seen as an unsubstantiated allegation.
- 3.8 The Board thus considers document D6 as an appropriate starting point for assessing the inventive step of the subject-matter of claim 1 according to the patent as granted and notes that the subject-matter of the claim is only distinguished from the disclosure of D6 by the feature that the assembly contains a desiccant.
- 3.9 The Board concurs substantially with the appellant that the technical problem which can be formulated in view of the distinguishing feature identified above is that of modifying the container and cap assembly of D6 such that the moisture contents within the container can be minimized (see page 11, third paragraph and page 14, first paragraph of the statement setting out the grounds of appeal) and that the provision of a desiccant to solve this problem is a technical solution within the reach of the person skilled in the art without the need of exercising any inventive skill on the basis of their common general knowledge alone (see page 11, fourth paragraph of the statement setting out the grounds of appeal).
- 3.10 The Board has no doubt that a desiccant and its technical properties are part of the common general knowledge of the person skilled in the art and notes that this has not been contested by the respondent when

this issue was discussed during the oral proceedings.

- 3.11 The Board is thus convinced by the arguments of the appellant that the decision of the opposition division that the subject-matter of claim 1 according to the patent as granted is based upon an inventive step is not correct.
  
- 4. Inventive step of the subject-matter of claim 1 of auxiliary request 1 (Article 56 EPC)
  
- 4.1 Since claim 1 of auxiliary request 1 is identical to claim 1 of the patent as granted, as agreed by the parties, its subject-matter is also not inventive in the sense of Article 56 EPC.
  
- 5. Admittance of auxiliary request 2 into the proceedings
  
- 5.1 The appellant argued at the oral proceedings, referring to the Board's preliminary opinion sent to the parties pursuant to Article 15(1) RPBA 2020, that the respondent had not indicated, in its reply to the statement of grounds of appeal, why auxiliary request 2 provided patentable subject-matter in the event that the main request was held to be not allowable by the Board.
  
- 5.2 The appellant also contested that the respondent only commented on the inventive step objection outlined in the statement of grounds of appeal by arguing that document D18 should not be admitted into the proceedings, but did not address the objection in substance.

5.3 Auxiliary request 2 should therefore not be admitted into the proceedings as it was unsubstantiated.

5.4 The Board disagrees.

Whether or not auxiliary request 2 was sufficiently substantiated is to be assessed in particular in view of the relevant procedural stage of its filing. The filing of claim requests needs generally to be accompanied by arguments to allow the Board and the other party to examine whether the claimed subject-matter has a basis in the application as originally filed, and whether the requests address objections which have been decided upon in the decision under appeal and/or which were admissibly raised by the other party, here the appellant (see T 1361/18, point 1.3 of the reasons).

5.5 In the case at hand, the degree of required substantiation by the respondent when filing the auxiliary requests with its reply to the appellant's appeal thus depends on the extent of substantiation of the appellant's objections in the statement of grounds of appeal, since no decision had been taken by the opposition division on the then auxiliary requests.

5.6 The appellant chose with the statement of grounds of appeal to object to the inventive step of auxiliary request 1 of the opposition proceedings starting from document D18 only.

5.7 Since, as indicated above, auxiliary request 1 was not decided upon by the opposition division, the only substantiation which the respondent needed to submit, when making that request, its auxiliary request 2, in appeal, was to provide the basis of the amendments made

and its counter-argument against the appellant's objection, which it did (see page 18 of the reply to the statement setting out the grounds of appeal).

5.8 The argument that document D18 should not be admitted into the proceedings is considered as sufficient substantiation for auxiliary request 2, since should the Board have followed the argument of the respondent in this regard, the only objection of the appellant against auxiliary request 2 would have been void.

5.9 Auxiliary request 2 is thus considered to be sufficiently substantiated and is admitted into the proceedings.

6. Admittance into the proceedings of the lines of arguments of the parties with respect to the objection of lack of inventive step of the subject-matter of claim 1 of auxiliary request 2 in view of the combination of D18 with either of D10 and D17.

6.1 The appellant requested not to admit any argument from the respondent against its objection of lack of inventive step in view of the combination of D18 with either of D10 and D17, since the respondent in the written procedure chose to object only to the admittance of document D18 without reacting to the attack of lack of inventive step in substance.

6.2 The Board considers that the attack of the appellant was submitted in appropriate detail for the first time at the oral proceedings and thus decides for reasons of equity to take into account the further developments of the arguments of both parties.

7. Inventive step of the subject-matter of claim 1 of auxiliary request 2 in view of the combination of D18 with either of D10 and D17 (Article 56 EPC)

7.1 Claim 1 of auxiliary request 2 is directed to the use of a substantially moisture tight container and cap assembly for storing test strips or drug delivery strips having the features of claim 1 of the patent as granted.

7.2 The appellant, further developing the arguments it submitted with the statement of grounds of appeal for auxiliary request 1 in opposition proceedings, which is identical to the present request (see statement of grounds of appeal, page 22, second and third paragraphs) argued that document D18 disclosed the use of a container for storing diagnostic test strips showing all the features of claim 1 apart from the provision of an additional skirt on the base portion of the cap, *i.e.* apart from a skirt according to the following combination of features of claim 1:

"wherein the skirt is configured at a location on the base portion that allows the skirt to enter into a closing relationship with the lip in which the skirt fits over a periphery of the lip."

7.3 The distinguishing combination of features would then provide the technical effect of improving the moisture tightness of the seal, whereby the objective technical problem to be solved would then be how to further improve the sealing arrangement of D18. That a further improvement would be obtained by providing a skirt as claimed is derivable from document D10 (column 5, line 47 ff).

- 7.4 The Board disagrees and rather follows the argument of the respondent that the person skilled in the art would not be motivated to provide a skirt according to claim 1 in the container and cap assembly of D18, since this would only be possible after further modifications, such as removing material from the ribs on the side of the opening of the container of D18, or by providing openings in the skirt to allow the skirt to fit around the opening of D18. No indication is to be found in D10 for providing such further modifications. That this would be done by the person skilled in the art on the basis of their common general knowledge remains an unsubstantiated allegation. The Board thus considers the argument submitted by the appellant as the result of an *ex-post facto* analysis.
- 7.5 The appellant argued that the subject-matter of claim 1 was also not inventive when starting from D18 in combination with the teaching of D17 (see statement of grounds of appeal, page 22, fourth paragraph). However, the appellant has failed to specifically indicate how and why the teaching of D17 would lead the person skilled in the art to the claimed subject-matter, so that this line of argument cannot be successful.
- 7.6 The Board is thus not convinced by the argument of the appellant that the subject-matter of claim 1 according to auxiliary request 2 is not inventive in view of the combination of the teaching of D18 with the teaching of either D10 or D17.



8. Admittance of the objection of lack of inventive step of the subject-matter of claim 1 of auxiliary request 2 in view of D2 in combination with D18

8.1 The appellant argued at the oral proceedings that it had been taken by surprise by the argument of the respondent that the structural differences between D18 and D10 would not allow a combination of the teachings of these documents and that therefore it should be allowed to react to such a new argument on the basis of the combination of the teaching of D2 and D18 which was used to object to the inventive step of the main request with the statement setting out the grounds of appeal.

8.2 The Board disagrees.

The appellant when filing the statement setting out the grounds of appeal chose to contest claim 1 of auxiliary request 1 in opposition proceedings for lack of inventive step exclusively starting from D18.

8.3 The Board notes that a party should be aware of the fact that, as indicated in Article 12(3) RPBA 2020, which substantially corresponds to Article 12(2) RPBA 2007, the statement of grounds of appeal shall contain the appellant's complete case.

8.4 No reasons have been submitted by the appellant nor are any apparent to the Board explaining why the appellant could not have objected to inventive step on the basis of the combination of the teaching of D2 and D18 with its statement of the grounds of appeal or after the respondent made auxiliary request 1 in opposition proceedings its auxiliary request 2 in appeal.

- 8.5 The Board considers that the course of action taken by the appellant of not defining its complete case at the beginning of the appeal procedure, is not only contrary to Article 12(3) RPBA 2020, corresponding essentially to Article 12(2) RPBA 2007, but also to the need for procedural economy and therefore considers it appropriate to exercise its discretion and not admit the amendment of the appellant's case into the proceedings pursuant to Article 13(1) RPBA 2020.
9. Admittance into the proceedings of the objection of added subject-matter for claim 9 of auxiliary request 2
- 9.1 The opponent, referring to its objection of added subject-matter against claim 9 of the patent as granted raised in the statement setting out the grounds of appeal, objected at the oral proceedings to added subject-matter for claim 9 of auxiliary request 2.
- 9.2 As indicated above, only objections concerning a lack of inventive step were raised against auxiliary request 2 in the written proceedings. No reason has been submitted by the appellant for not having raised the objection of added subject-matter with its statement of grounds of appeal or after the filing of auxiliary request 2 by the respondent.
- 9.3 Analogously to what has been discussed above, the Board considers that submitting the above objection for the first time at the oral proceedings is contrary to the need for procedural economy and thus decides to exercise its discretion and not admit this objection into the proceedings pursuant to Article 13(1) RPBA 2020.

10. Conclusions

In summary, in reviewing the decision under appeal, the Board finds that the appellant has convincingly shown the incorrectness of the decision under appeal and its underlying reasons in respect of the issue of inventive step of the subject-matter of claim 1 of the patent as granted, whereas none of the appellant's objections and arguments, as far as admissibly raised, prejudices the maintenance of the patent as amended according to auxiliary request 2, so that the decision under appeal should be set aside and the patent be maintained in amended form according to auxiliary request 2.

11. Remittal to the opposition division regarding the adaptation of the description based on auxiliary request 2

The Board finds that under the present circumstances the description can be adapted more efficiently in written proceedings, and considering that both parties agreed on a remittal of the case to the opposition division for the adaptation of the description of auxiliary request 2, there are sufficient reasons for deciding accordingly.

Special reasons in the sense of Article 11 RPBA 2020 are only required where a case is remitted to the department whose decision was appealed for further prosecution, *i.e.* decision.

## Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent in amended form with the following claims and a description to be adapted thereto:

**Claims:**

No. 1 to 9            according to auxiliary request 2 filed with the reply to the statement of grounds of appeal dated 5 October 2017.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated