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**Datasheet for the decision  
of 10 January 2022**

**Case Number:** T 1605/20 - 3.2.07

**Application Number:** 09831183.0

**Publication Number:** 2373557

**IPC:** B65G1/137

**Language of the proceedings:** EN

**Title of invention:**

PHARMACEUTICAL DISPENSING SYSTEM AND ASSOCIATED METHOD

**Applicant:**

Remedi Technology Holdings, LLC

**Headword:**

**Relevant legal provisions:**

EPC Art. 84, 56, 113, 116  
RPBA 2020 Art. 12(8)

**Keyword:**

Claims - clarity - main request (yes)  
Inventive step - main request (yes) - non-obvious solution -  
ex post facto analysis

**Decisions cited:**

T 0068/85

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 1605/20 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 10 January 2022**

**Appellant:**  
(Applicant)

Remedi Technology Holdings, LLC  
6225 Smith Avenue, Suite 210  
Baltimore, MD 21209 (US)

**Representative:**

Findlay, Alice Rosemary  
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**Decision under appeal:**

**Decision of the Examining Division of the  
European Patent Office posted on 9 December 2019  
refusing European patent application No.  
09831183.0 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman**

I. Beckedorf

**Members:**

A. Cano Palmero

S. Watson

## Summary of Facts and Submissions

- I. The appellant (applicant) lodged within the prescribed time limit and in the prescribed form an appeal against the decision of the examining division refusing European patent application no. 09 831 183.0.
- II. In its decision, the examining division held *i.a.* that the main request did not fulfil the requirements of Articles 84 and 56 EPC.
- III. The appellant requested in essence
- that the decision under appeal be set aside,  
and  
that a patent be granted on the basis of the set of claims according to the main request re-filed with the statement of grounds of appeal,  
or, in the alternative,  
that a patent be granted on the basis of one of the sets of claims according to auxiliary requests I or II re-filed and auxiliary requests III to VI filed with the statement of grounds of appeal.
- IV. The appellant submitted with letter dated 24 November 2021 a description adapted to the set of claims according to the main request.
- V. The lines of argument of the appellant are dealt with in detail in the reasons for the decision.
- VI. Independent claims 1 and 7 of the main request read:
1. "A dispenser for dispensing a patient's order of multiple different pharmaceutical products, the

dispenser comprising  
a storage arrangement adapted to store a plurality of pharmaceutical products each contained in an individual unit dose package (16, 518),  
a discharge assembly adapted to move selected ones of the unit dose packages (16, 518) from the storage arrangement, and  
a conveyor (30) adapted to transfer the selected unit dose packages (16, 518) from the discharge assembly, wherein the storage arrangement comprises  
a first and a second module (12, 14) each located proximate the conveyor (30),  
the first module (12) being spaced and positioned upstream from the second module (14),  
characterised  
in that the discharge assembly comprises  
a first discharge assembly (17) operative to move selected ones of the unit dose packages (16, 518) from the first module (12) while maintaining physical control of each of those selected unit dose packages (16, 518) such as not to permit the unit dose packages (16, 518) to move by gravity, and  
a second discharge assembly (62, 64) operative to move selected ones of the unit dose packages (16, 518) from the second module (14) while maintaining physical control of each of those selected unit dose packages (16, 518) such as not to permit the unit dose packages (16, 518) to move by gravity,  
in that the conveyor (30) transfers the selected unit dose packages (16, 518) while maintaining positive physical control of each of the selected unit dose packages (16, 518) such as not to permit the unit dose packages (16, 518) to move by gravity,  
whereby positive physical control is maintained during movement of the selected unit dose packages (16, 518) from the discharge assembly (17) by the conveyor (30),

and in that the first module (12) is adapted to store pharmaceutical products having a first frequency demand and the second module (14) is adapted to store pharmaceutical products having a second frequency demand different from the first frequency demand."

7. "A method of filling a patient's order of pharmaceutical products that includes one or more unit dose packages (16, 518) selected from a plurality of different unit dose packages (16, 518), the method comprising the steps of assigning a designated space on a conveyor (30) for receiving one or more of the unit dose packages (16, 518) for the patient's order, moving the designated space on the conveyor (30) along a conveyor path past a first and a second storage location (12, 14), wherein the first and the second storage locations (12, 14) are spaced from one another along the conveyor path, retrieving a first and a second unit dose package (16, 518) for the patient's order from the first and the second storage locations (12, 14), respectively, and placing the retrieved first and second unit dose packages (16, 518) on the conveyor (30) at the designated space, characterised in that the method comprises storing in the first storage location (12) pharmaceutical products having a first frequency demand that meets a first threshold and storing in the second storage location (14) pharmaceutical products having a second frequency demand that meets a second threshold different from the first threshold, and in that the method further comprises maintaining positive physical control by inhibiting gravity induced movement of the unit dose packages (16,

518) of the unit dose packages (16, 518) during the retrieving and placing steps.

VII. Since the present decision is taken on the basis of the main request, there is no need to reproduce the auxiliary requests.

## **Reasons for the Decision**

### *1. Procedural matters*

1.1 The case is ready for decision which is taken in written proceedings without holding oral proceedings in accordance with Article 12(8) RPBA 2020 and with Articles 113 and 116 EPC.

1.2 The principle of the right to be heard pursuant to Article 113(1) EPC is observed since that provision only affords the opportunity to be heard and the party's submissions are fully taken into account.

1.3 The appellant's request for oral proceedings pursuant to Article 116(1) EPC is auxiliary to its request that the decision under appeal be set aside and that a patent be granted on the basis of the main request.

1.4 Thus, since this request is followed by the Board, the auxiliary request for oral proceedings remains procedurally inactive.

### *2. Main request - Clarity, Article 84 EPC*

2.1 The examining division came to the conclusion in points 26 and 27 of the reasons of the decision under appeal that the subject-matter of claim 1 of the main request,

which corresponds to the main request in appeal, is not clear, since the feature "maintaining positive physical control" leaves the skilled person in doubt as to what this exactly means. Additionally the examining division held that the features "maintaining physical control of each...such as not to permit the unit dose packages to move by gravity" define a result to be achieved which is not allowable, rather than defining the assemblies in terms of technical features.

- 2.2 The Board disagrees and substantially follows the arguments of the appellant that the subject-matter of claim 1 of the main request is clear for the following reasons.
  - 2.2.1 The skilled reader understands that the feature "maintaining positive physical control" implies under a broad interpretation of the claims any kind of control, so that the scope of protection sought by the claims is clear. The breadth of this isolated term cannot automatically be equated to a lack of clarity, see Case Law of the Boards of Appeal [CLB], 9th edition 2019, II.A.3.3.
  - 2.2.2 The skilled reader further understands from claim 1 in its entirety what is meant by the adjective "positive" in relation to physical control, namely that gravity feed or free-fall of the unit dose packages is avoided. This interpretation, apart from making technical sense, is confirmed and supported by the description, at least in paragraphs [0016] and [0089], as correctly indicated by the appellant. Therefore, contrary to the conclusion of the examining division, the Board is convinced that the skilled person is not in doubt regarding the meaning of a "positive physical control".



2.2.3 The Board disagrees with the examining division that the claim is directed to a result to be achieved, but rather finds that it relates to **functional** features as indicated by the appellant (see CLB, *supra*, II.A.3.4 and T 68/85), which are limiting and allowable despite the absence of explicit structural features. It might be true that the claim is directed to obtain a desired result, *i.e.* to avoid gravity feed or free-fall of the packages, but the Board is convinced that this is a step that can be easily performed by the skilled person in order to achieve such a result, whereby a further more precise definition by structural features directed to such function would inevitably and objectively result in a restriction of the invention.

2.3 The Board thus concludes that the subject-matter of claim 1 according to the main request meets the requirements of Article 84 EPC.

3. *Main Request - Inventive step, Article 56 EPC*

3.1 The examining division found document D1 (**US 5,468,110**) as representing the closest prior art for the subject-matter of claim 1 of the main request, which, according to point 22 of the reasons of the decision under appeal, differs solely from the known dispenser of D1 in that the first module is adapted to store pharmaceutical products having a first frequency demand and the second module is adapted to store pharmaceutical products having a second frequency demand different from the first frequency demand.

3.2 The Board, however, following substantially the reasoning of the appellant in point 2.2 of its statement of grounds of appeal, is of the view that D1 also fails to disclose a conveyor suitable to perform a

transfer of the selected unit dose packages *"while maintaining physical control of each of the selected dose units packages such as not to permit the unit dose packages to move by gravity, whereby positive physical control is maintained during movement of the selected unit dose packages from the discharge assembly by the conveyor."*.

3.3 The Board notes that the examining division, in point 21 of the reasons of the decision under appeal, considered this feature as being anticipated by D1, since *"during movement of the conveyor, there will always be positive control"*. The Board agrees that this is indeed the case in D1, once the unit dose packages rest on the boxes 36 on the conveyor 34, and would anticipate the first part of the feature, namely *"while maintaining physical control of each of the selected dose units packages such as not to permit the unit dose packages to move by gravity"*.

3.4 However, the Board is convinced that under a subsequent reading of the second part of the feature in question, namely that *"whereby positive physical control is maintained during movement of the selected unit dose packages from the discharge assembly by the conveyor"* the skilled person unambiguously understands that this control refers to a different event, which is the transfer that takes place from the discharge assembly onto the conveyor, under a positive physical control maintained by the conveyor.

3.5 It follows that, as convincingly argued by the appellant, the positive control required by claim 1 involves the avoidance of the movement of the dose packages by gravity, including the movement that takes place from the discharge assembly onto the conveyor,

such controlled movement being performed by the conveyor. This requirement is not met by the dispenser of D1, in which, as correctly indicated by the appellant, the transfer of the dose packages 14 between the discharge assemblies 38 and the boxes 36 placed on the conveyor 34 is performed by allowing the packages to **fall freely**, see column 10, lines 49 to 59 of D1 (the packages are "dropped"). It follows that neither the conveyor nor the boxes placed on the conveyor are in contact with the packages at the moment in which they leave the discharge assembly, so that they cannot perform or maintain any kind of (positive) control on the dose packages during their movement from the discharge assembly, as required by claim 1.

- 3.6 The objective technical problem solved by this distinguishing feature can be seen as how to reduce errant unit doses, incomplete orders, and jammed unit doses in dispenser systems of the prior art.
- 3.7 Starting from D1, the skilled person has no hint or motivation to carry out significant and cumbersome modifications, which would likely require a fully redesigning of at least the picking means, the conveyor and the patient boxes, in order to provide a dispenser in which a positive physical control is maintained during movement of the selected unit dose packages from the discharge assembly by the conveyor and thereby arrive at the subject-matter of claim 1 according to the main request. In other words, starting from D1 and in view of the objective technical problem, the skilled person would only arrive at the subject-matter of claim 1 of the main request as the result of an *ex post facto* analysis.

3.8 The arguments above apply *mutatis mutandis* to the subject-matter of independent method claim 7, which is also considered inventive.

4. *Conclusion*

It follows that the appellant has provided convincing arguments that demonstrate the incorrectness of the decision under appeal as regards the main request, which is considered to meet the requirements of the EPC including those of clarity and inventive step. No other objections were raised by the examining division, nor are any obvious to the Board. Hence, the decision under appeal is set aside and the appellant's main request is allowed.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the examining division with the order to grant a patent in the following version:

Description:

Pages 1 to 32 received with letter of  
24 November 2021

Claims:

No. 1 to 18 received with the statement of  
grounds of appeal (main request)

Drawings:

Sheets 1/40 to 40/40 as originally filed.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated