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Datasheet for the decision of 13 August 2019

Case Number: T 2588/17 - 3.2.07

Application Number: 10181784.9

Publication Number: 2316748

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Language of the proceedings: EN

Title of invention:
Resealable food container

Patent Proprietor:
Intercontinental Great Brands LLC

Opponent:
REGATH HB

Headword:

Relevant legal provisions:
EPC Art. 54
RPBA Art. 13(1)

Keyword:
Novelty - main request (no) - auxiliary request (no)
Late-filed auxiliary requests - admitted (no)

Decisions cited:
T 0893/15

Catchword:

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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 2588/17 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 13 August 2019

Appellant: (Patent Proprietor)	Intercontinental Great Brands LLC 100 Deforest Avenue East Hanover, NJ 07936 (US)
Representative:	Forrest, Stuart WP Thompson 138 Fetter Lane London EC4A 1BT (GB)
Respondent: (Opponent)	REGATH HB Kapplöpningsgatan 14 252 30 Helsingborg (SE)
Representative:	AWA Sweden AB P.O. Box 5117 200 71 Malmö (SE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 9 October 2017 revoking European patent No. 2316748 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	I. Beckedorf
Members:	A. Pieracci
	V. Bevilacqua

Summary of Facts and Submissions

I. The patent proprietor lodged an appeal in the prescribed form and within the prescribed time limit against the interlocutory decision of the opposition division to revoke European patent No. 2 316 748.

II. The opposition had been filed against the patent as a whole based on Article 100(a) EPC (lack of novelty and of inventive step), Article 100(b) EPC (insufficiency of disclosure) and on Article 100(c) EPC (added subject-matter).
The opposition division considered Article 100(c) EPC to be prejudicial to the maintenance of the patent as granted and considered the patent as amended during opposition proceedings as not fulfilling the requirements of Article 123(2), 54(1) and (2) and 56 EPC.

III. With the statement setting out the grounds of appeal, the appellant (patent proprietor) requested

that the decision under appeal be set aside
and
that the patent be maintained as granted (re-filed as main request with a letter dated 19 February 2018)
or, in the alternative,
that the patent be maintained in amended form on the basis of one of auxiliary requests 1 to 9 filed with the letter dated 19 February 2018.

The appellant also requested remittal of the case to the opposition division for the examination of inventive step in case the Board considers the subject-

matter of claim 1 of the main request and of each of auxiliary requests 4, 5 and 6 to be novel.

IV. With the reply to the statement setting out the grounds of appeal, the respondent (opponent) requested

that the appeal be dismissed,
that auxiliary requests 2, 3, 4, 5, 8 and 9 not be admitted into the proceedings,
that the colour version of documents E1 and E2 be admitted into the proceedings.

V. In the present decision, reference is made to the following documents:

E1: Processing Equipment & Packaging Machinery Association: "Packaging News PPMA Preview", September 2001, (2001-09), page 40;

E2: "Machinery Update", April 2002 (2002-04), pages 59-60.

VI. In order to prepare the oral proceedings scheduled upon both parties' requests, the Board communicated its preliminary assessment of the case by means of a communication pursuant to Article 15(1) RPBA. The Board indicated that the subject-matter of claim 1 as granted (main request) and of each of auxiliary requests 1 to 9 appeared not to be new in view of document E1.

VII. With a letter dated 15 July 2019, the appellant replied to the Board's communication and submitted new claims according to auxiliary requests 10 to 12, on the basis of which the appellant, in addition to the requests submitted with the statement setting out the grounds of

appeal (see point III. above), requested maintenance of the patent in amended form.

The appellant also requested that in the event that the coloured copies of E1 and E2 are admitted into the proceedings the case be remitted to the opposition division to reconsider novelty in light thereof.

VIII. Oral proceedings before the Board took place on 13 August 2019. At the end of the oral proceedings, the parties confirmed their requests on file. For further details on the course of the oral proceedings, in particular the matters discussed with the appellant, reference is made to the minutes thereof.

The decision was given at the end of the oral proceedings.

IX. The appellant argues that the subject-matter of granted claim 1 is new in view of document E1 because a plurality of features of the claim is not shown in E1, in particular a frame defining the polygonal shape of the container.
The appellant also argues that a tamper-evident structure as required by claim 1 of each of auxiliary requests 1 to 9 is not directly and unambiguously derivable from document E1. The appellant also argues that auxiliary requests 10 to 12 should be admitted into the proceedings as they are a reaction to the new objection that a tamper-evident structure is also disclosed in document E1.

The respondent argues that all the features of claim 1 as granted can be found in combination in document E1 and that a tamper-evident structure as claimed in claim 1 of each of auxiliary requests 1 to 9 is also

disclosed in that document. The respondent also argues that auxiliary requests 10 to 12, being late filed, should not be admitted into the proceedings.

The lines of argument of the parties will be dealt with in detail in the reasons for the decision.

X. Independent claim 1 according to the main request, i.e. according to the patent as granted, reads as follows:

A polygonal shaped food container (10) comprising:
a frame (30) defining the polygonal shape of the container (10), said container (10) having a top (12), a bottom (13) and sides (14a, 14b, 15a, 15b) connecting the top (12) and bottom (13), the frame (30) containing food products such as cookies and the like;
a wrapper (11) surrounding said frame (30), said wrapper (11) forming the top (12), sides (14a, 14b, 15a, 15b) and bottom (13) of the container;
characterised in that
said top (12) having a flap (16) which can be pulled back to form an access opening (18) sufficiently large to provide hand access to the food products contained within the frame (30); and
a sealing layer (20) permanently adhered to the flap (16) using an appropriate adhesive and having an adhesive (26) applied to the surface of sealing layer (20) which is in contact with the top (12) so that said adhesive (26) provides a removable seal between the sealing layer (20) and the top (12), said sealing layer (20) including a tab portion (22) located near a side of the top (12) which can be grasped by a user, said sealing layer (20) being releasable when said tab portion (22) is pulled in a direction away from said side to in turn pull and thereby release at least a portion of said sealing layer (20) sealed to the top

(12) around said opening (18) to provide the hand access to said top access opening (18) and reclosable against said top (12) to seal said opening (18) when said sealing layer (20) is moved back against the said top (12).

XI. Independent claim 1 according to auxiliary request 1 corresponds to claim 1 of the patent as granted, with the following additional feature at the very end of the characterising portion of the claim:

the container further comprising a tamper-evident structure.

XII. Independent claim 1 according to auxiliary request 2 corresponds to claim 1 of the patent as granted, with the following additional feature at the very end of the characterising portion of the claim:

the container further comprising a tamper-evident structure associated with the opening of the sealing layer.

XIII. Independent claim 1 according to auxiliary request 3 corresponds to claim 1 of the patent as granted, with the following additional feature at the very end of the characterising portion of the claim:

the container further comprising a tamper-evident structure associated with the sealing layer.

XIV. Independent claim 1 according to auxiliary requests 4, 5 and 6 corresponds to claim 1 of the patent as granted; claim 1 of each of auxiliary requests 7, 8 and 9 corresponds to claim 1 of each of auxiliary requests 1, 2 and 3, respectively.

XV. Independent claim 1 according to auxiliary request 10 reads as follows (the features added with respect to claim 1 of the patent as granted are underlined):

A polygonal shaped food container (10) comprising: a frame (30) defining the polygonal shape of the container (10), said container (10) having a top (12), a bottom (13) and sides (14a, 14b, 15a, 15b) connecting the top (12) and bottom (13), the frame (30) containing food products such as cookies and the like;
a wrapper (11) surrounding said frame (30), <u>which forms a tray for the contents of food products to be placed,</u> said wrapper (11) forming the top (12), sides (14a, 14b, 15a, 15b) and bottom (13) of the container;
characterised in that
said top (12) having a flap (16) which can be pulled back to form an access opening (18) sufficiently large to provide hand access to the food products contained within the frame (30); and
a sealing layer (20) permanently adhered to the flap (16) using an appropriate adhesive and having an adhesive (26) applied to the surface of sealing layer (20) which is in contact with the top (12) so that said adhesive (26) provides a removable seal between the sealing layer (20) and the top (12), said sealing layer (20) including a tab portion (22) located near a side of the top (12) which can be grasped by a user, said sealing layer (20) being releasable when said tab portion (22) is pulled in a direction away from said side to in turn pull and thereby release at least a portion of said sealing layer (20) sealed to the top (12) around said opening (18) to provide the hand access to said top access opening (18) and reclosable against said top (12) to seal said opening (18) when

said sealing layer (20) is moved back against the said top (12).

XVI. Independent claim 1 according to auxiliary request 11 reads as follows (the features added with respect to claim 1 of the patent as granted are underlined):

A polygonal shaped food container (10) comprising: a frame (30) defining the polygonal shape of the container (10), said container (10) having a top (12), a bottom (13) and sides (14a, 14b, 15a, 15b) connecting the top (12) and bottom (13), the frame includes ends (31a, 31b) and a divider (32) which divides the frame into a first section (34) and a second section (36), the frame (30) containing food products such as cookies and the like;
a wrapper (11) surrounding said frame (30), said wrapper (11) forming the top (12), sides (14a, 14b, 15a, 15b) and bottom (13) of the container;
characterised in that
said top (12) having a flap (16) which can be pulled back to form an access opening (18) sufficiently large to provide hand access to the food products contained within the frame (30); and
a sealing layer (20) permanently adhered to the flap (16) using an appropriate adhesive and having an adhesive (26) applied to the surface of sealing layer (20) which is in contact with the top (12) so that said adhesive (26) provides a removable seal between the sealing layer (20) and the top (12), said sealing layer (20) including a tab portion (22) located near a side of the top (12) which can be grasped by a user, said sealing layer (20) being releasable when said tab portion (22) is pulled in a direction away from said side to in turn pull and thereby release at least a portion of said sealing layer (20) sealed to the top

(12) around said opening (18) to provide the hand access to said top access opening (18) and reclosable against said top (12) to seal said opening (18) when said sealing layer (20) is moved back against the said top (12).

XVII. Independent claim 1 according to auxiliary request 12 reads as follows (the features added with respect to claim 1 of the patent as granted are underlined):

A polygonal shaped food container (10) comprising: a frame (30) defining the polygonal shape of the container (10), said container (10) having a top (12), a bottom (13) and sides (14a, 14b, 15a, 15b) connecting the top (12) and bottom (13), the frame includes ends (31a, 31b) and a divider (32) which divides the frame into a first section (34) and a second section (36), the frame (30) containing food products such as cookies and the like;
a wrapper (11) surrounding said frame (30), which forms a tray for the contents of food products to be placed, said wrapper (11) forming the top (12), sides (14a, 14b, 15a, 15b) and bottom (13) of the container;
characterised in that
said top (12) having a flap (16) which can be pulled back to form an access opening (18) sufficiently large to provide hand access to the food products contained within the frame (30); and
a sealing layer (20) permanently adhered to the flap (16) using an appropriate adhesive and having an adhesive (26) applied to the surface of sealing layer (20) which is in contact with the top (12) so that said adhesive (26) provides a removable seal between the sealing layer (20) and the top (12), said sealing layer (20) including a tab portion (22) located near a side of the top (12) which can be grasped by a user, said

sealing layer (20) being releasable when said tab portion (22) is pulled in a direction away from said side to in turn pull and thereby release at least a portion of said sealing layer (20) sealed to the top (12) around said opening (18) to provide the hand access to said top access opening (18) and reclosable against said top (12) to seal said opening (18) when said sealing layer (20) is moved back against the said top (12).

Reasons for the Decision

1. Novelty of the subject-matter of claim 1 of the patent as granted (Article 100(a) and 54 EPC)

1.1 In the statement setting out the grounds of appeal, the appellant argues that, contrary to the decision of the opposition division (see paragraphs 17.3.2 to 17.3.3 of the reasons for the decision), document E1 does not show:

a frame defining the polygonal shape of the container and containing food products,

a wrapper surrounding said frame, said wrapper forming the top, sides, and bottom of the container, or

a sealing layer permanently adhered to the flap using an appropriate adhesive.

1.1.1 The appellant notes that while the decision of the opposition division and document E1 both refer to a tray, granted claim 1 defines a frame which contains

food products. Such a frame is not shown in E1. Moreover, E1 clearly indicates that a frame is not disclosed, since it is stated therein that the "...Re-seal It does not involve the expense of plastic profile...".

1.1.2 The appellant also argues that the figure of E1 does not show a wrapper that surrounds a frame according to claim 1. In E1 a flow-wrapper machine is mentioned, but only to produce a filmic label that is applied over the flap and sealed using pinch rollers. In the figure of E1 the film appears to be adhered to the top of the container, which is a tray. In E1 there is no direct and unambiguous disclosure of a container comprising a wrapper that forms the top, sides and bottom of the container.

1.1.3 The appellant further argues that the flap shown in E1 follows the sealing layer because it is die cut from the film, which means that it is also readily detachable from the film.
The sealing layer of E1 is coated with a single peelable adhesive, so that the flap could be peeled back from the sealing layer in the same way the sealing layer can be peeled back to open the pack.

1.2 In its reply to the communication of the Board under Article 15(1) RPBA, and at the oral proceedings the appellant submitted the following further arguments.

1.2.1 The appellant argues that the terms "frame" and "tray" used in the patent in suit are not synonymous. It can be derived from paragraph [0018] of the patent specification that the tray is only formed once the wrapper surrounds the frame and provides a base onto which the food products can be placed. This is not the

case for the tray of E1, which therefore does not show a frame according to claim 1.

1.2.2 The appellant also argues that the food products shown in Figure 1 of E1 are not contained "within the frame" as required by claim 1, but are rather placed onto a tray.

1.2.3 The appellant further argues that E1 does not disclose a frame that defines the polygonal shape of the container, since the shape of the upper portion of the container is partly defined by the food which is onto the tray, as apparent from the figure of E1.

Since the food on the tray of E1 has a curved shape and protrudes outwards, the upper part of the container has an arcuate profile, and a polygonal shape is thus not apparent.

The appellant further argues that the person skilled in the art, when reading the claim and having knowledge of the examples of the patent, would interpret the term "polygonal shaped food container" as meaning that the container is a polyhedron, i.e. that all its faces are polygonal.

1.2.4 The appellant contests that it is known to a person skilled in the art that a flow wrap is formed by a web sealed longitudinally and at its ends, and that the burden of proof of proving this is on the respondent.

1.2.5 The appellant contests that the container shown in the figure of E1 has a top, a bottom and sides connecting the top and bottom. In particular, it is not evident that walls are present on opposite sides of the container and, in any case, that the walls do not

extend to the full height of the container and therefore do not define its sides as required by the claims.

1.2.6 The appellant also argues that by analogy with T893/15 of 2 May 2019, not published in OJ EPO, point 7.2 of the reasons for the decision, the tray of E1 is not to be seen as a frame because its side walls do not extend to the height of the container.

1.3 The respondent contests the arguments of the appellant as follows.

1.3.1 Referring to paragraph [0018] of the patent in suit, the respondent contests the interpretation of the appellant and argues that the white tray shown in the figure of E1 can be seen as a frame according to the claimed invention.

1.3.2 With reference to Figure 1 and to the text of E1 mentioning flow wrapping, the respondent argues that the person skilled in the art would recognise that the frame shown in the figure of E1 is flow wrapped, and thus a wrapper according to the invention is thereby disclosed. In the art is well known what a flow wrap is, as apparent for example from documents E1 and E2.

1.3.3 With reference to the second paragraph of E1, the respondent also argues that it is clear that the sealing layer is permanently adhered to the flap, since it is arranged to carry the flap during opening, and that it also provides a removable seal between the sealing layer and the top.

1.3.4 The respondent argues that a polygon defines a figure on a plane, i.e. in two dimension, while the food

container is a three-dimensional body. The feature "polygonal shaped food container" in claim 1 thus has thus to be interpreted as meaning a container whose footprint, i.e. the projection on the plane where it lies, is polygonal.

1.3.5 The respondent also argues that from the figure of E1 the shadow of the tray can be seen, which means that the tray has a certain height and can therefore be seen as being a frame.

1.3.6 The respondent further argues that the food products in the container of E1 do not exceed the lateral boundary of the tray and are therefore contained within the tray of E1, which also acts as a frame.

1.4 The Board cannot accept the arguments of the appellant and concurs substantially with the respondent for the following reasons.

1.4.1 The fact that in E1 it is mentioned that "...Re-seal It does not involve the expense of plastic profile..." does not mean that trays or frames are not used, in fact, the use of a tray is clearly shown in the figure, which is labelled "The Re-Seal It system in action" and mentioned in the last paragraph of E1.

The tray shown in the figure of E1 can be considered as being a frame, since it can be seen as being a structure that provides shape and strength and that supports the food products, thus also fulfilling the definition provided by the appellant itself (see point 3.14 of the reply to the communication pursuant to Article 15(1) RPBA).

The Board cannot accept the argument of the appellant that the tray of E1 cannot be seen as a frame because of the disclosure of paragraph [0018] of the patent in suit.

The first sentence of paragraph [0018] reads:

"Wrapper 11 surrounds a frame 30 which forms a tray for the contents of the food to be placed".

That a tray is formed by the wrapper providing a base to the frame cannot be derived from this sentence. The term "which" refers to the frame and not to the wrapper. A base of the tray formed by the wrapper is not mentioned.

The figures of the patent also do not show that the frame is without a base. Figure 13, which is the only figure that could provide some information in this regard, shows that the frame has a base and that the base is not provided by the wrapper.

Point 7.2 of the reasons for the decision of case T 893/15, *supra*, does not lead the Board to consider the tray of the figure of E1 as not being a frame, since case T 893/15 deals with a different prior art document.

The arguments of the appellant as outlined in points 1.1.1, 1.2.1 and 1.2.6 above cannot be accepted, and the Board is therefore of the opinion that the figure of E1 shows a food container having a frame.

1.4.2 The Board also considers that the food products of E1 are contained "within the frame", as required by claim 1 of the patent in suit, since the food products do not

extend over the lateral boundary of the frame. The expression "food products contained within the frame" does not mean that the food products cannot exceed the height of the frame. The fact that the food products could be seen as being onto the frame does not exclude that they can also be described as being within the frame.
The argument of the appellant outlined in point 1.2.2 above is thus not convincing.

1.4.3 The Board concurs with the interpretation of the respondent that the person skilled in the art would understand the expression "polygonal shaped food container" as meaning a container which has a polygonal projection on the plane where it lies, i.e. a polygonal footprint.

The fact that the food container of the figure of E1 has an arcuate cross section due to the food exceeding the height of the tray is not relevant for the issue of the polygonal shape, since, as indicated above, the person skilled in the art would understand the polygonal shape as being linked to the footprint of the container and not to its cross section.

The argument of the appellant that the expression "polygonal shaped food container" should be interpreted as meaning that the container is a polyhedron, i.e. that it has faces which are polygonal, cannot be accepted. "Polyhedron" has its own specific meaning, which is different from "polygonal".
The appellant itself has selected the terms to be used for defining its invention when drafting the patent application and cannot now choose to have the meaning of these terms replaced by the meaning of other terms

at will for distinguishing the claimed subject-matter from the prior art.

The tray of the figure of E1 gives the shape to the wrapper of the container, which otherwise would be loose, and is such that the projection of the container on the plane where it lies, i.e. its footprint, is rectangular. The tray, i.e. the frame, of the figure of E1, therefore defines the polygonal, in particular rectangular, shape of the food container of that figure.

The arguments of the appellant as outlined in point 1.2.3 above cannot thus be accepted.

1.4.4 In the second paragraph of E1 it is stated that "...Re-Seal It allows flow wraps of bacon, sliced cooked meat, cheese and similar food products eaten over a period of time to be opened and then resealed, to avoid drying out in the fridge...".

The Board concurs with the argument of the respondent, that it is considered known to the person skilled in the art that a "flow wrap" is formed by a web sealed longitudinally and at its ends, providing in this way a sealed package (see page 7, second paragraph of the reply to the grounds of appeal).

The Board cannot accept the argument of the appellant that it is not known to the person skilled in the art what a "flow wrap" is. As indicated by the respondent, the term "flow wrap" is used in E1 and E2, which are publications in the technical field of the invention, without there being any need for any further explanation. In E1 reference is even made to a

commercially available "flow wrapper", i.e. a flow wrap machine.
The argument of the appellant, that the person skilled in the art is not aware of what a "flow wrap" is, cannot be accepted and, as a blank denial of the respondent's argument substantiated by the relevant E1 and E2 publication, does not suffice to cast doubts upon the correctness of the plausible and convincing explanation of the term given by the respondent.

The fact that in the fourth paragraph of E1 it is mentioned that:
"...The system operates without conventional wrapping film..."
does not invalidate the information previously stated in the second paragraph that the "Re-Seal IT" is applied to flow wraps, but indicates, namely, that the film is not a conventional wrapping film, nothing more.

The last paragraph of E1 states that:
"...apart from sliced meats and cheese, the system is suitable for trays of high value food such as sushi or canapés and for peel-open packs for ‘clean’ medical goods...".

The person skilled in the art would then consider the figure of E1 as representing the "Re-Seal It" system being applied to a flow wrap, as indicated in the second paragraph, with a tray for food, as indicated in the last paragraph.

It is noted that, as argued by the respondent, the figure of E1 also shows the shadow of the tray, so that it is evident that the tray has a defined and recognisable height. As a consequence, the height

defines the sides of the container, which connect the corresponding top and bottom as required by claim 1.

The arguments of the appellant outlined in points 1.1.2, 1.2.4 and 1.2.5 are thus not convincing, and the Board considers that E1 also discloses a wrapper surrounding said frame, said wrapper forming the top, sides and bottom of the container.

1.4.5 E1 states in the first paragraph of the second column that:

"...A filmic label is then applied over the flap and sealed into place under pressure..."

In the second paragraph of the right column, E1 reads:

"...To open the pack consumers simply peel back the label, which carries the flap with it...",

and in the third paragraph:

"...To reclose, the label is wiped back into place held by the peelable adhesive...".

Since the label carries the flap with it when it is peeled back, the sealing layer "is permanently adhered to the flap", in the broadest sense of the term, because the flap remains attached to the sealing layer during use of the container. The fact that the same adhesive allows the flap to be peeled back, the adhesive thus being "peelable" with respect to the top of the container, does not exclude a "permanent" adhesion of the sealing layer to the flap. It is noted that the claim does not require that two different adhesives be used.

The arguments of the appellant indicated in point 1.1.3 above cannot thus be accepted.

1.4.6 Since all the features of claim 1 which, according to the appellant, should distinguish the subject-matter of granted claim 1 from the disclosure of document E1 are to be found in that document, the Board comes to the conclusion, that the subject-matter of said claim is not new within the meaning of Article 54 EPC.

2. Novelty of the subject-matter of claim 1 according to auxiliary request 1 (Article 54 EPC)

Claim 1 according to auxiliary request 1 corresponds to claim 1 as granted, with the additional feature of

"...the container further comprising a tamper-evident structure...".

2.1 The respondent argues that E1 discloses such a tamper-evident structure, since the passage bridging the left and the right column of E1 reads:

“... die-cutting three sides of a rectangle to produce a flap, which is held in place by small notches...”.

Although not explicitly indicated as being a tamper-evident structure, the small notches mentioned in this passage are broken when the label is pulled and they thus have a tamper-evident function associated with the opening of the sealing layer.

The respondent argues further that the small notches will only break when opening the container and not during manufacturing or transport. The person skilled in the art would also feel when opening the container

whether the notches are already broken. The notches have, therefore, a tamper-evident function.

2.2 The appellant replies that a tamper-evident structure is not to be directly and unambiguously derivable from document E1.

This is because from the figure of E1 it is not apparent whether notches are present; furthermore, it is not clear when the notches are broken. The notches could well be broken during the manufacturing process, when applying the filmic label by pressure, as indicated in the first paragraph of the right column of E1, or when transporting the food containers for delivery.

The notches could also be broken by a quality check before leaving the factory.

Furthermore, the notches could realign when wiping back the label into place after opening, so that a tampering attempt cannot be detected.

The appellant further argues that the notches could be so small that it would not be possible to detect that they have been broken, while it is clear from the patent specification (see paragraph [0030]) that the tamper attempt should be immediately apparent to the consumer.

The appellant also argues that it might be not possible to see the small notches through the filmic label.

A tamper-evident structure is thus not to be directly and unambiguously derivable from document E1.

2.3 The Board cannot accept the argument of the appellant and concurs substantially with the respondent for the following reasons.

The Board is of the opinion that, even if they cannot be seen from the figure of E1, notches are present in the food container shown therein, since according to the caption of the figure such container is an example of the Re-Seal It system, in which notches are provided (see the passage bridging the left and the right columns of E1).

The argument that the notches cannot be seen through the filmic label is not convincing, because the filmic label shown in the figure of E1 is evidently transparent; it is possible to see the food products through it.

The Board concurs with the respondent that the manufacturing process is such that the notches will not break when applying the filmic label by pressure. It has to be expected that since the notches are made to maintain the label in place for the subsequent manufacturing steps, they are such that they will not break during such steps.

That the notches would break during transportation of the food container is to be seen as an hypothetical event which finds no support in E1.

The same applies for the argument that the notches could be broken for a quality check. Such a quality check is not apparent from E1.

The Board cannot accept the argument of the appellant and is thus of the opinion that the notches are such

that they will break when peeling back the label to open the container (see the second paragraph from the top of the right column of E1) and not before.

The argument of the appellant, that the notches are small and that consequently it cannot be ascertained whether they are broken and that they can realign when wiping back the label into place, also can not be accepted and is considered as a blanket allegation that remains unsubstantiated.

The claimed feature of the "tamper-evident structure" is to be interpreted as meaning that some change is caused by a tamper attempt which can somehow be detected. How easy or accurate such detection should be is not to be derived from the claim. The passage of paragraph [0030] of the description of the patent in suit does not provide any further indication either. The arguments of the appellant are therefore not convincing.

The Board is of the opinion that the food container of the figure of E1 has small notches that will break when opening the container, and that the person skilled in the art is in the position of detecting the structural modification linked to the fact that the notches are broken, so that the container of E1 is provided with a tamper-evident structure in the broadest sense of the term.

2.4 The Board therefore concludes that the subject-matter of claim 1 of auxiliary request 1 is not new within the meaning of Article 54 EPC.

3. Novelty of the subject-matter of claim 1 according to auxiliary request 2 (Article 54 EPC)

Claim 1 according to auxiliary request 2 corresponds to claim 1 as granted, with the additional feature of:

"...the container further comprising a tamper-evident structure associated with the opening of the sealing layer...".

3.1 The respondent argues that in E1 the small notches are also associated with the opening of the sealing layer while the appellant does not add any further arguments with respect to those already brought forward for auxiliary request 1.

3.2 The Board concurs with the respondent that since the notches are broken when peeling back the sealing layer, and since the small notches constitute a tamper-evident structure, the food container shown in the figure of document E1 also shows a tamper-evident structure associated with the opening of the sealing layer.

3.3 The subject-matter of claim 1 according to auxiliary request 2 is therefore not new within the meaning of Article 54 EPC.

4. Novelty of the subject-matter of claim 1 according to auxiliary request 3 (Article 54 EPC)

Claim 1 according to auxiliary request 3 corresponds to claim 1 as granted with the additional feature:

"...the container further comprising a tamper evident structure associated with the sealing layer...".

4.1 The appellant argues that the small notches of the flap of E1 are not associated with the sealing layer as required by claim 1. According to the invention, as can be seen from Figures 5a and 5b, the fact that the tamper-evident structure is associated with the sealing layer means that it is part of the structure of the sealing layer.

4.2 The respondent contests there being any basis for such an interpretation in the original application.

4.3 The Board cannot accept the argument of the appellant and concurs substantially with the respondent.
The flap of document E1 is held in place by the small notches. When the user peels back the label, this carries the flap with it, thus breaking the notches, which constitute the tamper-evident structure.
The tamper-evident structure of E1 is thus activated by peeling back the label, i.e. the sealing layer, and it is thus "associated" with it in the broad sense of the term.

The Board cannot accept the argument of the appellant that the expression "associated with the sealing layer" should be read as meaning "being part of the sealing layer". Independently from what is derivable from Figures 5a and 5b of the patent in suit, the appellant cannot choose at wish to give a term of a claim a more restrictive meaning than the commonly accepted one to distinguish the subject-matter of the claim from the prior art. If a restrictive interpretation is wished, this should be clearly apparent from the wording of the claim.

4.4 The Board is therefore of the opinion that the tamper-evident structure of E1 is associated with the sealing

layer and that the subject-matter of claim 1 of auxiliary request 3 is thus also not new within the meaning of Article 54 EPC.

5. Novelty of the subject-matter of claim 1 according to auxiliary requests 4 to 9 (Article 54 EPC)

5.1 The Board notes that claim 1 according to auxiliary requests 4, 5 and 6 corresponds to claim 1 as granted, and that claim 1 of each of auxiliary requests 7, 8 and 9 corresponds respectively to claim 1 of each of auxiliary requests 1, 2 and 3. This has been acknowledged by the parties.

5.2 Therefore, from the considerations made above with respect to claim 1 of the patent as granted and of each of auxiliary requests 1 to 3, none of auxiliary requests 4 to 9 is allowable for lack of novelty of the subject-matter of claim 1 thereof in view of E1.

6. Admittance into the proceedings of auxiliary requests 10 to 12

The appellant filed auxiliary requests 10 to 12 after the communication of the Board pursuant to Article 15(1) RPBA.

6.1 The respondent contests the admittance of auxiliary requests 10 to 12 into the proceedings, arguing that they have been filed late since they are not a timely response to the reply to the statement setting out the grounds of appeal.

6.2 When filing auxiliary requests 10 to 12 the appellant argued that the submission of the new auxiliary requests was "...intended to deal with the new lack of

novelty objections that were raised for the first time in the Board's summons to oral proceedings...".

At the oral proceedings the appellant acknowledged that the novelty objection had already been submitted by the respondent with its reply to the grounds of appeal and then followed by the Board in its communication.

The appellant admitted that it waited for the preliminary opinion of the Board before filing auxiliary requests 10 to 12 dealing with the new novelty objection raised by the respondent in its reply to the grounds of appeal.

6.3 The Board is of the following opinion.

As acknowledged by the appellant, the Board has not raised any new objection with its communication pursuant to Article 15(1) RPBA dated 15 March 2019 but has merely concurred with the objection raised by the respondent in its reply to the statement setting out the grounds of appeal dated 21 June 2018.

The communication of the Board therefore does not introduce any new objection justifying the filing of new requests at this stage of the proceedings.

To deliberately wait for the preliminary opinion of the Board before reacting to an objection raised by the other party is totally contrary to the very meaning of the Rules of Procedure of the Boards of Appeal, which make it clear that the case of the parties should be complete at a very early stage of the proceedings.

The admittance of any amendments to a party's case, in particular after oral proceedings have been arranged,

is in fact subject to the Board's discretion within the meaning of Article 13 RPBA.

In the present case the Board considers it inappropriate that the appellant has waited for the communication pursuant to Article 15(1) RPBA before reacting to the new objection raised by the respondent in its reply to the statement setting out the grounds of appeal, thereby impeding the Board and the respondent from dealing with the new auxiliary requests in a timely manner.

The Board considers such a course of action as being contrary to the economy of procedure and thus decides to exercise its discretion to not admit auxiliary requests 10 to 12 into the proceedings pursuant to Article 13(1) RPBA.

7. In view of the above conclusions, the request of the respondent that auxiliary requests 2, 3, 4, 5, 8 and 9 not be admitted into the proceedings does not need to be addressed.

8. Likewise, the appellant's request to remit the case to the opposition division in the event that the subject-matter of claim 1 of the patent as granted or of each of auxiliary requests 4 to 6 is considered novel, does not need to be addressed either due to the Board's conclusion that the claimed subject-matter is not novel over the disclosure of E1.

9. The requests of both parties in relation to the colour copies of E1 and E2 also do not need to be addressed since only the black and white version of documents E1 and E2 was considered at the oral proceedings with the agreement of both parties. Moreover, only said version

has been taken into account by the Board in taking the present decision.

10. Because none of the sets of claims relied upon by the appellant is allowable or admitted into the proceedings, the appeal is not founded.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

G. Nachtigall I. Beckedorf

Decision electronically authenticated