



**UPC\_CFI\_480/2025**  
**PROCEDURAL ORDER**  
**of the Court of First Instance of the Unified Patent Court**  
**Central Division Milan**  
**issued on 15 January 2026**  
**concerning EP4185356**

CLAIMANT:

Fisher & Paykel Healthcare Limited, 15 Maurice Paykel Place, East Tamaki, Auckland, 2013, New Zealand,  
represented by its directors Andrew Grant Niccol, Andrew Robert Donald Somervell and James Peter Tuck, ibidem

Representatives: Thorsten Haslinde, Marc Wachenhausen and Vladimir Traykov, European Patent Attorneys and registered representatives before the Unified Patent Court, WBH Wachenhausen Patentanwälte PartG mbB, Müllerstraße 40, 80469 Munich, Germany

Further represented by: Dr. Arno Rißé and Dr. Felix Beck, German Attorneys at Law (Rechtsanwälte), Arnold Ruess Rechtsanwälte Partnerschaft mbB, Königsallee 59 a, 40215 Düsseldorf, Germany

DEFENDANT:

Flexicare (Group) Limited, Cynon Valley Business Park, Mountain Ash, Mid Glamorgan, CF45 4ER / GB,  
represented by its directors Marc Peter Davies, Khashayar Poormand and Ghassem Poormand, ibidem

Representatives: Matthew Naylor and Isobel Stone, European Patent Attorneys and registered representatives before the Unified Patent Court, Mewburn Ellis LLP Aurora Building Counterslip Bristol BS1 6BX United Kingdom

PATENT AT ISSUE: European Patent no. 4185356

DECIDING JUDGE:

This order is issued by the full panel.

COMPOSITION OF THE FULL PANEL:

Presiding judge

Andrea Postiglione

Legally qualified judge and judge rapporteur

Anna-Lena Klein

Technically qualified judge

Kerstin Roselinger

LANGUAGE OF THE PROCEEDINGS:

English

SUBJECT MATTER OF THE PROCEEDINGS:

Revocation action. Here: application to allow subsequent amendments to the patent into the proceedings

GROUND FOR THE ORDER:

Summary of facts:

- 1 On 29 May, 2025, the claimant lodged a revocation action against the defendant, concerning the above mentioned patent. On 1 August, 2025, the defendant lodged a defence to the statement of revocation, together with an application to amend the patent in suit. The defendant proposed 13 auxiliary requests. Auxiliary request 2 contains the additional feature “wherein the connector attaches to the manifold (2) via an aperture (6) formed in the manifold, wherein the aperture fluidically connects the gas tube to the manifold”. In the application to amend the patent, the defendant maintained that the feature that “the connector attaches to the manifold (2) via an aperture (6) formed in the manifold” is introduced from a dependent claim (claim 7 as granted) and does not create any new lack of clarity objection under Art. 84 EPC. With regard to the feature “the aperture fluidically connects the gas tube to the manifold”, the defendant argued that this feature was straightforwardly understood by the skilled person in the context of the specification, so that no lack of clarity objection arose. Auxiliary requests 3 to 13 all contain the same features as auxiliary request 2, worded slightly differently (“(...) aperture fluidically connecting the gas tube to the manifold”) with regard to the syntax based on additional amendments.
- 2 In their reply to the defence to revocation and defence to the application to amend the patent from 1 October, 2025, the claimant maintained (inter alia) that the scope of auxiliary request 2 was unclear because the claim did not make it clear to the skilled person if the gas tube was part of the claimed subject matter or not, and how the aperture was supposed to provide a connection. They argued the same for auxiliary requests 3 to 13, with additional arguments relating to the specific auxiliary requests.

- 3 With their rejoinder to the reply to the defence to revocation and reply to the defence to the application to amend the patent dated 31 October, 2025, the defendant argued that their auxiliary requests 1 to 13 were both admissible and allowable. They maintained that the skilled person would understand the feature “the aperture fluidically connects the gas tube to the manifold” as defining that such fluidic connection between the gas tube and the manifold occurs via the defined aperture, when the gas tube is attached to the manifold via the connector as introduced in feature 1.2. Additionally, they filed with their submission from 31 October, 2025, auxiliary requests 2A to 13A, all containing an amendment requiring that the nasal cannula comprises a gas tube connected to the connector. Auxiliary requests 8A to 13A additionally address claimant’s arguments relating to added matter contained in auxiliary requests 8 to 13. In their submission of 31 October, 2025, the defendant argued that these new auxiliary requests 2A to 13A were introduced as a mere precaution and in direct response to new objections of lack of clarity/ added matter raised by the claimant in their reply to the defence to the revocation action.
- 4 In their rejoinder to the reply to the defence to the application to amend the patent, submitted on 28 November, 2025, the claimant stressed that auxiliary requests 2A to 13A were late filed and should be disregarded. They maintained that the defendant had not lodged a specific request to the Court to allow auxiliary requests 2A to 13A into the proceedings, contrary to the requirements of Rule 30.2 RoP. The claimant argued that the defendant should have foreseen the claimant’s clarity objections and prepared the auxiliary requests in a manner complying with the EPC.
- 5 During the Interim Conference held on 18 December, 2025, the matter of the subsequently introduced auxiliary requests was discussed with the parties (see order of 23 December, 2025). The Court informed the parties of the Court’s provisional opinion that the auxiliary requests 2A to 13A might not be allowed into the proceedings. The parties were heard on that matter. The defendant underlined that the subsequently introduced auxiliary requests were directly responsive to the objections made by the claimant in their reply, and they did not introduce any issues that had not previously been discussed by the parties. Therefore, it would be proportionate to allow them into the proceedings, and proceedings’ efficiency would not be affected by allowing the amendments into the proceedings.

### Grounds for the decision

#### **A. Legal background**

- 6 According to Rule 49.2(a) RoP, the defence to revocation may inter alia include an application to amend the patent. The application shall contain, inter alia, an explanation as to why the amendments satisfy the requirements of Art. 84 and 123.2, .3 EPC, Rule 50.2 RoP, Rule 30.1(b) RoP. Any subsequent request to amend the patent may only be admitted into the proceedings with the permission of the Court, Rule 50.2 RoP, Rule 30.2 RoP. Rule 30.2 RoP also applies to an intended amendment of an amendment (CD

Paris, UPC\_CFI\_255/2023, order of 27 February, 2024, Meril v Edwards, margins 16 to 27).

- 7 When assessing the application to allow subsequent amendments into the proceedings, the Court will take into account the Court's obligation to ensure expeditious (and high quality) decisions, while striking a fair balance between the interests of the parties and taking into account the need for proportionality and flexibility, as well as fairness and equity (margin 6 of the preamble of the UPCA; margins 2 to 6 of the preamble of the RoP; LD Düsseldorf, UPC\_CFI\_733/2024 and UPC\_CFI\_255/2025, order of 12 September 2025, TRUMPF v IPG, margin 7; CD Paris, UPC\_CFI\_255/2023, order of 27 February, 2024, Meril v Edwards, margins 29 et sequi). This assessment requires the party applying for allowing subsequent amendments into the proceedings to explain their decision to file subsequent amendments (LD Düsseldorf, UPC\_CFI\_733/2024 and UPC\_CFI\_255/2025, order of 12 September 2025, TRUMPF v IPG, margin 8; CD Paris, UPC\_CFI\_255/2023, order of 27 February, 2024, Meril v Edwards, margin 33; LD Mannheim, UPC\_CFI\_210/2023, order of 27 June 2024, Panasonic v OROPE, II.5.). Rule 30.2 RoP, applicable by virtue of Rule 50.2 RoP to revocation actions, is a strict preclusion rule (LD Mannheim, UPC\_CFI\_210/2023, order of 27 June 2024, Panasonic v OROPE, II.5.; LD Hamburg, UPC\_CFI\_22/2023, order of 20 December 2024, 10x Genomics v Vizgen). Generally, the patentee shall introduce all the amendments with the application to amend the patent. Only in exceptional circumstances shall a subsequent amendment be allowed. This principle is an expression of the principle of parity of arms between the parties.

#### **B. Decision in the case at hand**

- 8 Against this legal background, the Court concludes that the subsequent application is admissible, but not allowable.
- 9 **I.** The application to allow auxiliary requests 2A to 13A is admissible.
- 10 While there is no explicit request to allow auxiliary requests 2A to 13A into the proceedings, the Court regards the introduction of new auxiliary requests as an implicit request.
- 11 The request is admissible. The defendant stated that the auxiliary requests were introduced as a precaution and in direct response to the clarity issues raised by the claimant in their reply. This explanation renders the request admissible. The assessment if this explanation is sufficient to decide in favour of the defendant will be assessed below (II.).
- 12 **II.** The request to allow auxiliary requests 2A to 13A into the proceedings is not allowable and is therefore rejected.
- 13 The explanation for the newly introduced auxiliary requests given in the rejoinder to the reply to the defence to revocation and reply to the defence to the application to amend the patent of 31 October, 2025, that these auxiliary requests were introduced as a

precaution and in direct response to the new objections of lack of clarity raised in the claimants reply, is no basis to allow the subsequent auxiliary requests into the proceedings.

- 14 As addressed above, subsequent auxiliary requests shall only be allowed into the proceedings on an exceptional basis. While it is true that the clarity objection to which the defendant reacted with the subsequent auxiliary requests were only submitted in the claimant's reply, the defendant should have and could have foreseen the claimant's clarity objection. Clarity is one aspect that specifically needs to be addressed in an application to amend the patent, as pointed out above, especially with regard to amendments based on the description, not on dependent claims. As the claimant points out in the rejoinder to the reply to the defence to the application to amend the patent (margin 31), the EPO's Guidelines for Examination (F.IV.4.14.1) specifically deal with the clarity of the wording of claims directed to one entity or a combination of entities.
- 15 The defendant's explanations during the Interim Conference do not change the Court's assessment. While it is true that the subsequent amendments did not introduce any new issues not previously discussed by the parties but reacted to the claimant's objection, the parties' discussions on the correct interpretation of the added feature "the aperture fluidically connects the gas tube to the manifold" show that the scope of the first set of auxiliary requests 2 to 13 might be seen as broader. The defendant argues that the skilled person would understand this feature in the sense that such fluidic connection between the gas tube and the manifold occurs via the defined aperture, [only] when the gas tube is attached to the manifold via the connector as introduced in feature 1.2. The claimant disagrees with this claim construction and stresses that the respective feature simply requires a connection. Thus, the subsequently added feature, introduced by auxiliary request 2A et sequi, which specifically require the nasal cannula to comprise a gas tube, can be seen as further limiting the claim. In the Court's view, it is specifically the goal of Rules 50.2, 30.2 RoP to make sure that (limiting) amendments are not introduced into the proceedings "in little steps", but in a straightforward manner.
- 16 The defendant's argument that the proceeding's efficiency would not be affected does not lead to a differing assessment. As pointed out above, subsequent amendments are only allowed on an exceptional basis. The Court must respect the preclusive nature of Rules 50.2, 30.2 RoP outlined above. The fact that the other party and the Court might have enough time to consider the subsequent amendments before an oral hearing are not sufficient reason for allowing subsequent amendments.

### **Order**

The request dated 31 October 2025 to allow auxiliary requests 2A to 13A into the proceedings is rejected.

Issued on 15 January 2026

Presiding Judge Andrea Postiglione

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Legally Qualified Judge Anna-Lena Klein

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Technically Qualified Judge Kerstin Roselinger

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