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**Datasheet for the decision
of 7 July 2025**

Case Number: T 0727/23 - 3.3.02

Application Number: 17816857.1

Publication Number: 3558399

IPC: A61L15/44

Language of the proceedings: EN

Title of invention:

MULTI-LAYER WOUND CARE PRODUCT WITH PERFORATED RELEASE LAYER

Patent Proprietor:

BSN medical GmbH

Opponent:

Mölnlycke Health Care AB

Headword:

BSN MEDICAL / WOUND DRESSING / MULTILAYER

Relevant legal provisions:

EPC Art. 54, 56, 100(a), 100(c)

RPBA 2020 Art. 12(3), 12(4)

Keyword:

Grounds for opposition - added subject-matter (no) - novelty (no)

Auxiliary Request 1 - part of appeal proceedings (yes) - added subject-matter (no) - inventive step (yes)

Decisions cited:

G 0001/24

Catchword:



Beschwerdekammern

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Chambres de recours

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Case Number: T 0727/23 - 3.3.02

D E C I S I O N
of Technical Board of Appeal 3.3.02
of 7 July 2025

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
1 March 2023 concerning maintenance of the
European Patent No. 3558399 in amended form.**

Composition of the Board:

Chairman M. O. Müller
Members: M. Maremonti
M. Blasi

Summary of Facts and Submissions

- I. The appeals by the patent proprietor and the opponent are against the opposition division's interlocutory decision finding that European patent No. 3 558 399 ("the patent") as amended in the form of auxiliary request 1, the claims of which were filed by letter dated 10 March 2022, and the invention to which it relates met the requirements of the EPC.
- II. Claim 1 as granted reads as follows:
- "1. A multilayered wound care product comprising:*
- (a) an upper liquid-absorbing layer;*
- (b) an intermediate occlusive layer; and*
- (c) an active agent-releasing bottom layer;*
- wherein the occlusive layer and the active agent-releasing layer are sheet-like layers with pores or perforations, wherein each pore or perforation is a common pore or perforation that extends through the whole thickness of both the intermediate layer and the active agent-releasing layer that enable the passage of wound exudate through the common pores or perforations of the said two layers to reach the liquid-absorbing layer and simultaneously enable the release of the active agent from the area between the pores or perforations to enter the wound site."*
- III. The opposition was filed by invoking grounds under Article 100(a) to (c) EPC. Reference was made to the following documents, *inter alia*:
- D1: WO 2016/038109 A1
- D2: WO 2016/038111 A1

D12: WO 2016/079538 A1

D13: WO 2012/052561 A2

IV. With its reply to the notice of opposition, the patent proprietor filed *inter alia* a set of claims of auxiliary request 1. The patent as granted was maintained as the main request. The opposition division's conclusions in its decision included the following.

- The ground for opposition under Article 100(c) EPC did not prejudice the maintenance of the patent as granted.
- The subject-matter of claim 1 as granted was not novel over the disclosures in each of documents D1 and D2.
- The subject-matter of claim 1 of auxiliary request 1 was novel and involved an inventive step in view of D12 taken as the closest prior art.

V. Since the patent proprietor and opponent are both appellant and respondent in these proceedings, for simplicity the board will continue to refer to the parties as the patent proprietor and the opponent.

VI. In its statement of grounds of appeal, its reply to the opponent's appeal and further submissions, the patent proprietor argued, *inter alia*, that the subject-matter of claim 1 as granted did not extend beyond the content of the application as filed, was novel over the disclosure in document D1 and involved an inventive step.

VII. In its statement of grounds of appeal, its reply to the patent proprietor's appeal and further submissions, the opponent contested the admissibility of the patent proprietor's appeal. Moreover, it argued, *inter alia*,

that the subject-matter of claim 1 as granted extended beyond the content of the application as filed, was not novel over the disclosure in D1 and did not involve an inventive step starting from D1 as the closest prior art. Furthermore, the opponent objected to the admittance of auxiliary request 1 found allowable by the opposition division and raised objections under Article 123(2) and Article 56 EPC against this request.

VIII. The parties were summoned to oral proceedings as per their requests. In preparation for the oral proceedings, the board issued a communication under Article 15(1) RPBA. In this communication, the board expressed, *inter alia*, its preliminary opinion that the subject-matter of claim 1 as granted lacked novelty over the disclosure in document D1.

IX. The patent proprietor replied to the board's communication and made further submissions in support of the patentability of the claimed subject-matter.

X. Oral proceedings before the board were held on 7 July 2025 by videoconference in the presence of both parties.

XI. Final requests relevant to the decision

The patent proprietor requested that the appealed decision be set aside and that the patent be maintained as granted (main request), implying that the opposition be rejected. Alternatively, the patent proprietor requested as auxiliary request 1, the dismissal of the opponent's appeal, meaning that the patent be maintained in amended form in the version considered allowable by the opposition division.

The opponent requested that the patent proprietor's appeal be rejected as inadmissible. The opponent

further requested that the appealed decision be set aside and that the patent be revoked in its entirety.

- XII. As regards the parties' submissions that are relevant to the decision, reference is made to these in the reasons for the decision set out below.

Reasons for the Decision

Admissibility of the patent proprietor's appeal -
Article 108 EPC and Rule 99(2) EPC and Article 12(3) RPBA

1. The opponent contested the admissibility of the patent proprietor's appeal. It argued that the patent proprietor in its statement of grounds of appeal had merely repeated the arguments already submitted before the opposition division in support of the novelty of the claimed subject-matter over D1 and D2, without addressing the specific reasoning provided by the opposition division leading to the finding of lack of novelty. According to the opponent, the patent proprietor's appeal barely made any reference to the decision under appeal. Thus, the appeal was inadmissible.
2. The board disagrees for the following reasons.
 - 2.1 As long as at least one submission contesting the decision under appeal has been made in the statement of grounds of appeal in compliance with the provisions of Rule 99(2) EPC and Article 12(3) RPBA, and if as a consequence it is clear why the appealing party considers that, on the basis of that submission, the opposition division's decision should be overturned, the appeal is admissible.
 - 2.2 In the current case, the patent proprietor in the statement of grounds of appeal (pages 2 to 10)

contested the opposition division's finding of lack of novelty in view of D1 and D2. The mere fact that the patent proprietor may have disputed the opposition division's reasoning by repeating previous submissions, as alleged by the opponent, has no impact on the question of whether or not the requirements of Rule 99(2) EPC and Article 12(3) RPBA are fulfilled. On the basis of the patent proprietor's submissions, the board can immediately understand why, in the patent proprietor's view, the opposition division's finding that the subject-matter of claim 1 as granted lacked novelty in view of D1 and D2 should be reversed. Thus, reasons have been given as to why the decision under appeal should be set aside.

- 2.3 Therefore, the board decided that the patent proprietor's appeal is admissible.

Main request - patent as granted - claim 1 - ground for opposition under Article 100(c) EPC - added subject-matter

3. Claim 1 as granted (point II above) contains the following amendments to claim 1 of the application as filed, highlighted by the board:

"1. A multilayered wound care product comprising:

- (a) an upper liquid-absorbing layer;
- (b) an intermediate occlusive layer; and
- (c) an active agent-releasing bottom layer;

wherein the occlusive layer and the active agent-releasing layer are sheet-like layers with ~~common~~ pores or perforations, **wherein each pore or perforation is a common pore or perforation that extends through the whole thickness of both the intermediate layer and the active agent-releasing layer** that enable the passage of wound exudate through the common pores or perforations

*of the said two layers to reach the liquid-absorbing layer **and simultaneously enable the release of the active agent from the area between the pores or perforations to enter the wound site.**"*

- 3.1 The opponent raised several objections of added subject-matter, as follows.
 - 3.1.1 It argued that the first amendment to claim 1 as filed expressed two alternatives, namely that either pores or perforations were required to extend through the whole thickness of both the intermediate layer and the active agent-releasing layer (hereinafter the "extending feature"). The fact asserted by the patent proprietor that claim 13 as filed or the description as filed did not distinguish between pores and perforations was irrelevant since claim 1 as granted was clear as such. There was thus no need to consult the description or the dependent claims to interpret claim 1 as granted. It therefore could not be assumed that pores and perforations as mentioned in claim 1 as granted were one and the same thing. Therefore, the application as filed had to provide a basis for both pores and perforations extending through the whole thickness of both the intermediate layer and the active agent-releasing layer. However, the application as filed did not contain any disclosure of pores extending through the whole thickness of the two layers.
 - 3.1.2 The opponent further argued that as regards the basis for perforations extending through the whole thickness of both the intermediate layer and the active agent-releasing layer, the opposition division had referred to figures 1A and 5 of the application as filed. However, when considering figures 1A and 5, it became clear that the above feature would have to be extracted from the specific embodiments shown in those figures without any other features present in those embodiments

also being added to claim 1 as granted, *inter alia* the feature that all the perforations in the two layers were of the same diameter. This amounted to an unallowable intermediate generalisation.

- 3.1.3 Moreover, the opponent noted that even though figures 1A and 5 of the application as filed might show the claimed feature, this was not the case for other figures. Figure 1B did not show any pores or perforations extending through both layers (b) and (c) as defined in claim 1 as granted. Additionally, it was not directly and unambiguously derivable from figure 4 as filed that each perforation was a common perforation extending through the entire thickness of both layers, as required by claim 1 as granted. Rather, at least some perforations were not common perforations and did not extend through the entirety of both layers.
- 3.1.4 Furthermore, according to the opponent, the application as filed did not provide any basis for pores or perforations enabling, i.e. causing, the flow of exudate and active agent in opposite directions as required by claim 1 as granted (hereinafter the "enabling feature"). According to the opponent, the passage on page 4, lines 26 to 34 of the application as filed, which the patent proprietor indicated as a basis, did not constitute proper disclosure for the enabling feature of claim 1 as granted. In this passage, the application as filed disclosed two separate mechanisms: (i) the passage of wound exudate through the active agent-releasing layer and the occlusive layer as enabled by the pores or perforations, and (ii) the release of active agent from the area between the pores or perforations to reach the wound site. These two mechanisms had been combined in claim 1 as granted, i.e. a nexus between these two mechanisms had been included, owing to the statement

that especially the pores should enable the release of the active agent. Even though pores might well allow the release of active agents from their inner surface, i.e. this feature made technical sense, it was not disclosed in the application as filed.

3.2 The opponent's arguments are not convincing for the following reasons.

3.2.1 Contrary to the opponent's view, the board holds that the extending feature of claim 1 as granted does create ambiguity. While it is unclear whether the term "*pore or perforation*" is intended to express two alternative items or the same item, the board shares the patent proprietor's view that the skilled person construing this term in the light of the description of the patent (see in this respect decision G 1/24 of the Enlarged Board of Appeal, Order) would have directly and unambiguously established that pores and perforations referred to the same entity. This conclusion results, for example, from reference sign 4. On page 18, line 45, the patent discloses examples of perforation patterns on the wound care product with reference to figure 2 of the patent, in which the perforations bear the reference sign 4. The same reference sign 4 then indicates the item "*pores*" in the list of reference signs provided in paragraph [0209] of the patent. Additionally, as indicated by the patent proprietor, claim 15 of the patent as granted discloses that "*pores or perforations have a triangular, rectangular, hexangular, ellipsoid or circular form*", thus confirming that the same item is intended. The same follows from the disclosure of the method for preparing the claimed wound care product in paragraph [0194] of the patent: the occlusive layer is bonded to the active agent-releasing layer and then the bilayer thus obtained "*is provided with pores or perforations*".

Moreover, as submitted by the patent proprietor, the diagram in figure 3 of the patent mentions "holes" when referring to pores and perforations - a further demonstration that the same entity is intended. Therefore, contrary to the opponent's view, the disclosure of the application as filed does not require a separate basis for pores on one hand and perforations on the other hand extending through the whole thickness of the occlusive layer and active agent-releasing layer.

- 3.2.2 Irrespective of whether the terms "*pores*" and "*perforations*" indicate the same or different items, the extending feature of claim 1 as granted is directly and unambiguously derivable from claim 1 as filed. This claim discloses that the occlusive layer and the active agent-releasing layer are provided "*with common pores or perforations that enable the passage of wound exudate through the common pores or perforations of the said two layers to reach the liquid-absorbing layer*". Wound exudate can pass through only if the pores or perforations are common to the two layers in the sense that they extend through the whole thickness of both layers. The same disclosure is also found on page 4, lines 26 to 28 of the application as filed.
- 3.2.3 As submitted by the patent proprietor, the further requirement of claim 1 as granted that **each** pore or perforation extends through the whole thickness of both layers is directly and unambiguously derivable *inter alia* from the method for preparing the claimed wound care product disclosed on page 37, lines 7 to 16 of the application as filed. By disclosing that the bilayer formed by the occlusive layer and the active agent-releasing layer "is provided with pores or perforations", the application as filed directly and unambiguously discloses that each pore or perforation

extends through the whole thickness of these two layers.

- 3.2.4 Contrary to the opponent's view, figure 1B of the application as filed does not contradict the above conclusion. As argued by the patent proprietor, figure 1B merely shows a different perspective view of the same embodiment as shown in figure 1A; see page 38, lines 1 and 2 of the application as filed. More specifically, these pores and perforations are not visible in figure 1B for the simple reason that the layers are shown in a side view rather than in a top view, meaning that the pores, while present, are not visible to the observer. The fact that pores or perforations as required by claim 1 of the patent as granted are present is clear on the basis of figure 1A of the application as filed, which does show that each pore or perforation (4) extends through the whole thickness of both the intermediate occlusive layer (2) and the active agent-releasing layer (3) as required by claim 1 of the patent as granted.
- 3.2.5 Lastly, even if it were accepted that, as submitted by the opponent, the embodiment of figure 4 of the application as filed does not show that each pore or perforation is a common pore or perforation extending through the entire thickness of both the occlusive layer (2) and the active agent-releasing layer (3), this could only mean that the embodiment of figure 4 does not provide a basis for claim 1 as granted. However, this does not change the above conclusion that the extending feature of claim 1 as granted, belonging to each pore or perforation, is directly and unambiguously disclosed in the above-mentioned passages of the application as filed.

3.2.6 As regards the enabling feature, the board shares the patent proprietor's view that this feature is directly and unambiguously disclosed on page 4, lines 26 to 34 of the application as filed. Even though different wording is included in claim 1 of the patent as granted, there is no difference from that passage of the description as filed. According to the passage on page 4 of the application as filed, it is the presence of the pores or perforations provided in the occlusive layer and the active agent-releasing layer that enables both the passage of wound exudate through said two layers to reach the liquid-absorbing layer, and the simultaneous release of the active agent from the area between the pores or perforations, as mentioned in claim 1 as granted. The enabling feature of claim 1 as granted does not imply that the active agent is released from the inner surface of the pores as asserted by the opponent; it merely implies that it is released from the area between the pores or perforations. The inner surface of a pore or perforation is within this pore or perforation rather than between pores or perforations.

3.3 For these reasons, the board concluded that the amendments to claim 1 of the application as filed included in claim 1 of the patent as granted do not lead to any added subject-matter. Therefore, the ground for opposition pursuant to Article 100(c) EPC does not prejudice the maintenance of the patent as granted.

Main request - patent as granted - claim 1 - ground for opposition under Article 100(a) EPC and Article 54 EPC - novelty

4. In accordance with the decision under appeal (pages 11 to 14), the opponent disputed the novelty of the subject-matter of claim 1 as granted in view of the disclosure in document D1. It referred in particular to

person skilled in the field of wound dressings was very familiar with the term "sheet-like" layer. Accordingly, a layer needed to have a certain structural integrity and specific properties to be considered sheet-like. The silicone-based adhesives stated on page 3, lines 17 to 21 of D1 as being preferred for the adhesive layer (3) were typically wobbly and lacked the type of structural integrity and stand-alone properties to be considered sheet-like. The patent proprietor also observed that figure 2b of D1 did not disclose any perforations extending through an occlusive layer and an active agent-releasing layer as required by claim 1 as granted. The coating (9) containing the active agent to be released was in the form of dots or particles. Thus, it was not a layer containing perforations common to the layer (11). While D1 disclosed, on page 3, lines 22 to 24, that the coating might also be provided as a continuous layer, this was merely one alternative among various possibilities. Thus, a further selection would have been needed to arrive at the subject-matter of claim 1 as granted. Therefore, the patent proprietor argued that the opponent's novelty objection had been raised in a mosaic-like fashion with the benefit of hindsight; it should be concluded that the subject-matter of claim 1 as granted was novel over D1.

4.2 The patent proprietor's arguments are not convincing for the following reasons.

4.2.1 As noted by the opponent, D1 discloses (page 4, line 22 to page 5, line 6; page 9, line 18 to page 10, line 3; figure 2b; claims 1, 2, 4 and 13) a wound dressing comprising (reference signs as in figure 2b of D1 reproduced above)

- a substrate layer (2),

- an intermediate layer (11), corresponding to the intermediate occlusive layer (b) of claim 1 as granted, and
- an adhesive layer (3) coated with a chemical compound to be released to a wound, corresponding to the active agent-releasing bottom layer (c) of claim 1 as granted,

wherein the layer (11) and the adhesive layer (3) are provided with common perforations (14), wherein each of these perforations extends through the whole thickness of both layers (11) and (3) as required by claim 1 as granted.

According to D1 (*loc. cit.*), the absorption of exudates and wound fluids from the wound and/or the release of a chemical compound from the substrate (2) to the wound is/are facilitated through said perforations (14). At the same time, said chemical compound is released from the adhesive layer (3) present between said perforations (14) to reach the dermal surface. Hence, the enabling feature of claim 1 as granted is also disclosed in D1.

- 4.2.2 Since the absorption of wound exudate by the substrate layer (2) is directly and unambiguously disclosed in said passages of D1, the substrate layer (2) can be regarded as the liquid-absorbing layer (a) within the meaning of claim 1 as granted. The fact pointed to by the patent proprietor that, according to D1, the substrate layer (2) can also comprise a chemical compound to be released to the wound does not change the nature of the substrate layer (2) being able to absorb the wound exudate. The possibility of having a releasable active agent in the absorbing layer (a) is not excluded by the wording of claim 1 as granted either. Additionally, the fact that the substrate layer

(2) may include an absorbing material is directly and unambiguously disclosed throughout D1 (see e.g. page 4, lines 1 to 6, page 11, lines 26 to 30 and claim 13). Even if the board were to accept the patent proprietor's argument that a selection in this respect would have had to be made from the above-cited passage of D1, this would be a single selection and would thus be unable to confer novelty.

- 4.2.3 It follows that D1 discloses all the features of claim 1 as granted in combination.
- 4.2.4 As set out above, the patent proprietor asserted that the intermediate perforated layer (11) shown in figure 2b of D1 would not be occlusive within the meaning of claim 1 as granted, especially because its permeability was not mentioned. However, the term "*occlusive*" in claim 1 as granted is so vague and general that no distinction with respect to the intermediate layer (11) of D1 can be discerned. As noted by the opponent, claim 1 as granted does not specify any thickness, permeability or other properties of the occlusive layer (b).
- 4.2.5 The same applies to the definition of the active agent-releasing bottom layer (c) as "*sheet-like*" according to claim 1 as granted. First of all, it is to be noted that claim 1 as granted merely requires the layer to be sheet-like, not a sheet. Moreover, the term "*sheet-like*" is so vague and general that no distinction between the adhesive layer (3) of D1 and the active agent-releasing bottom layer (c) of claim 1 as granted can be discerned. With respect to the patent proprietor's argument that silicone-based adhesives lacked structural integrity and stand-alone properties, the board notes that claim 1 as granted does not specify any particular structure or properties for the active agent-releasing bottom layer (c) except that it

has common perforations with the occlusive layer extending through both layers. As set out above, the same is true for the adhesive layer (3) and the intermediate layer (11) of figure 2b of D1.

- 4.2.6 Additionally, the fact invoked by the patent proprietor that the chemical compound to be released from the adhesive layer (3) of D1 is provided on the adhesive layer (3) in the form of dots or particles of the coating (9) does not affect the novelty considerations set out above. Claim 1 as granted does not require any particular distribution of the active agent within the active agent-releasing bottom layer (c); this layer should merely enable the release of the active agent. This is assured in D1 by the adhesive layer (3).
- 4.3 For these reasons, the subject-matter of claim 1 as granted is not novel over D1. The ground for opposition under Article 100(a) EPC in combination with Article 54 EPC, lack of novelty, prejudices the maintenance of the patent as granted. Therefore, the main request is not allowable.
- 4.4 The opponent had raised a novelty objection against the subject-matter of claim 1 as granted in view of example 5 of D1 too. The patent proprietor requested that this objection not be admitted. At the oral proceedings, the board decided that this objection raised by the opponent formed part of the appeal proceedings. However, since the subject-matter of claim 1 as granted was found to lack novelty without considering example 5 of D1, no reasoning by the board is needed as regards the decision to reject the patent proprietor's non-admittance request.

Auxiliary request 1 - admittance into the proceedings -
Article 12(3) and (4) RPBA

5. The opponent requested that auxiliary request 1 not be admitted. It argued that the patent proprietor in its statement of grounds of appeal had referred to this auxiliary request filed before the opposition division without providing any substantiation as to why this request was also relevant to the appeal proceedings.

6. The board notes the following.

6.1 Auxiliary request 1 is the version of the patent considered allowable by the opposition division (decision under appeal, pages 21 to 25) and thus forms the basis for the decision under appeal (Article 12(2) RPBA). The board sees no basis for excluding this request from the appeal proceedings.

Relying on this request on appeal is not an amendment to the patent proprietor's appeal case, and no discretion is available to the board in relation to this request under Article 12(4) RPBA.

6.2 It is true that the patent proprietor only re-filed and substantiated auxiliary request 1 with its reply to the opponent's appeal, rather than with its statement of grounds of appeal. However, pursuant to Article 12(3) RPBA, the patent proprietor, in its role as respondent to the opponent's appeal, could provide its counterarguments and submissions with regard to auxiliary request 1, found allowable by the opposition division, with its reply to the grounds of appeal. Thus, the requirements of Article 12(3) RPBA have been met.

6.3 For these reasons, the board decided that auxiliary request 1 forms part of the appeal proceedings.

Auxiliary request 1 - claim 1 - added subject-matter under Article 123(2) EPC

7. Claim 1 of auxiliary request 1 differs from claim 1 of the patent as granted (point II above) in that item (c) was amended as follows (amendments have been highlighted by the board):

*"(c) an active agent-releasing bottom layer **comprising a therapeutic gas as active agent**"*

- 7.1 The opponent raised objections under Article 123(2) EPC against the subject-matter of claim 1 of auxiliary request 1.

- 7.1.1 In the opponent's written submissions, its objections were the same as mentioned above with respect to claim 1 as granted. For the reasons set out above in that regard, these objections were not found to be convincing.

- 7.1.2 At the oral proceedings, the opponent raised a further objection. It argued that while the application as filed disclosed a therapeutic gas as the active agent in relation to the wound care product embodiment shown in figure 5, this embodiment comprised several additional features - especially a gas-permeable layer - that had not been included in claim 1 of auxiliary request 1. The subject-matter of claim 1 of auxiliary request 1 was thus an intermediate generalisation of the embodiment of figure 5 without any basis in the application as filed.

- 7.2 This objection is not convincing either. The application as filed does not disclose a therapeutic gas as the active agent to be released to the wound only in conjunction with the embodiment shown in figure 5. On the contrary, claim 4 of the application as filed, which is dependent *inter alia* on claim 1 as

filed, discloses this possibility in general, further stating that a gas-permeable layer may preferably be included. Therefore, when the active agent is a therapeutic gas, claim 4 of the application as filed discloses the inclusion of a gas-permeable layer as being optional. The same disclosure is found e.g. on page 16, lines 30 and 31 of the application as filed.

7.3 For these reasons, the board concluded that the subject-matter of claim 1 of auxiliary request 1 meets the requirements of Article 123(2) EPC.

7.4 The patent proprietor requested that the opponent's objection raised at the oral proceedings not be admitted. At the oral proceedings, the board admitted the objection. However, since the objection was found unconvincing, there is no need to provide any of the board's reasoning as regards the decision to reject the patent proprietor's non-admittance request.

Auxiliary request 1 - claim 1 - inventive step under Article 56 EPC

8. Closest prior art

8.1 The opponent disputed the inventive step of the subject-matter of claim 1 of auxiliary request 1 in view of D1 taken as the closest prior art. The patent proprietor requested that this objection not be admitted.

8.2 At the oral proceedings, the board decided that this objection was part of the appeal proceedings. However, since the final decision is in the patent proprietor's favour (see below), there is no need to provide any of the board's reasoning as regards the decision to reject the patent proprietor's non-admittance request.

9. Distinguishing feature

In view of the considerations set out above concerning the novelty of the subject-matter of claim 1 of the patent as granted, the subject-matter of claim 1 of auxiliary request 1 differs from the disclosure in D1 only in that the active agent-releasing layer comprises a therapeutic gas; D1 discloses solid or liquid compounds to be released from the adhesive layer (3) (see in particular page 6, line 19 to page 7, line 4 of D1).

10. Objective technical problem

10.1 The opponent argued that using a therapeutic gas in lieu of the chemical compounds disclosed in D1 did not lead to a technical effect. Thus, the objective technical problem was to provide an alternative wound care product.

10.2 The board accepts this formulation of the objective technical problem in the opponent's favour.

11. Obviousness of the claimed solution

11.1 The opponent submitted that according to claim 1 of auxiliary request 1, a therapeutic gas had to be released from the active agent-releasing layer during use. Therefore, claim 1 of auxiliary request 1 encompassed the embodiment in which the gas was generated from solid precursors during use. It argued that documents D12 and D13 disclosed wound dressings using nitric salts for the generation *in situ* of a therapeutic gas, specifically NO, as a bioactive agent for wound healing. The opponent then referred to page 6, lines 19 to 27 of D1 as disclosing various salts to be included in the adhesive layer (3) as the active agents to be released. Since salts were used in both D1 and D12 or D13, incorporating the precursor layer

system as disclosed in D12 or D13 into the existing active agent-releasing layer of D1 required no structural modification. This was confirmed by the fact that the wound dressing disclosed in figure 2b of D1 (see the novelty discussion above) comprised all the structural features mentioned in claim 1 of auxiliary request 1. Moreover, both D1 and D12 disclosed a hydrogel as a possible material for the layers of the wound dressing. Therefore, D12 or D13 rendered the claimed subject-matter obvious.

11.2 The board disagrees.

11.2.1 D12 discloses (page 2, line 11 to page 3, line 4; claims 1 and 31 to 33) a two-component system to be used *inter alia* for treating a wound, the first component being a layer containing a nitrite, and the second component, to be placed in contact with the skin, being a hydrogel comprising a sulfonic acid. According to D12, the two components can be considered two separate dressings; the second component can absorb exudates from the wound. When the two components are placed in contact with each other, a chemical reaction takes place to produce nitric oxide released to the wound.

11.2.2 D13 discloses (page 3, claim 1 and figures) a wound dressing comprising: a first compartment containing a reducing agent and an agent capable of forming a transient complex with nitric oxide; a second compartment containing a nitric oxide precursor that forms nitric oxide when placed in contact with and reduced by the reducing agent; a barrier separating the contents of the first and second compartments; and a nitric oxide-permeable membrane that is impermeable to the nitric oxide precursor and reducing agent. According to D13, the first and second compartments are configured such that breaking or removing the barrier

allows the nitric oxide precursor to mix with the reducing agent and complex forming agent, thereby producing nitric oxide and a transient nitrosyl complex. The produced nitric oxide is released from the dressing through the nitric oxide-permeable membrane.

11.2.3 The board concurs with the patent proprietor that the wound dressings disclosed in D12 and D13 are structurally entirely different from the wound dressing of D1. Even though both D1 and D12 disclose using a hydrogel, this is used in D1 as the material of the absorbing layer (2) (see figure 2b mentioned above and page 11, lines 26 to 30), whereas it is used in D12 for the layer in contact with the skin. Moreover, as argued by the patent proprietor, where D1 discloses using two active agents (page 9, line 18 to page 10, line 3), these are released separately to the wound - one from the absorbing layer (2) through perforations (14) and the other from the adhesive layer (3). Even though salts are used as chemical agents in D1 and in D12 and D13, contrary to the opponent's view the gas delivery system taught in D12 and D13 cannot be incorporated into the device of D1 without substantial structural modifications; for example, the intermediate layer (11) in D1 would have to be removed to allow the salts to come into contact in order to first produce a gas which is then to be released to the wound.

11.2.4 Therefore, when starting from D1 and consulting D12 and D13, the skilled person facing the above-mentioned objective technical problem would at most have departed from the wound dressing of D1 and turned to the dressings of D12 or D13. The subject-matter of claim 1 of auxiliary request 1 would, however, not have been obtained.

11.3 For these reasons, the board concluded that the subject-matter of claim 1 of auxiliary request 1 involves an inventive step within the meaning of Article 56 EPC.

Conclusion

12. The opponent did not raise any other objections against auxiliary request 1. It follows that auxiliary request 1 is allowable. Since auxiliary request 1 is the amended version of the patent found allowable by the opposition division and the patent proprietor's main request is not allowable, the overall conclusion is that the appeals by both the patent proprietor and the opponent have to be dismissed.

Order

For these reasons it is decided that:

The appeals are dismissed.

The Registrar:

The Chairman:



C. Vodz

M. O. Müller

Decision electronically authenticated