

Internal distribution code:

- (A) [-] Publication in OJ
(B) [-] To Chairmen and Members
(C) [-] To Chairmen
(D) [X] No distribution

**Datasheet for the decision
of 11 February 2016**

Case Number: T 0057/14 - 3.3.09

Application Number: 03724637.8

Publication Number: 1509096

IPC: A23L2/56, A23L2/02, A23L2/38,
A23L2/395, A23C9/156, A47G21/18

Language of the proceedings: EN

Title of invention:
DRINK FLAVOURING STRAW

Patent Proprietor:
UNISTRAW HOLDINGS PTE LTD

Opponents:
MC Scotland Export-Import Ltd.
NESTEC S.A.
Felföldi Edessegyarto Kft

Headword:

Relevant legal provisions:
EPC Art. 54

Keyword:

Intervention - Admissibility (yes)
Public prior use - novelty (no)

Decisions cited:

T 0472/92, T 0097/94, T 0055/01, T 2010/08, T 0002/09

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

European Patent
Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89
2399-4465

Case Number: T 0057/14 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 11 February 2016

Appellant: UNISTRAW HOLDINGS PTE LTD
(Patent Proprietor) One Raffles Place, Level 28-02
Tower 1
Singapore, 048616 (SG)

Representative: Schlich, George
Schlich
9 St Catherine's Road
Littlehampton, West Sussex BN17 5HS (GB)

Appellant: MC Scotland Export-Import Ltd.
(Opponent 1) 2700 Cegléd,
Ipartelepi út 8. B. ép., (HU)

Representative: Kacsuk, Zsófia
Kacsukpatent
Üteg u. 11/a
1139 Budapest (HU)

Appellant: NESTEC S.A.
(Opponent 2) Avenue Nestlé 55
1800 Vevey (CH)

Representative: Rupp, Christian
Mitscherlich PartmbB
Patent- und Rechtsanwälte
Postfach 33 06 09
80066 München (DE)

Party as of right: Felföldi Edessegyarto Kft
(Intervener) 4030 Debrecen
Dioszegi ut Keleti ipartelep 6 (HU)

Representative: Szederjessy, Nikoletta
Szederjessy Ügyvédi Iroda

Andrássy Út 95
1062 Budapest (HU)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
22 October 2013 concerning maintenance of the
European Patent No. 1509096 in amended form.**

Composition of the Board:

Chairman W. Sieber
Members: M. O. Müller
 F. Blumer

Summary of Facts and Submissions

I. This decision concerns the appeals filed by the opponents and the patent proprietor against the decision of the opposition division that European patent No. 1 509 096 as amended meets the requirements of the EPC.

II. With their notices of opposition, opponent 1 (MC Scotland Ltd.) and opponent 2 (NESTEC S.A.) had requested revocation of the patent in its entirety on the grounds of Article 100(a) (lack of novelty and inventive step), 100(b) and 100(c) EPC.

The documents submitted during the opposition proceedings included:

O1: US 4,921,713 A; and

O2: WO 98/15187 A1.

III. In its decision, the opposition division rejected the main request (claims as granted) for lack of inventive step over O2. Claims 1 and 2 (the only independent claims) of the main request read as follows:

"1. A receptacle including:

an elongate tubular body;

a plurality of pellets of a predetermined size and shape containing a predetermined measure of active ingredient; and

filtration means disposed at or adjacent each end of the tubular body to retain the pellets substantially within the body,

the receptacle being sized to allow a carrier liquid to be drawn therethrough, such that passage of the carrier liquid through the receptacle causes the pellets to progressively dissolve, thereby releasing the active ingredient into the beverage upon consumption,

characterised in that substantially all pellets have a diameter of between around 25% and 75% of the internal diameter of the tubular body."

"2. A receptacle including:

an elongate tubular body;

a plurality of pellets of a predetermined size and shape containing a predetermined measure of active ingredient; and

filtration means disposed at or adjacent each end of the tubular body to retain the pellets substantially within the body,

the receptacle being sized to allow a carrier liquid to be drawn therethrough, such that passage of the carrier liquid through the receptacle causes the pellets to progressively dissolve, thereby releasing the active ingredient into the beverage upon consumption,

characterised in that the pellets are formed predominantly as nonpareil pellets, each having a plurality of generally concentric layers."

Auxiliary request 1 filed during the oral proceedings before the opposition division was found to be allowable. The opposition division considered this request in particular to be novel and inventive over O2.

IV. All parties filed an appeal.

V. The proprietor's statement of grounds of appeal (letter of 20 February 2014) contained a main request (granted claims) and auxiliary requests 1 to 4. With its letter dated 9 July 2014, the proprietor filed an auxiliary request 5.

VI. The statement of grounds of appeal of opponent 1 included:

D15: B.R. Jennings et al., The Royal Society Lond., volume A 419, 1988, pages 137 to 149.

VII. The statement of grounds of appeal of opponent 2 included:

O23: WO 01/37813 A2;

O24: "Flavor" from Wikipedia, 16 January 2014, 7 pages; and

O25: "Tang (drink)" from Wikipedia, 16 January 2014, 3 pages.

VIII. On 5 May 2014, an intervention was filed by Felföldi Édességgártó Kft and the opposition fee was paid on 23 May 2014, the intervention including:

A1: Cease and desist letter of Innovatelegal dated 14 February 2014;

A2: Application for preliminary injunction in Hungary;

A3: Company registry extract "Tárolt Cégkivonat";

- A4: Copy of the Hungarian IP register for EP1509096;
- A5: Order of the Metropolitan Court of Hungary of 31 March 2014;
- A6: WIPO datasheet "Patentscope" (WO 2003101226);
- A7: Patent family EP1509096;
- A8: Patent Court decision 2013Huh4855;
- A9: Photograph of the package of the product SUPER CANDY;
- A10: Declaration by József Felföldi, signed 25 April 2014;
- A11: Expertise by László Somogyi, signed 10 April 2014;
- A12: Declaration by Anita Felföldi, signed 28 March 2008;
- A13: Decision 14c O 60/08 of the Landgericht Düsseldorf;
- A14: Authorisation dated 20 March 2014;
- I1: Bibliographic data BE1009423;
- I2: Bibliographic data US4911937;
- I3: Bibliographic data US2002009517;
- I4: Bibliographic data US4168674;

I5: Bibliographic data US5010838;

I6: Bibliographic data DE3310232; and

I7: Bibliographic data EP0406904.

IX. This intervention was completed by a second letter on 30 May 2014, which contained

A15: Product sheet of Felföldi Potpourri;

A16: Expertise of the Animal Health and Food Control Station, dated 1 April 1998;

A17/1: Declaration by József Csizmarik, signed 14 July 2014;

A17/2: E-mail by Paul Veen, dated 26 March 2008;

A17/3: Declaration by Jutta Harmannstein, signed 31 March 2009;

A17/4: Document entitled Szamla;

A17/5: Declaration by Peresztegi Gyuláné, signed 14 July 2014;

A17/6; Declaration by Edit Pölöskei, signed 18 March 2008; and

A18: S. Jaschik, "Materials and Production Part 2", H. Koch and J. Cseh (ed.), Technical Publishing House, Budapest, 1964.

X. As the proprietor and the opponents are the appellant and the respondents in the present proceedings, for

simplicity, the board will continue to refer to the parties as "the proprietor", "opponent 1", "opponent 2" and "the intervener".

XI. In the subsequent proceedings, the parties filed the following further documents:

Proprietor:

O59: Declaration by Kendall Norman Palazzi, signed 16 September 2014;

O60: Declaration by Jozsef Felföldi, dated 24 April 2008;

O61: "Felföldi's master cow magic straw";

O62: Letter of Johnny Wilkinson, dated 14 March 2004;

O63: Image of the cross-section through a nonpareil pellet;

O64: Letter of George W. Schlich, dated 2 October 2014;

O65: Declaration by Graham Nigel Luke, signed 28 May 2015, including annexes 1 to 3; and

O66: Declaration by Georg William Schlich, signed 25 June 2015, including annexes 1 to 7.

Opponent 1:

D16: US 6,190,692 B1;

D17: Laboratory Report including appendix A1 and A2;

- D18: Notarised document including images (in Hungarian language);
- D19: Notarized document (in Hungarian language);
- D20: English translation of D18;
- D21: English translation of D19; and
- D22: Three DVDs.

Intervener:

- A19: Photographs of a rotating drum;
- A20: Letter of Bachta Tiborné, dated 26 November 2012;
- A21: Photograph of the package of the SUPER CANDY product;
- A22: Photograph of the package and content of the SUPER CANDY product;
- A23: Declaration by Sándor Bodnár signed 28 October 2015;
- A24: Schedule on proofs;
- A25: Declaration by Vass Istvánné signed 19 January 2016;
- A26: Declaration by Antal Nagy signed 28 January 2016;

A27: Declaration by Anita Felföldi signed 11 January 2016;

A28: Declaration by József Felföldi signed 28 January 2016; and

A29: Authorisation for Nikoletta Szederjessy.

XII. With its letter dated 20 May 2015, opponent 2 withdrew its appeal.

XIII. By communication of 7 July 2015, the parties were summoned to oral proceedings.

XIV. With its letters dated 24 July 2015 and 14 August 2015, the proprietor requested that the oral proceedings be postponed. With its letter dated 4 August 2015, the intervener requested that the proprietor's request for postponement be rejected.

With its communications dated 3 and 19 August 2015, the board stated that it appeared not to be appropriate to re-schedule the oral proceedings.

XV. With its communication dated 11 August 2015, the board communicated its preliminary opinion to the parties and commented *inter alia* on the public prior use.

XVI. With its letter dated 13 August 2015, opponent 2 stated that it would not be represented at the scheduled oral proceedings.

XVII. With its letter dated 16 December 2015, the proprietor requested that Kendall Palazzi and Graham Luke be permitted to speak during the oral proceedings, in

relation to the subject-matter of their declarations and the conclusions reached, should this be of assistance.

- XVIII. On 11 February 2016, oral proceedings were held before the board in opponent 2's absence. At the beginning of the proceedings, the proprietor withdrew its request that they be rescheduled. It reiterated its written request that Kendall Palazzi and Graham Luke be permitted to speak, if necessary, but subsequently did not ask for them to be heard. After the board had given its opinion on the main request, the proprietor had no further comments on the auxiliary requests.
- XIX. The main request are the claims as granted (see point III above).
- XX. Claim 2 of auxiliary requests 1 to 3 and claim 1 of auxiliary request 4 are identical to claim 2 as granted.
- XXI. Claim 1 of auxiliary request 5 reads as follows (amendments with regard to the claims as granted in bold type):

"1. A receptacle including:

an elongate tubular body;
a plurality of **generally spherical** pellets of a predetermined size and shape containing a predetermined measure of active ingredient; and
filtration means disposed at or adjacent each end of the tubular body to retain the pellets substantially within the body,
the receptacle being sized to allow a carrier liquid to be drawn therethrough, such that passage of the carrier liquid through the receptacle causes the pellets to

progressively dissolve, thereby releasing the active ingredient into the beverage upon consumption,

characterised in that substantially all pellets have a diameter of between around 25% and 75% of the internal diameter of the tubular body."

XXII. The opponents and the intervener raised objections under Article 100(b) and (c) EPC and contested novelty and inventive step in view of O1 and O2.

They furthermore attacked novelty in view of a public prior use. Their main arguments in the written and oral proceedings can be summarised as follows (for more details, see points 3 to 5 below):

The company Feldföldi Potpourri Kft. had sold the product "SUPER CANDY DRAGEES DRINK" (hereinafter "SUPER CANDY product") to various clients (A9, A17/2, A17/3, A17/5 and A21) and had exhibited it at various trade fairs before the priority date of the patent. The package of the SUPER CANDY product (A9 and A21) contained a drinking straw with crimped ends for drinking milk, being filled with nonpareil pellets having a diameter of one third to half of the straw diameter (A11). The SUPER CANDY product was thus novelty-destroying to the subject-matter of claims 1 and 2.

The proprietor's argument that the straw of the SUPER CANDY product was empty and had first to be filled with pellets before using it was not convincing. The package contained a straw and a bag each filled with pellets as visible in A11 and A22. The bag was there to **re**charge the straw, rather than filling a straw that was initially empty, as indicated by the instruction shown

on the package in A21. Moreover, the pellets contained in the straw and those in the bag were the same. Furthermore, contrary to the proprietor's statement, the crimped ends of the straw represented filtration means. The proprietor also erred in thinking that the pellets in the straw were not of the nonpareil type. More specifically, it followed from the statements and photographs in A11 and the way the pellets were produced, as evidenced in A15, that they were nonpareil pellets. In this respect, the term "granules" used in the declarations A12, A17/1, A17/3 and A17/5 had been used as an umbrella term for whatever type of particles, without imposing any restriction on particle morphology. It was not correct either that O63 proved that the pellets in the straw of the SUPER CANDY product were not of the nonpareil type. Neither could such proof be derived from the fact that the "Master Cow" product tested by the proprietor did not contain nonpareil pellets, since the present public prior use was concerned with the different product SUPER CANDY.

XXIII. The proprietor contested the opponents' and intervener's objections. As regards the public prior use, the proprietor's main arguments in the written and oral proceedings can be summarised as follows (for more details see points 3 to 5 below):

It was not clear whether the straw of the SUPER CANDY product was filled with pellets. A11 could not prove that the pellets in the straw of the SUPER CANDY product had a diameter as claimed. A11 and A15 could not prove that the pellets of the SUPER CANDY product were of the nonpareil type. Moreover, the crimped ends of the SUPER CANDY straw did not represent filtration means. Lastly, it had not been proven that the SUPER CANDY product had

been sold or exhibited at trade fairs before the priority date of the patent.

XXIV. Opponent 1 requested that the decision under appeal be set aside and the patent be revoked.

Opponent 1 further requested that certain questions be referred to the Enlarged Board of Appeal in the event that the board decided that the opponent's insufficiency objections only concerned the requirement of clarity under Article 84 EPC and thus could not be examined in the present appeal proceedings.

XXV. The intervener requested that the patent be revoked.

XXVI. The proprietor requested that the decision under appeal be set aside and that the patent be maintained as granted (main request) or, alternatively, that the patent be maintained on the basis of any of auxiliary requests 1 to 4 as filed with letter of 20 February 2014, or on the basis of auxiliary request 5 as filed with letter of 9 July 2014.

The proprietor furthermore requested that D15, O23, O24 and O25 not be admitted into the proceedings.

Reasons for the Decision

1. Admissibility of the intervention

As confirmed by the proprietor, it had filed an application for preliminary injunction in Hungary against the intervener as a complaint against patent infringement in respect of the Hungarian part of the opposed patent. A copy of this application was submitted

by the intervener as A2. This document carries a stamp with the date of 26 March 2014.

An application for preliminary injunction triggers the three-month time limit under Rule 89 EPC for filing an intervention. This time limit thus started on 26 March 2014. The notice of intervention was filed in two parts on 5 and 30 May 2014 and the opposition fee was paid on 23 May 2014, all being within the required three-month time limit. This was not contested by the proprietor.

The board therefore decided that the intervention was admissible.

Main request (claims as granted) - Novelty

2. Novelty was contested in view of the public prior use of the product "SUPER CANDY DRAGEES DRINK" (hereinafter "SUPER CANDY product"). According to the intervener, the company Feldföldi Potpourri Kft. had sold this product to various clients and had exhibited it at various trade fairs before the priority date of the patent. The intervener and the opponents considered this product to be novelty-destroying with respect to the subject-matter of claims 1 and 2.

The SUPER CANDY product originates from the intervener, and thus all available proof is in its sphere of influence. The appropriate standard for the intervener to prove its case is therefore "up to the hilt" (T 472/92, OJ EPO 1998, 161 (point 3.1), which is equivalent to the "beyond reasonable doubt" standard of proof (T 97/94, OJ EPO 1998, 467, point 5.1; T 55/01, point 4.1; and T 2/09, point 3.2).

3. Identity between the SUPER CANDY product and the receptacle of claim 1
 - 3.1 A photograph of the package of the SUPER CANDY product is shown in A9 and A21. A9 shows the front and one side of the package. The front has on its top the indication "SUPER CANDY DRAGEES DRINK" and below it, the head of a cow drinking from a straw filled with pink pellets. On the lower part of the package, there is a second image showing part of a straw filled with pink pellets and having a crimped end. The side of the package contains on its top the indication "SUPER CANDY DRAGEES DRINK straw with candy pearls". Below this indication, there is a list of the ingredients of the pellets, an instruction to keep the product in a cool and dry place, the company name "Felföldi Potpourri Kft." together with its address and, near the bottom, the expiry date "Best before date: 14.01.98".

A21 shows the other two sides of the package not visible in A9. One side is identical to the front visible in A9. On the top of the other side, the instruction "Stick a straw into a glass of milk and sip the fantastic flavour drink!" is written. Underneath is the indication "rechargeable in subjunctive bag" and with it three images showing the process of recharging. Towards the bottom, a bar code is visible.
 - 3.2 In A17/3, Jutta Harmannstein, who assisted in the foundation of a company that purchased the SUPER CANDY product, states that this product was a drinking straw containing granules suitable for drinking milk.
 - 3.3 In A11, László Somogyi, associate professor at Corvinus University of Budapest, gives expertise on the characteristics of the SUPER CANDY product.

László Somogyi declares that the package of the SUPER CANDY product - photograph 1 of A11 shows a package that is identical to that of A9 - contained one plastic bag filled with nonpareil dragees and one straw filled with nonpareil dragees (item "Sample of the product" on the second page of A11). The straw had a diameter of 6 mm, and was filled with spherical dragees having a diameter of between 2 and 3 mm. The filled straw is shown in photograph 3 of A11. László Somogyi concludes that the diameters of the dragees were one third to half of the straw diameter.

Also, A22 shows a package, identical to that of A9, a bag and a straw, both filled with spherical pellets looking identical to those in A11.

- 3.4 The filled straw of the SUPER CANDY product corresponds to the feature of claim 1 of a receptacle including an elongate tubular body, and a plurality of pellets of a predetermined size and shape containing a predetermined measure of active ingredient, the receptacle being sized to allow a carrier liquid to be drawn therethrough, such that passage of the carrier liquid through the receptacle causes the pellets to progressively dissolve, thereby releasing the active ingredient into the beverage upon consumption.
- 3.5 As visible on photograph 3 of A11, the straw filled with the dragees has crimped ends. Such a crimped end is also visible on the package shown in A9 and A21. The crimped ends retain the pellets substantially within the straw. These crimped ends therefore correspond to the filtration means as required by claim 1. This is in line with the decision of the Landgericht Düsseldorf (A13, first two pages of the Reasons).

- 3.6 It is therefore beyond reasonable doubt that the SUPER CANDY product exhibited all features of claim 1.
- 3.7 The proprietor contested this. For the following reasons, the proprietor's arguments (which are summarised below) are, however, not convincing:
- 3.7.1 It was not clear whether it was the particles in the bag or those in the straw that were tested in A11; they were different from another, at least in terms of the diameter (argument presented in writing only).

It is true that László Somogyi stated in A11 that the package contained one plastic bag and one straw, each filled with pellets. However, he arrived at the finding that the diameter of the pellets is one third to half of the straw diameter (see 3.3 above) on the basis of the size of the pellets inside the straw (seventh line from the bottom of the second page of A11). There is thus no doubt that the pellets in the straw rather than those in the bag were taken into account for determining the diameter.

- 3.7.2 The straw in the package shown in A9 and A21 was empty and one had to first fill pellets from a bag into the straw before using it.

The board does not agree with this argument. The package in A9 and A21 does not show an empty straw but one filled with pellets. Furthermore, the instruction shown on the package in A21 to fill the straw with pellets actually concerns the **re**charging of the straw, which implies that the straw in the package was initially already filled with the pellets. This is corroborated by

László Somogyi and Jutta Harmannstein, who state that the straw contained pellets.

3.7.3 Claim 1 required the filtration means to be such that the pellets remained within the straw while they dissolved during the drinking of the milk. Contrary thereto, the crimped ends of the SUPER CANDY straw were completely closed and had to be opened for drinking. Thus, while sucking the milk through the opened straw, all pellets were immediately sucked out of the straw. The crimped ends did therefore not constitute filtration means.

Firstly, the proprietor has not provided any evidence for its assertion that the crimped ends of the SUPER CANDY straw are completely closed.

Secondly, in the instruction to recharge the straw with pellets (A21), red arrows indicate that one of the crimped ends needs to be pressed together - thereby pushing the crimped end open - to allow pellets to be filled in the straw.

Unlike for the process of refilling the straw, no such instruction is present on the package for the process of drinking. On the contrary, the image of the head of a cow drinking from the straw rather indicates that no additional measure, and in particular no pushing open of the crimped ends, is necessary for drinking.

The proprietor's argument that the crimped ends have to be pushed open for drinking is thus not valid.

As regards the proprietor's other allegation that the crimped ends would open due to sucking force, there is simply no evidence for this allegation.

The board's finding (point 3.5 above) that the crimped ends of the SUPER CANDY straw are filtration means therefore still holds true. It is in this respect noted that whether, possibly, a crimped end is a less efficient filtration means than some other type of filter is not relevant, since claim 1 is not restricted in this respect.

3.8 The board's finding thus remains valid, i.e. that it is beyond reasonable doubt that the SUPER CANDY product exhibits all features of claim 1.

4. Identity between the SUPER CANDY product and the receptacle of claim 2

4.1 Claim 2 differs from claim 1 in that, instead of their diameter, the pellets are defined to be formed predominantly as nonpareil pellets, each having a plurality of generally concentric layers. It was a matter of dispute whether the pellets of the SUPER CANDY product fulfill this requirement.

4.2 In declaration A11, László Somogyi states that the straw contained in the box was filled with nonpareil dragees (item "Sample of the product" on the second page of A11). This is corroborated by the further statement just before point 2 on the third page of A11:

"I cut the dragees and found that a centre is clearly observable from the outer layer. Investigating under microscope the crystallized sugar layers were recognisable".

This statement is further corroborated by the three photographs 4 to 6 of one of the pellets (last three

pages of A11). In these photographs, a pellet with a dark pink core and a lighter pink surrounding is visible. Since the thickness of the surrounding is large compared with the dimension of the core, it is plausible that the surrounding consists of more than one layer.

4.3 The statements and photographs in A11 are further supported by the terms "DRAGEES" (front in A9 and A21) and "pearls" (side in A9) on the package of the SUPER CANDY product, which indicate that the pellets are of the nonpareil type.

4.4 Lastly, this is corroborated by the way the pellets are produced, as evidenced by A15:

A15 is a product sheet referring to the SUPER CANDY mixed fruit flavoured dragée (see the item "3) Name of Food" on the first page of the English translation of A15). The intervener declared that this sheet was submitted to the Directorate of Food Chain Safety and Animal Health Government Office to get approval as regards certain food and health requirements. This is confirmed by the seal of the directorate concerned and the approval A16 given by the Animal Health and Food Control Station for the pellets of A15.

According to A15, the SUPER CANDY dragée is produced as follows: Sugar is put into the dragée drum and dragée syrup is poured onto it. The corpora that have got wet are dried by sprinkling powdered sugar on them. This operation is repeated until the adequate size is achieved (point 8 on the second page of the English translation of A15). As not disputed by the proprietor, such a process results in a nonpareil pellet with multiple generally concentric sugar layers.

It is thus beyond reasonable doubt that the SUPER CANDY product exhibited all the features of claim 2.

4.5 The proprietor has contested this. The proprietor's arguments (which are summarised below) are, however, not convincing for the following reasons:

4.5.1 A15 and A16 were only about the pellets and not the straw, and thus did not relate to the SUPER CANDY product (i.e. the straw including the pellets).

The board acknowledges that A15 and A16 indeed deal only with pellets. This is, however, not surprising, since approval as regards food and health requirements is needed for the pellets only, because these rather than the straw are being consumed upon drinking. It is in fact against life experience that a product that has been approved by the food authorities and has a certain name is not used in straws with the same name.

4.5.2 In declarations A12, A17/1, A17/3 and A17/5, the SUPER CANDY product was said to be composed of "granules". Granules in the proprietor's view were different from nonpareil pellets.

However, these declarations are not about the particle morphology of the SUPER CANDY product but its public availability. Therefore, the term "granules" in these declarations can be assumed to have been used as an umbrella term for whatever type of particles, without imposing any restriction on particle morphology. The use of the term "granules" in these declarations can therefore not invalidate the board's finding that the pellets in the SUPER CANDY product are of the nonpareil type.

- 4.5.3 Contrary to the photographs of the pellets of the SUPER CANDY product in A11, the photograph of a nonpareil pellet in O63 showed multiple coating layers. This implied that the pellets of the SUPER CANDY product did not contain such multiple coating layers.

This argument is not convincing. As pointed out by opponent 1 during the oral proceedings, and as not disputed by the proprietor, O63 shows a pellet in which the various coating layers are formed from materials with two different colours (dark purple and very light purple). It is due to these different colours, rather than the fact that the pellet is a nonpareil pellet, that multiple individual layers are visible in O63.

- 4.5.4 The relevance of A11 was doubtful, since the tests were done on a product that was 16 years old and thus the properties of the product had possibly changed (argument presented in writing only).

However, the product shown in the photographs annexed to declaration A11 looks identical to that on the package of the "SUPER CANDY" product (A9 and A21). Therefore, in the absence of any proof to the contrary, it must be assumed that the features of the product tested in A11 are the same as those of the "SUPER CANDY" product sold before the priority date of the patent.

- 4.5.5 The pellets in "Master Cow" had, according to József Felföldi's declaration A10, been produced by the same technology as those in the SUPER CANDY product, and thus were nonpareil pellets. This was in contradiction to the finding of Graham Nigel Luke in O65 that the "Master Cow" product was composed of granules rather than nonpareil pellets. Also, the decision of the Landgericht Düsseldorf A13 acknowledged that the pellets of the

"Master Cow" product were flakes rather than nonpareil pellets.

The board does not find the proprietor's argument convincing. The present public prior use is concerned with the SUPER CANDY product rather than the "Master Cow" product. The finding that the "Master Cow" product was composed of granules rather than nonpareil pellets can, if anything, only shed doubt on the credibility of József Felföldi's declaration A10. This declaration is, however, not relevant, since the board's finding is not based thereon. Furthermore, contrary to the proprietor's assertion, the Landgericht Düsseldorf did not acknowledge that the pellets of the "Master Cow" product were not of the nonpareil type. In fact, it explicitly stated that there was no need to decide ("kann dahinstehen") on whether the pellets were pearls or flakes (second paragraph on page 11 of A13).

- 4.5.6 According to decision T 2010/08, a declaration is not credible if no witness is offered to confirm it. Since, in the present case, none of the declarants of the intervener was present at the oral proceedings or offered as a witness, the declarations of the intervener had to be discarded as not credible.

The board is, however, not aware of any passage in T 2010/08 that supports the proprietor's argument. What this decision says is that, in the event of a declaration not being sufficient to prove that an allegedly prior-used product has all the claimed features, this cannot be supplemented by hearing the declarant as a witness (point 2.8 of the decision).

4.6 The board's finding thus remains valid, i.e. that it is beyond reasonable doubt that the SUPER CANDY product exhibited all features of claim 2.

5. Public availability

5.1 As set out above, the package in A9 gives as the expiry date "Best before date: 14.01.98". The product was thus produced and foreseen to be consumed before 14 January 1998, which is prior to the priority date of the patent (31 May 2002).

In A17/2, Mr P. Veen, General manager of the former company Biscomar N.V., declared that, in January 1999, he ordered and received 2700 pieces of the product "SUPER CANDY" from Felföldi Potpourri Ltd, and he confirmed that the package of this product shows a straw and a cow head, as does the package of A9 and A21. This is corroborated by the attached invoice proving that 2700 pieces of "SUPER CANDY" had been ordered by the company N.V. Biscomar on 25 January 1999 and shipped to it on 8 February 1999.

In A17/3, Jutta Harmannstein, who assisted in the foundation of the company AGILORA Gesund & Schön, confirmed that this company purchased the product "Super Candy" from Felföldi Potpourri Industrial and Trading Ltd. on 14 September 1998. This is corroborated by the attached invoice proving that 9720 pieces of "SUPER CANDY" had been ordered by Agilora Gesund + Schön on 14 September 1998 and shipped to it on 6 October 1998.

In A17/5, Peresztegi Gyuláné, who was a commercial team leader of the company MOL Rt between 1 July 1995 and 30 November 2000, states that this company regularly purchased a product named "Super Candy Dragees" from

Felföldi Potpourri Kft during this period, and that the product was sold in a box which showed the head of a cow and a straw hanging from its mouth, as does the package of A9 and A21.

5.2 In view of the above, it is beyond reasonable doubt that the SUPER CANDY product was produced and sold to at least three customers before the priority date of the patent.

5.3 The proprietor has contested public availability before the priority date. For the following reasons, the proprietor's arguments (which are summarised below) are not convincing:

5.3.1 All the photos of the SUPER CANDY product package were identical. There seemed thus to have existed only one single such product package. It was therefore doubtful whether the SUPER CANDY product had ever been sold.

It is true that the intervener relied on one single product sample in the present appeal proceedings. However, A17/2, A17/3 and A17/5 show that thousands of SUPER CANDY products had been sold before the priority date of the patent. Furthermore, it is not surprising that, after a long time - the intervener had filed its intervention in 2014, i.e. more than a decade after the SUPER CANDY product had been sold - the intervener had only one product sample at its disposal.

5.3.2 Opponent 2, a major food company, had never indicated that the SUPER CANDY product existed. This shed doubt on whether the product had been on the market at all.

However, the reasons why an opponent is silent about the existence of a certain product may be manifold. The

opponent's silence can in particular not shed doubt on what is proven by the declarations and invoices A17/2, A17/3 and A17/5, namely that thousands of SUPER CANDY products had been sold to various customers.

- 5.3.3 The dimensions of the straw given in A17/1 for the SUPER CANDY product and the material thereof (polyethylene) were different from all other straws known to the proprietor.

The board acknowledges that it may well be that the straws used in the SUPER CANDY product were different from those known to the proprietor. The board fails to see, however, how this can invalidate its finding that the product was sold before the priority date of the patent.

- 5.3.4 According to A17/6, the package shown in A9 had been designed in September 1998. This was after and thus in contradiction to the expiry date indicated on the package, i.e. 14 January 1998.

The board acknowledges that the date of September 1998 given in A17/6 for a "packet and leaflet" (penultimate sentence of the declaration) is indeed after the expiry date on the package. However, the intervener pointed out that the packet was different from the package, in that the packet (and leaflet) referred to in A17/6 were intended for trade fairs rather than for sale.

The board furthermore notes that A9, A11 and A21 show a photograph of the package with the expiry date of 14 January 1998. Hence this package must have physically existed on, and thus have been designed before, that date. This is in fact corroborated by A17/6 itself, which explicitly mentions November 1997, which is before

the expiry date on the package as the date of making "the design of the **packaging** (i.e. not packet) of "Super Candy" (emphasis and insertion in brackets added by the board).

- 5.3.5 The date of manufacture in A10 did not say anything about whether the SUPER CANDY product was publicly available. Moreover, since the product shown in A17/6 was a computer-generated image rather than a photograph, A17/6 did not constitute proof that the SUPER CANDY product existed. Furthermore, the intervener had not sufficiently proven that the SUPER CANDY product had been exhibited at trade fairs before the priority date of the patent.

However, the board's finding of public availability before the priority date of the patent does not rely on A10, A17/6 or any exhibition of the SUPER CANDY product during trade fairs. The proprietor's argument can thus not change this finding.

- 5.4 The board's finding thus remains valid, i.e. that it is beyond reasonable doubt that the SUPER CANDY product had been produced and sold to at least three customers before the priority date of the patent. The SUPER CANDY product had therefore been publicly available before the priority date of the patent.
6. The subject-matter of claims 1 and 2 therefore lacks novelty over the public prior use. The main request is thus not allowable.

Auxiliary requests - Novelty

7. Claim 2 of auxiliary requests 1 to 3 and claim 1 of auxiliary request 4 are identical to claim 2 of the main

request. Therefore, for the same reasons as given above with regard to claim 2 of the main request, the subject-matter of claim 2 of auxiliary requests 1 to 3 and claim 1 of auxiliary request 4 lacks novelty over the public prior use.

Claim 1 of auxiliary request 5 differs from claim 1 of the main request only in that the pellets are defined to be generally spherical. As visible on the package of the SUPER CANDY product in A9 and A21 and in photograph 3 of A11, and as not disputed by the proprietor, the pellets of the SUPER CANDY product are generally spherical. Therefore, for the same reasons as given above with regard to claim 1 of the main request, the subject-matter of claim 1 of auxiliary request 5 lacks novelty over the public prior use.

Auxiliary requests 1 to 5 are thus not allowable.

8. In view of the fact that none of the proprietor's requests was allowable, the board did not decide on the opponents' and the intervener's further objections as regards lack of novelty and lack of inventive step over the printed prior art and the grounds of Article 100(b) and (c) EPC.

No decision was furthermore taken on the proprietor's request that D15, O23, O24 and O25 not be admitted into the proceedings - these documents were not relevant to the present decision - and on opponent 1's request that certain questions related to the ground of Article 100(b) EPC be referred to the Enlarged Board of Appeal.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated