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**Datasheet for the decision
of 4 April 2025**

Case Number: T 1522/22 - 3.3.09

Application Number: 08796462.3

Publication Number: 2183103

IPC: B32B27/00, B65D65/40, B65D77/00

Language of the proceedings: EN

Title of invention:

MULTILAYER FILM HAVING PASSIVE AND ACTIVE OXYGEN BARRIER
LAYERS

Patent Proprietor:

Cryovac, Inc.

Opponent:

Puchberger & Partner Patentanwälte

Headword:

Multilayer film/CRYOVAC

Relevant legal provisions:

EPC Art. 54, 56, 83, 108 sentence 3

EPC R. 99(2)

Keyword:

Admissibility of appeal - appeal sufficiently substantiated
(yes)

Sufficiency of disclosure - (yes)

Novelty - (yes)

Inventive step - (yes)

Decisions cited:

J 0010/11



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 1522/22 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 4 April 2025

Appellant: Puchberger & Partner Patentanwälte
(Opponent) Reichsratstraße 13
1010 Wien (AT)

Representative: Puchberger & Partner Patentanwälte
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1010 Wien (AT)

Respondent: Cryovac, Inc.
(Patent Proprietor) 100 Rogers Bridge Road
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Representative: J A Kemp LLP
80 Turnmill Street
London EC1M 5QU (GB)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 6 April 2022
rejecting the opposition filed against European
patent No. 2183103 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman M. Ansorge
Members: C. Meiners
A. Jimenez

Summary of Facts and Submissions

- I. The appeal was filed by the opponent (appellant) against the opposition division's decision to reject the opposition against the European patent.
- II. In its decision, the opposition division concluded, *inter alia*, that the subject-matter of claims 1 and 3 as granted did not extend beyond the content of the application as filed (Article 100(c) EPC) and that the patent disclosed the claimed invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Article 100(b) EPC). Moreover, the subject-matter of claim 1 as granted was held to be novel over document D9 and to involve an inventive step in view of both documents D9 and D10 as the closest prior art.
- III. In its notice of opposition, the appellant had requested that the patent be revoked in its entirety based on the grounds for opposition under Article 100(a) (lack of novelty and lack of inventive step), (b) and (c) EPC.
- IV. The following documents are relevant for the present decision:
- D1 EP 1 538 176 A1
D9 EP 1 721 737 A1
D10 US 5,491,009 A
- V. In its statement of grounds of appeal, the appellant requested that the opposition division's decision be set aside and that the patent be revoked. The appellant

presented arguments as to insufficiency of disclosure regarding the parameter "oxygen scavenging rate" in claim 1 as granted, lack of novelty of claim 1 as granted over document D9, and lack of inventive step in view of D10 as the closest prior art in light of document D1 or alternatively D9.

VI. With its reply to the statement of grounds of appeal, the patent proprietor (respondent) requested that the appeal be held inadmissible. In the event that the appeal was held admissible, it requested that the appeal be dismissed and that the patent be maintained as granted (main request). As an auxiliary measure, the respondent requested that the patent be maintained on the basis of one of the first to sixth auxiliary requests filed with the reply to the statement of grounds of appeal.

VII. In its communication pursuant to Article 15(1) RPBA, the board set out its preliminary assessment of the case. *Inter alia*, the board detailed that it considered the appeal admissible. Furthermore, taking into account all the arguments presented by the appellant, the board concluded that a skilled person was in the position to carry out the claimed invention across the full scope of claim 1 without undue burden (on the relevant date). The ground for opposition under Article 100(b) EPC hence did not prejudice the maintenance of the patent.

The board also stated that it held the subject-matter of claim 1 as granted to be novel in view of D9, but not to involve an inventive step starting from D10 as the closest prior art in combination with D1 or D9. This conclusion also applied to the first to fourth auxiliary requests filed with the reply to the statement of grounds of appeal; however, the subject-

matter claimed in the fifth auxiliary request filed with the reply to the statement of grounds of appeal was considered to meet the requirements of the EPC.

- VIII. By letter of 28 February 2025, the respondent filed a description adapted to the fifth auxiliary request filed with the reply to the statement of grounds of appeal.
- IX. By letter dated 10 March 2025, the appellant withdrew its request for the patent to be revoked in its entirety and requested that the patent be maintained on the basis of respondent's fifth auxiliary request filed with the reply to the statement of grounds of appeal. The board understands from this that the appellant had no objections to the fifth auxiliary request.
- X. In a submission of 11 March 2025, the respondent withdrew the main request and the first to fourth and sixth auxiliary requests filed with the reply to the statement of grounds of appeal and made the fifth auxiliary request filed with the reply to the statement of grounds of appeal its new and sole request (see point XIII. below). The respondent and the appellant both withdrew their requests for oral proceedings.
- XI. Consequently, the board cancelled the oral proceedings scheduled for 31 March 2025.
- XII. The parties' arguments at the appeal stage, where relevant for the present decision, are reflected below in the reasons for the decision.
- XIII. Claim 1 of the fifth auxiliary request filed with the reply to the statement of grounds of appeal (the sole claim request on appeal) reads as follows:

"A multilayer active oxygen barrier film comprising a multilayer oxygen barrier component comprising at least one of

- i) an active oxygen barrier layer that is disposed between two opposing passive oxygen barrier layers, or
- ii) a passive oxygen barrier layer that is disposed between two opposing active oxygen barrier layers,

wherein the active oxygen barrier layer(s) and the passive oxygen barrier layer(s) are in direct contact with each other;

wherein the active oxygen barrier layer comprises an oxygen scavenging composition that is a blend of:

- (A) a thermoplastic resin having carbon-carbon double bonds substantially in its main chain, which is at least one resin selected from the group consisting of polybutadiene, polyisoprene, polychloroprene, and polyoctenylene;
- (B) a transition metal salt; and
- (C) an oxygen barrier polymer,

wherein the passive oxygen barrier layer(s) have an oxygen permeability measured according to ASTM D-3985 of 20cc-20 μ m/(m²-day-atm) or less at 65% RH and 20°C, and comprise(s) an oxygen barrier polymer selected from the group consisting of polyvinyl alcohol, ethylene vinyl alcohol copolymer, polyvinyl chloride and its copolymers, polyvinylidene dichloride and its copolymers, polyacrylonitrile and its copolymers, poly(vinyl alcohol), silica, and blends thereof, wherein the multilayer oxygen barrier component is disposed between an outer sealant layer and an outer abuse layer, and

wherein the film has an oxygen scavenging rate that is at least 0.01 cc oxygen per day per gram of the oxygen scavenging composition blend."

Claims 2 to 12 are claims that are dependent on claim 1.

Independent claim 13 is directed to a package comprising a food article and a film having all the features of claim 1.

XIV. Final requests

The appellant requested that the decision under appeal be set aside. It did not present any objection to the patent being maintained on the basis of the fifth auxiliary request filed with the reply to the statement of grounds of appeal.

The respondent requested that the decision under appeal be set aside and that the patent be maintained on the basis of the fifth auxiliary request filed with the reply to the statement of grounds of appeal (including the adapted description).

Reasons for the Decision

1. Admissibility of appeal

- 1.1 The board detailed its preliminary assessment of the admissibility of the appeal in its communication pursuant to Article 15(1) RPBA. No further arguments or objections concerning this question of law were presented by the parties in response. Hence, the board sees no reason to deviate from its preliminary

conclusions, which are essentially reproduced in the following.

- 1.2 Under Article 108, third sentence, EPC "[w]ithin four months of notification of the decision, a statement setting out the grounds of appeal shall be filed in accordance with the Implementing Regulations." Under Rule 99(2) EPC, "[i]n the statement of grounds of appeal the appellant shall indicate the reasons for setting aside the decision impugned, or the extent to which it is to be amended, and the facts and evidence on which the appeal is based."
- 1.3 Whether the requirements of these provisions are met has to be decided on the basis of the statement of grounds of appeal and the reasons given in the contested decision. If the appellant submits that the decision under appeal is incorrect, then the statement setting out the grounds of appeal must enable the board to understand immediately why the decision is alleged to be incorrect and on what facts the appellant bases its arguments, without first having to make investigations of its own (J 10/11, point 2.1 of the Reasons).
- 1.4 It is settled case law that the statement of grounds for appeal must set out an appellant's case in a way that is coherent, clear and sufficiently substantiated (Case Law of the Boards of Appeal, 10th edition, 2022, V.A.2.6.3.a).
- 1.5 In the case in hand, the appellant has provided additional arguments at least in relation to sufficiency of disclosure and inventive step. They directly address the corresponding reasons for rejecting the opposition in the decision under appeal.

Whether or not the additional arguments referred to by the respondent in the first paragraph on page 4 of its reply are *admissible* constitutes a separate issue (see Case Law of the Boards of Appeal, 10th edition, 2022, V.A.2.6.4.a). Similarly, the board understands the appellant's criticism of the positive assessment of inventive step in the decision under appeal to be directly related to the formulation of the objective technical problem by the opposition division. This reasoning also seemed to be clear to the respondent; see the first sentence on page 14 of the reply, which deals with the consideration of technical effects of making structural changes when seeking to provide an alternative.

The appeal is thus admissible (Article 108 and Rule 99(2) EPC).

2. *Allowability of the fifth auxiliary request filed with the reply to the statement of grounds of appeal*

After notification of the board's communication pursuant to Article 15(1) RPBA, the respondent withdrew the main request and the first to fourth and sixth auxiliary requests and requested that the patent be maintained on the basis of the fifth auxiliary request filed with the reply to the statement of grounds of appeal (new main request on appeal). The appellant did not object to the patent being maintained on the basis of the fifth auxiliary request.

The appellant did not raise any objections under Articles 123(2) or (3), 54 or 56 EPC to the claimed subject-matter of the new main request on appeal, and the board does not have any either.

The group of oxygen barrier materials to be comprised in the passive oxygen barrier layers, inserted into claims 1 and 13, finds its basis in the application as filed (paragraph bridging pages 16 and 17). This amendment distinguishes the claimed subject-matter from the claims as granted and imposes an additional limitation in claim 1.

For the reasons provided in the board's communication, the board considers that the fifth auxiliary request is allowable. *Inter alia*, in that communication, the board held that the feature "wherein the film has an oxygen scavenging rate that is at least 0.01 cc oxygen per day per gram of the oxygen scavenging composition blend" did not give rise to insufficiency of disclosure. As regards this feature, the appellant had not addressed the opposition division's conclusions on sufficiency of disclosure. Consequently, the board concluded that the claimed subject-matter is sufficiently disclosed. The novelty of the claimed subject-matter over D9 had already been acknowledged for claim 1 as granted. The board held that D9 did not disclose a "multilayer oxygen barrier component" as specified in claim 1 as granted. With regard to inventive step, document D10, as the closest prior art, provided teaching leading away from the solution proposed in claim 1 of the fifth auxiliary request. Hence, the claimed subject-matter of this request involved an inventive step.

3. *Adaptation of the description*

The appellant has not put forward any objections to the adapted description, filed by letter of 28 February 2025. The board has no objections to the amendments made, either. The claims are supported by the adapted description (Article 84 EPC).

4. In view of these considerations, the sole claim request on appeal is allowable.

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 on the basis of claims 1 to 13 of the sole request on appeal (the fifth auxiliary request filed with the reply to the statement of grounds of appeal), paragraphs [0001] to [0103] of the adapted description filed by letter of 28 February 2025, and the drawings of the patent as granted.

The Registrar:

The Chairman:



K. Götz-Wein

M. Ansorge

Decision electronically authenticated