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**Datasheet for the decision  
of 26 March 2021**

**Case Number:** T 0165/16 - 3.3.09

**Application Number:** 05112989.8

**Publication Number:** 1813155

**IPC:** A23D9/04, A23D9/00, A23G9/32,  
A23G9/48

**Language of the proceedings:** EN

**Title of invention:**  
Fat blend for use in fat-based coatings for ice confection

**Patent Proprietor:**  
CSM Nederland B.V.

**Opponent:**  
Société des Produits Nestlé S.A.

**Headword:**  
Fat Blend/CSK NEDERLAND

**Relevant legal provisions:**  
EPC Art. 100(c), 100(b), 100(a), 54, 56, 83, 123(2)

**Keyword:**

Grounds for opposition - added subject-matter (no) -  
insufficiency of disclosure (no)  
Novelty - main request (yes) - public prior use (no) -  
insufficient evidence  
Inventive step - main request (yes) - non-obvious alternative

**Decisions cited:**

T 0063/06

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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Case Number: T 0165/16 - 3.3.09

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.09**  
**of 26 March 2021**

**Appellant:** Société des Produits Nestlé S.A.  
(Opponent) Entre-deux-Villes  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 20 November  
2015 rejecting the opposition filed against  
European patent No. 1813155 pursuant to Article  
101(2) EPC.**

**Composition of the Board:**

**Chairman** A. Haderlein  
**Members:** M. Ansorge  
E. Kossonakou  
F. Rinaldi  
F. Blumer

## Summary of Facts and Submissions

- I. The appeal was filed by the opponent (appellant) against the opposition division's decision rejecting the opposition to European patent no. 1 813 155.
- II. With its notice of opposition, the opponent had requested that the patent be revoked on the grounds for opposition under Article 100(a) EPC (lack of novelty and lack of inventive step), Article 100(b) EPC and Article 100(c) EPC.
- III. The opposition division decided that the subject-matter of the claims as granted met the requirements of the EPC. In particular, it held that the alleged public prior use was not proven, D5 was the closest prior art and the claimed subject-matter involved an inventive step when starting from D5 as the closest prior art.
- IV. The respondent's only claim request relevant in the present case is the claims as granted (main request).
- V. Claims 1, 8, 9 and 10 of the patent as granted read as follows:

(a) Claim 1

"1. Use of a fat blend in coatings for ice confection, said fat blend not containing an interesterified oil and being characterised by the following fatty acid composition:

- $2 \text{ wt.}\% \leq C_8 \leq 12 \text{ wt.}\%$ ;
- $1 \text{ wt.}\% \leq C_{10} \leq 10 \text{ wt.}\%$ ;

- 25 wt.%  $\leq$  C<sub>12</sub>  $\leq$  45 wt.%;
- 8 wt.%  $\leq$  C<sub>14</sub>  $\leq$  18 wt.%;
- 8 wt.%  $\leq$  C<sub>16</sub>  $\leq$  18 wt.%;
- 1 wt.%  $\leq$  C<sub>18:0</sub>  $\leq$  10 wt.%;
- 14 wt.%  $\leq$  C<sub>18:1</sub>  $\leq$  24 wt.%;
- 1 wt.%  $\leq$  C<sub>18:2</sub>  $\leq$  10 wt.%; and
- total trans-unsaturated fatty acids < 4 wt.%;
- total cis-unsaturated fatty acids 14 - 28 wt.%

said fat blend further being characterised by the following solid fat profile:

- 65%  $\leq$  N<sub>0</sub>  $\leq$  85%;
- 52%  $\leq$  N<sub>10</sub>  $\leq$  72%;
- 37%  $\leq$  N<sub>15</sub>  $\leq$  57%;
- 7%  $\leq$  N<sub>20</sub>  $\leq$  27%;
- 0%  $\leq$  N<sub>30</sub>  $\leq$  10%;
- N<sub>35</sub>  $\leq$  2%."

(b) Claim 8

"8. Fat-based coating composition for coating ice confection, containing:

- 20 - 80 wt.% of a fat blend as defined in any one of the preceding claims;
- 18 - 50 wt.% of sugar;
- up to 30 wt.% of milk ingredients; and
- up to 30 wt.% of cocoa ingredients. *[sic]*
- up to 5 wt.% of other food ingredients."

(c) Claim 9

"9. Coated ice confection comprising an ice confection core and a fat-based outer coating layer that is composed of a fat-based coating composition according to claim 8."

(d) Claim 10

"10. A method of preparing a fat blend that is characterised by the following fatty acid composition:

- 2 wt.%  $\leq$  C<sub>8</sub>  $\leq$  12 wt.%;
- 1 wt.%  $\leq$  C<sub>10</sub>  $\leq$  10 wt.%;
- 25 wt.%  $\leq$  C<sub>12</sub>  $\leq$  45 wt.%;
- 8 wt.%  $\leq$  C<sub>14</sub>  $\leq$  18 wt.%;
- 8 wt.%  $\leq$  C<sub>16</sub>  $\leq$  18 wt.%;
- 1 wt.%  $\leq$  C<sub>18:0</sub>  $\leq$  10 wt.%;
- 14 wt.%  $\leq$  C<sub>18:1</sub>  $\leq$  24 wt.%;
- 1 wt.%  $\leq$  C<sub>18:2</sub>  $\leq$  10 wt.%; and
- total trans-unsaturated fatty acids < 4 wt.%;
- total cis-unsaturated fatty acids 14 - 28 wt.%

said fat blend further being characterised by the following solid fat profile:

- 65% < N<sub>0</sub>  $\leq$  85%;
- 52%  $\leq$  N<sub>10</sub>  $\leq$  72%;
- 37%  $\leq$  N<sub>15</sub>  $\leq$  57%;
- 7%  $\leq$  N<sub>20</sub>  $\leq$  27%;
- 0%  $\leq$  N<sub>30</sub>  $\leq$  10%;
- N<sub>35</sub>  $\leq$  2%;
- N<sub>35</sub>  $\leq$  2% [*sic*];

said method comprising admixing:

- 60 - 90 wt.% of lauric fat selected from the group of coconut oil; palmkernel oil and combinations thereof;
- 10 - 40 wt.% of palm olein with an iodine value of more than 55, an oleic acid content of 50 - 70 wt.% and a palmitic acid content of 20 - 40 wt.%."

Claims 2 to 7 as granted are dependent use claims.

VI. The board issued a communication indicating its preliminary opinion, which confirmed the opposition division's conclusion.

VII. By letter dated 24 September 2020, the proprietor (respondent) filed auxiliary requests 1 to 3.

VIII. In the present decision, reference is made to the following documents:

D4: EP 0 023 150 A1

D5: WO 96/10338 A2

D10b: Specification of "product 0863" ("Kokos/Palmolein 70/30") by Nutriswiss AG

D21: Determined solid fat profile

D32: "VEGETABLE OILS IN FOOD TECHNOLOGY: Composition, Properties and Uses", Frank D. Gunstone, Blackwell Publishing, 2002, pages 59 to 69

D35: "VEGETABLE OILS IN FOOD TECHNOLOGY: Composition, Properties and Uses", Frank D. Gunstone, Blackwell Publishing, 2002, pages 65, 67 and 160

D36: Minutes of telephone discussion of 20 April 2015 with Mr Friedli

D53b: Analysis Certificate of ITERG

D55: Summary of analytical data

IX. Requests

The appellant requested that the decision be set aside and that the patent be revoked in its entirety.

The respondent requested that the appeal be dismissed (main request), or alternatively that the patent be

maintained on the basis of one of auxiliary requests 1 to 3, all filed by letter of 24 September 2020.

## **Reasons for the Decision**

1. Article 100(c) EPC
  - 1.1 The appellant argued that the subject-matter of claims 1 and 10 contravened the requirement of Article 123(2) EPC, and thus in its view the ground for opposition under Article 100(c) EPC prejudiced the maintenance of the patent.
  - 1.2 The board does not agree for the following reasons:
    - 1.2.1 The subject-matter of claim 1 is based on the original claim 1 in combination with page 5, lines 9 and 10 of the application as filed. Rewording the expression "Fat blend for use in coatings for ice confection ..." of the original claim 1 to "Use of a fat blend in coatings for ice confection ..." is in line with Article 123(2) EPC. Page 5, lines 9 and 10 of the application as filed is a basis for the feature "fat blend not containing interesterified oil".
    - 1.2.2 There is also a basis for the subject-matter of claim 10 in the application as filed (see original claims 1 and 10 and page 6 of the application as filed). Page 6, lines 20 to 22 of the application as filed provides a basis for the feature "an oleic acid content of 50 - 70 wt.% and a palmitic acid content of 20 - 40 wt.%" introduced into the method claim. The clause "The level of C<sub>8</sub> - C<sub>14</sub> fatty acids in the palm olein fraction typically does not exceed 5 wt.



" (emphasis added) on page 6, lines 22 and 23 of the application as filed does not mean that the feature incorporated in claim 10 is disclosed as inextricably linked with the aforementioned clause, but that the limitation contained therein is to be interpreted as an optional feature.

In view of the above, the ground for opposition under Article 100(c) EPC does not prejudice the maintenance of the patent.

2. Article 100(b) EPC

2.1 The appellant contested that the invention can be carried out by a skilled person.

2.2 The board does not agree for the following reasons:

2.2.1 The appellant argued that a skilled person would not know whether examples 1 and 2 of the patent lay within or outside the claimed range, since no data were given with respect to the specific fatty acid composition and solid fat profile.

However, this is not an issue of sufficiency but, if at all, a question of clarity or support in the description.

2.2.2 The appellant further argued that the term "interesterified" in claim 1 is indicative of a lack of enabling disclosure, as the skilled person would have to find out whether one is working within or outside the claimed range.

Firstly, the term "interesterified" is a frequently-used and well-accepted term in the technical field of

fats and oils. Secondly, if at all, this is an issue of clarity because it relates to the question of whether or not an embodiment is covered by the claims.

2.2.3 Since examples 1 and 2 of the patent do not contain any information about the fatty acid composition and solid fat profile required in claim 1, the appellant further argued that these examples could not be reworked and the patent failed to show any way of carrying out the invention. In this context, the appellant stressed that examples 1 and 2 of the patent failed to provide explicit information concerning the origin of the oils/fats used. However, since coconut oil and palm olein were natural products, depending on their origin, they have a largely varying fatty acid composition, depending on their origin.

It is true that examples 1 and 2 of the patent do not specify exactly what fatty acid composition and solid fat profile is achieved for the fat blend. However, example 1 relates to a specific fat blend composition made of 48.38 parts by weight of coconut oil and 15 parts by weight of palm olein (IV = 62), and example 2 uses 51 parts by weight of coconut oil and 15 parts by weight of palm olein (IV = 62). Thus both examples provide information concerning the oils/fats to be used and their amounts, and specify a palm olein which is of a particular type, namely one having an iodine value (IV) of 62.

As can be learned from D32 or D35 (see page 65, Table 3.4 of D32 and D35), the iodine value of palm olein may vary from less than 60 over more than 60 up to a range of 70 to 72, so an iodine value of 62 for palm olein is a definite value within a wide range of fractions obtained from palm oil which are all

characterised as palm olein; palm olein having such an iodine value is called "Super olein".

It follows that this information corresponds rather to precise guidance for a skilled person.

Although it is true that the origin of coconut oil and palm olein is not given in examples 1 and 2 of the patent, thus leading to some uncertainty, it would have been straightforward to test whether or not a fat blend in line with all the information given in examples 1 and 2 falls within the scope of claim 1 as granted or whether laborious experimentation might be necessary to find appropriate blends. However, the appellant did not try to reproduce these examples, and thus did not show that these examples would not enable the skilled person to arrive at the claimed subject-matter or that it might be an undue burden to arrive at a fat blend falling within the claimed range. However, the burden of proof is on the appellant.

In the absence of any experimental evidence challenging examples 1 and 2 of the patent, the board cannot agree with the appellant in this respect.

2.2.4 In this context, the appellant also referred to T 63/06, the Headnote of which reads as follows:

"When the patent does not give any information of how a feature of the invention can be put into practice, only a weak presumption exists that the invention is sufficiently disclosed (see Reasons 3.3). In such case, the opponent can discharge his burden by plausibly arguing that common general knowledge would not enable the skilled person to put this feature into practice." (emphasis added)

However, in the present case two specific fat blends are mentioned in examples 1 and 2 of the patent and there is supplementary information in the claims and the description. Consequently, in contrast to the case underlying the cited decision, the patent provides guidance as to how the fatty acid composition and solid fat profile required in claim 1 could be achieved, and it cannot be said that the patent does not contain any information on putting the claimed fatty acid composition and solid fat profile into practice. Thus the board concludes that the case decided in T 63/06 is not comparable with the present case, so the decision is not applicable in this case. The appellant was unable to discharge its burden of proof.

- 2.2.5 According to the appellant, if one were to agree with the respondent that the commercially-available products of the alleged prior use (see below) could not be reproduced, by the same token it must be concluded that the examples of the patent could not be reproduced, resulting in a lack of sufficiency.

This argument must fail. In assessing sufficiency of disclosure, it is decisive whether the patent as a whole provides sufficient information to reproduce the invention claimed and not, as alleged by the appellant, whether the examples of the patent can be reproduced without knowledge of the patent as a whole.

The appellant did not submit evidence showing that the skilled person, using the information contained in the patent, in particular examples 1 and 2, and common general knowledge, would be unable to reproduce the invention as claimed.

- 2.2.6 The objection to claim 10 directed to the oleic acid content of 50-70 wt.% is not convincing. The appellant referred to D35 and contended that an oleic acid content higher than 52 wt.% cannot be reached with palm olein. However, D35 (see Table 3.4) does not teach that higher oleic acid contents cannot be reached, but on the contrary confirms that palm olein having a content of oleic acid falling within the range called for in claim 10 exists, thus supporting that the invention can be carried out.
- 2.2.7 As concerns the appellant's argument relating to the "arbitrarily high iodine value" or the open range with respect to the iodine value, the appellant has failed to show that claim 10, when construed with a mind willing to understand, would cover palm olein with iodine values which would not be achievable by or available to the skilled person.
- 2.3 Although the appellant bears the burden of proof to demonstrate a lack of sufficiency of disclosure, it did not discharge it, and did not raise serious doubts substantiated by verifiable facts that there might be a sufficiency problem.
- 2.4 In view of the above, the board concludes that the invention is sufficiently disclosed, so the ground for opposition under Article 100(b) EPC does not prejudice the maintenance of the opposed patent.
3. Novelty
- 3.1 The appellant raised novelty objections against the use according to claim 1 in view of two instances of an alleged prior use.

- The first instance of alleged prior use relates to the sale or supply of a fat blend consisting of 70 wt.% coconut oil and 30 wt.% palm olein ("product 0863") from Nutriswiss AG to Nestlé Broc coating factory and the alleged use of this "product 0863" in coatings for ice confection. In particular, the appellant referred to documents D10b, D21 and D36 as evidence.
  
- The second instance of alleged prior use relates to the sale of the Nestlé Extrême ice cream cones in Italy, the Netherlands, Switzerland and the United Kingdom which allegedly comprised a coating composition of a fat blend in accordance with "product 0863" containing 0.5 wt.% of palm stearin. In this respect, the appellant referred particularly to documents D10b, D21, D36, D53b and D55 as evidence.

3.2 For the following reasons, neither instance of alleged prior use is sufficiently proven, and consequently cannot be used to call into question novelty of the use according to claim 1.

3.3 First instance of alleged prior use

3.3.1 The board concurs with the opposition division's conclusion that it had not been proved by the appellant that the fat blend of "product 0863" was indeed used in coatings for ice confection.

Insofar as the first instance of alleged prior use is concerned, the only document which could possibly prove its use in coatings for ice confection is declaration D36. With respect to the alleged sale or supply of "product 0863", the appellant argues that the statement

of Mr. Friedli made in D36 proves that a fat blend of 70 wt.% coconut oil and 30 wt.% palm olein was intended to be used for ice cream coatings at Nestlé. An intention to use does however not mean that it was indeed used.

The appellant does not argue or indeed prove that the opposition division erred in its evaluation of D36's probative value, but merely repeats its argument that D36 is sufficient proof of the fat blend's public availability. The board, in line with the opposition division's conclusion, considers that D36 has limited probative value as it merely reflects a third person's statements regarding somebody else's intentions.

Even the most pertinent statement "During the employment term of Mr. Friedli at Nutriswiss he knew that the Coconut/palm olein 70/30 product was delivered to the Nestlé Factory in Broc, Switzerland, between 2001 and 2004 for producing coatings for ice cream products ..." (emphasis added) in D36 does not prove that "product 0863" was used as such in coatings for ice confectionary without any additional fat or oil component.

Thus the appellant has failed to show that the opposition division's conclusion with respect to D36 was wrong. It follows that the first instance of alleged prior use is not sufficiently proved for this reason alone.

3.3.2 Moreover, the appellant did not show which specific types of coconut oil and palm olein were actually present in "product 0863", for instance with respect to the origin of these oils/fats and the iodine value of

the palm olein. In addition, it failed to explain exactly what was analysed in documents D21 and D53b.

As correctly outlined by the respondent, the appellant did not provide any information about the coconut oil and palm olein of "product 0863", e.g. with respect to its exact origin, fatty acid composition and iodine value of the palm olein.

The appellant itself argued and acknowledged in the context of sufficiency of disclosure (see point 2.2.3 above) that coconut oil and palm olein are natural products which may have a largely varying fatty acid composition. By the same token, there is ambiguity concerning the fatty acid composition of "product 0863". This conclusion is also supported by Table 3.4 of document D32 (corresponding to Table 3.4 of D35 submitted by the respondent) showing that, for instance, palm olein may have a widely varying fatty acid composition.

Thus the board concludes that, in the absence of any information about the exact origin of the coconut oil and the palm olein and the iodine value of palm olein, the precise fatty acid composition of "product 0863" is unclear.

Without knowing the exact fat blend composition including the fatty acid composition, it is however impossible to make any predictions concerning the solid fat profile. Even given knowledge of the exact fatty acid composition of a fat, it would be extremely difficult or even impossible to derive the solid fat profile by reverse conclusion.



3.3.3 The only document which could possibly prove the solid fat profile is D21. In D21, a value for  $N_{10}$  of a fat blend (70% coconut oil/30% palm olein) of 67.55% is indicated, which is however outside the product specification for "product 0863", which indicates a range of 60 to 66 (see section "11. CHEMISCHE / PHYSIKALISCHE KENNZAHLEN" of D10b). The same applies to the value for  $N_{20}$  being 16.8% in D21, which is outside the range given in D10b. Due to these inconsistencies, D21 is not suitable for proving that the solid fat profile of "product 0863" falls within the solid fat profile required in claim 1.

3.3.4 For the above reasons, the board concludes that the first instance of alleged prior use is not sufficiently proved. In particular, due to a lack of information about the exact origin of the oils/fats used and the iodine value of the palm olein, the exact composition of "product 0863" is unclear. Consequently, lack of novelty was not shown in view of the first instance of alleged prior use (Article 54 EPC).

3.4 Second instance of alleged prior use

3.4.1 "Product 0863" was allegedly used as a starting material when producing the fat blend relating to the second instance of alleged prior use, which additionally contains palm stearin (at 0.5 wt.% according to the appellant). Since "product 0863" was also used in this case, the same conclusions reached with respect to the first instance of alleged prior use also apply to the second instance of alleged prior use.

3.4.2 In addition, it can be gathered from the appellant's own documents D53b and D55 that the tested fat blend as analysed from a cone coating is outside the scope of

claim 1 due to a deviation in the C<sub>16</sub> fatty acid content and the range for N<sub>15</sub> and N<sub>35</sub>.

The appellant's opinion that this deviation is merely the result of measurement variations is unconvincing. With respect to the second instance of alleged prior use, the appellant has failed to prove that a fat blend falling within the scope of claim 1 was used.

3.4.3 The only other document which could possibly show that the required solid fat profile might be achieved is again D21. However, as already explained in relation to the first instance of alleged prior use, the analysed fat blend was outside the product specification for "product 0863" given in D10b. These inconsistencies apply equally to the fat blend of "product 0863", which additionally contains 0.5 wt.% palm stearin according to the second instance of alleged prior use. Thus D21 is not suitable for proving that a fat blend of "product 0863" containing 0.5 wt.% palm stearin falls within the solid fat profile required in claim 1.

3.4.4 Moreover, the origin of palm stearin is unclear in the fat blend according to the second instance of alleged prior use. As can be gathered from Table 3.6 of D32 and as implicitly confirmed by the appellant in its sufficiency argumentation, palm stearin too has a wide variation in its fatty acid composition. Due to these variations, the ambiguity concerning the fatty acid composition of the final fat blend is even further increased over the first instance of alleged prior use.

3.4.5 For the above reasons, the board concludes that the second instance of alleged prior use is not sufficiently proved either. As with the first instance of alleged prior use, the exact composition of the fat

blend is unclear. As a consequence, a lack of novelty was not shown in view of the second instance of alleged prior use (Article 54 EPC).

3.5 In summary, it is concluded that a lack of novelty of the subject-matter of claim 1 was not proved in view of both instances of alleged prior use. For the above reasons, the first and second instances of alleged prior use cannot be used as prior art in assessing inventive step, neither as closest prior art nor as a combination document.

4. Inventive step

4.1 The appellant raised inventive-step objections against independent claims 1 and 8, 9 and 10 in view of D4, D5 and the first or second instance of alleged prior use as closest prior art.

4.2 Owing to the ambiguity with respect to the exact composition of "product 0863", the first instance of alleged prior use is not suitable as closest prior art. For similar reasons, the second instance thereof is not suitable as closest prior art either. Thus it has to be decided whether D4 or D5 is the closest prior art in the present case. While the appellant argued in writing that both are suitable starting documents for assessing inventive step, it focused on D5 as closest prior art during the oral proceedings before the board.

4.3 The board concurs with the opposition division that D5 is the closest prior art document in the present case, since D5 relates to the same technical field and - like the opposed patent - also aims at providing a flexible coating composition for ice confection which does not contain appreciable amounts of trans fatty acids. By

comparison, D4 does not address the latter objective of achieving a low trans fatty acid content. In addition, D4 even proposes selective hardening of oils/fats, which inherently results in the formation of trans fatty acids. Thus the board concludes that D5 is the most appropriate starting document in the inventive-step assessment.

4.4 D5 as closest prior art

4.4.1 D5 relates to a flexible ice-cream coating composition, comprising at least a sugar and a triglyceride composition, wherein the triglyceride composition comprises:

< 8 wt%, preferably < 5 wt%, most preferably < 2 wt% of SSS;

25 - 80 wt%, preferably 35 - 75 wt% of SUS;

2 - 40 wt%, preferably 5 - 20 wt% of SU<sub>2</sub>;

> 5 wt%, preferably > 10 wt%, most preferably 15 - 45 wt% of U<sub>3</sub>,

wherein S and U are fatty acid residues in the triglycerides, **S** being saturated fatty acid with **C<sub>16</sub> - C<sub>24</sub>**; and **U** being unsaturated fatty acid with **≥ 18 C-atoms** (claim 1, emphasis added).

4.4.2 The subject-matter of the present claim 1 differs from D5 in its fatty acid composition and solid fat profile. More precisely, D5 does not disclose that C<sub>8</sub>, C<sub>10</sub>, C<sub>12</sub> and C<sub>14</sub> fatty acids (i.e. fatty acids generally referred to as "medium-chain fatty acids") are present in the triglyceride composition at all. On the contrary, the fatty acids contained in the triglyceride composition according to D5 are saturated fatty acids with **C<sub>16</sub> to C<sub>24</sub>** or unsaturated fatty acids with **C<sub>18</sub> or above** (see claim 1 of D5). In addition, D5 is silent on

values for N<sub>10</sub>, N<sub>15</sub>, N<sub>30</sub> and N<sub>35</sub> concerning the solid fat profile of the fat blend.

- 4.4.3 There was no agreement among the parties as to whether there is an effect resulting from these differences in view of D5. This question may however be left unanswered because, even if the objective technical problem were merely to provide an alternative use of a fat blend, the claimed subject-matter would still involve an inventive step in view of D5 as the closest prior art.
- 4.4.4 The fat blend disclosed in D5 is a triglyceride composition having a fatty acid composition containing solely fatty acids with 16 carbon atoms or more, i.e. "long-chain" fatty acids. Conversely, the fatty acid composition required in claim 1 not only requires these fatty acids, but a significant and essential content of C<sub>8</sub>, C<sub>10</sub>, C<sub>12</sub> and C<sub>14</sub> fatty acids, i.e. a substantial amount of medium-chain fatty acids.

The board is unable to see why the skilled person starting from D5 would contemplate C<sub>8</sub>, C<sub>10</sub>, C<sub>12</sub> and C<sub>14</sub> fatty acids. There can be no doubt that shifting the fatty acid composition towards lower-chain fatty acids significantly influences the resulting solid fat profile. In the board's view, using a significant amount of C<sub>8</sub>, C<sub>10</sub>, C<sub>12</sub> and C<sub>14</sub> fatty acids would go against the teaching of D5.

- 4.4.5 Moreover, it can be learned from the examples of D5 that the use of the specific, long-chain fatty acid-containing triglyceride composition according to D5 results in good flexibility of the coating composition. Coconut oil (used in examples 1 and 2 of the patent as an example of the main ingredient of the fat blend) is

used in a reference example of D5, but results in inappropriate flexibility. While it is true that claim 1 is not restricted to the use of coconut oil, it can be assumed from examples 1 and 2 of the patent that coconut oil is a type of oil/fat suited to achieving the fat blend required in claim 1 when mixed with an appropriate amount of a particular type of palm olein.

Since coconut oil is used only in a reference example of D5, there seems to be no motivation for a skilled person to use this oil in a fat blend for coating ice confection. This is a further indication that there is no teaching in D5 to arrive at a fat blend of the type required in claim 1.

- 4.4.6 The appellant argued that it would be obvious to contemplate a fat blend having the fatty acid composition and solid fat profile required in claim 1 in view of the alleged instances of prior use. Even if the instances of prior use had been proved to be part of the state of the art for the present invention (see point 3.5 above), the appellant did not succeed in showing either that it was obvious to combine the teachings of D5 and those of the alleged instances of prior use or that the skilled person would have arrived at a fat blend as covered by claim 1.
- 4.4.7 In view of the above, the subject-matter of claim 1 is a non-obvious alternative in view of D5 and involves an inventive step over D5 as closest prior art. Since the fat blend defined in claim 1 is also part of claims 8 and 9, the same reasoning and conclusion apply in respect of these claims, as well as dependent use claims 2 to 7.

4.4.8 The fatty acid composition and solid fat profile mentioned in claim 10 is very similar to the one defined in claim 1. The fat blend mentioned in claim 10 differs from that in claim 1 in that the negative feature "said fat blend not containing an interesterified oil" is not present and in that the feature " $65\% < N_0 \leq 85\%$ " (emphasis added) is present instead of " $65\% \leq N_0 \leq 85\%$ " (emphasis added) of claim 1. The appellant has not provided a different line of argument with respect to this claim. The board finds that the same rationale given for claim 1 still applies to claim 10. Thus the subject-matter of claim 10 also involves an inventive step in view of D5.

4.5 D4 as the closest prior art

Even when starting from D4 as the closest prior art, the claimed subject-matter would not have been obvious to the skilled person for the reasons set out in the board's communication under Article 15(1) RPBA. These are briefly summarised as follows:

When starting from D4 as the closest prior art, it is important to note that D4 teaches an interesterified mixture of lauric fats or oils and non-lauric fats or oils, whereas the fat blend defined in claim 1 does not contain an interesterified oil. To eliminate the interesterification in the interesterified mixture of D4 would go against the teaching of D4.

5. Since the main request is allowable, there is no need to comment on auxiliary requests 1 to 3.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



A. Nielsen-Hannerup

A. Haderlein

Decision electronically authenticated