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Datasheet for the decision of 29 July 2008

Case Number: T 1275/05 - 3.3.09

Application Number: 95908807.1

Publication Number: 0743824

IPC: A23D 7/02

Language of the proceedings: EN

Title of invention:
Improved temperature stability and whipping performance foods

Patentee:
RICH PRODUCTS CORPORATION

Opponent:
Unilever N.V. Patent Department

Headword:
-

Relevant legal provisions:
EPC Art. 56
EPC R. 80

Relevant legal provisions (EPC 1973):
-

Keyword:
"Main Request, Auxiliary Requests 1A, 1B: Amendments occasioned by opposition ground (no)"
"Amended Auxiliary request 2A: Inventive step (yes)"

Decisions cited:
-

Catchword:
-

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Case Number: T 1275/05 - 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 29 July 2008

Appellant: (Opponent)
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Representative:
-

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Decision under appeal:
Interlocutory decision of the Opposition Division of the European Patent Office orally announced 16 June 2005 and posted 26 July 2005 concerning maintenance of European patent No. 0743824 in amended form.

Composition of the Board:

Chairman: P. Kitzmantel
Members: W. Ehrenreich
W. Sekretaruk

Summary of Facts and Submissions

I. Mention of the grant of European patent No. 743 824 in respect of European patent application No. 95 908 807.1, filed on 7 February 1995 as International application No. PCT/US95/01553 (published as WO 95/21535) in the name of *Rich Products Corporation*, was announced on 2 May 2002 (Bulletin 2002/18).

The patent, entitled *"Improved Temperature Stability and Whipping Performance Foods"* was granted with twenty six claims.

Claim 1 read as follows:
"1. A whippable food product suitable for preparing a stable whipped confection, comprising an oil-in-water emulsion of (1) a triglyceride fat component comprising at least about 90% (w/w) of a first fraction wherein at least about 50% or more of the fatty acids thereof are of C 14 length or less, and about 10% (w/w) or less of a second fraction of hardening fat wherein at least about 50% or more of the fatty acids of said second fraction are fully saturated and of C 16 or C18 length, and wherein at least about 20% of said fully saturated fatty acids thereof are of C 16 length, (2) water, and (3) an emulsifier component provided that said triglyceride fat component has a profile of solid fat index of about 70 at 10°C (50°F), about 40 to 75 at 27°C (80°F), and less than about 20 at 38°C (100°F), and wherein said product is **characterized by** providing a whipping overrun of between 300 and about 500%.".

Claims 2 to 24 were, either directly or indirectly, dependent on Claim 1.

Independent Claim 25 was directed to a process for preparing a whipped confection comprising steps (a) to (d) and independent Claim 26 pertained to a whippable food product suitable for preparing a stable whipped confection prepared and then processed by the steps (a) and (b).

II. An opposition against the patent was filed by

Unilever N.V.

on 22 January 2003.

The Opponent based its opposition on Articles 100(a) and 100(b) EPC.

With regard to Article 100(a) the Opponent submitted that the claimed subject-matter lacked novelty and was not based on an inventive step. In support of its objections the Opponent, *inter alia*, cited the following document:

D5 US-A 4 208 444.

III. With its interlocutory decision, orally announced on 16 June 2005 and issued in writing on 26 July 2005 the Opposition Division maintained the patent in amended form on the basis of Claims 1 to 24 according to the second auxiliary request filed during the oral proceedings.

Claim 1 of this request corresponded to Claim 1 as granted with the following amended definition of the triglyceride fat component:

"(1) a triglyceride fat component comprising a first fraction and at least a second fraction,
said first fraction being present in an amount of at least 90% (w/w) and wherein...;
said second fraction being a hardening fat present in an amount of about 10% (w/w) or less and wherein..."
(emphasis by the Board).

The set of claims according to the second auxiliary request also included a new independent Claim 24 which read as follows:

"24. A whippable food product suitable for preparing a stable whipped confection, comprising an oil-in-water emulsion of:

(1) a triglyceride fat component comprising at least 50% or more of fatty acids of C14 length or less, wherein said triglyceride fat component consists essentially of palm kernel oil hydrogenated to an iodine value of about 1;
(2) water; and
(3) an emulsifier component,

provided that said triglyceride fat component has a profile of solid fat index of
about 70 at 10°C (50°F)
about 40 to 75 at 27°C (80°F); and
less than about 20 at 38°C (100°F);

wherein said product is characterised by providing a whipping overrun of between 300 and about 500."

The Opposition Division held that, in the context of the feature "10% or less", the introduction of the wording "at least a second fraction" into Claim 1 of the second auxiliary request clearly excluded whippable formulations with only one fat fraction and was therefore not objectionable under Article 84 EPC.

In its view, this amendment to Claim 1 also established novelty over D5, which disclosed whippable topping compositions with only one fat fraction. The subject-matter of Claim 24 was also considered new over D5 in that the iodine value of the hydrogenated palm kernel oil of "about 1" differed from the disclosure in D5 of "less than about 5".

As regards inventive step the Opposition Division argued that it was not obvious from D5 to add a second fraction to the whippable food product, as specified in Claim 1, or to use a hydrogenated palm kernel oil with an iodine value of about 1 according to Claim 24, in order to arrive at a whipping overrun above 300%. Inventive step was therefore also acknowledged.

As to the opposition ground of Article 100(b) EPC, the Opposition Division stated in its decision that this had not been pursued with regard to the subject-matter of the second auxiliary request.

IV. On 27 September 2005 appeal was filed by the Opponent (hereinafter: the Appellant) against the decision of the Opposition Division. The Statement of Grounds of Appeal was submitted on 5 December 2005.

The Appellant reiterated its previous objections as to lack of novelty, inventive step and clarity and furthermore pointed to the inadmissibility of Claim 24 under Article 123(3) EPC and Rule 80 EPC. No arguments were presented concerning the opposition ground according to Article 100(b) EPC.

V. With its letter dated 19 April 2006 the Patent Proprietor (hereinafter: the Respondent) defended, as the main request, the patent as maintained by the Opposition Division (ie on the basis of auxiliary request 2 submitted on 16 June 2005) and filed further sets of claims as bases of auxiliary requests 1A, 1B, 2A, 3A, 3B and 4A to 4C. Enclosed with the letter was also experimental evidence according to Annexes 1 to 3.

Claims 1 of each of the main request and auxiliary requests 1A and 1B are identical and read as follows:

"1. A whippable food product suitable for preparing a stable whipped confection, comprising an oil-in-water emulsion of
(1) a triglyceride fat component comprising a first fraction and at least a second fraction,
said first fraction being present in an amount of at least 90% (w/w) and wherein at least 50% or more of the fatty acids thereof are of C 14 length or less;
said second fraction being a hardening fat present in an amount of about 10% (w/w) or less and wherein at least about 50% or more of the fatty acids of said second fraction are fully saturated and of C 16 or C18 length, and wherein at least about 20% of said fully saturated fatty acids thereof are of C 16 length;
(2) water; and

(3) an emulsifier component,
provided that said triglyceride fat component has a profile of solid fat index of
about 70 at 10°C (50°F)
about 40 to 75 at 27°C (80°F); and
less than about 20 at 38°C (100°F);
and wherein said product is characterized by providing a whipping overrun of between 300 and about 500%.".

Claims 24 of the main request and auxiliary requests 1A and 1B correspond to each other with regard to the following wording:

"24. A whippable food product suitable for preparing a stable whipped confection, comprising an oil-in-water emulsion of:

(1) a triglyceride fat component comprising at least 50% or more of fatty acids of C14 length or less, wherein said triglyceride fat component consists essentially of palm kernel oil hydrogenated to an iodine value of about 1;
(2) water; and
(3) an emulsifier component,

provided that said triglyceride fat component has a profile of solid fat index of
about 70 at 10°C (50°F)
about 40 to 75 at 27°C (80°F); and
less than about 20 at 38°C (100°F);

wherein said product is characterised by providing a whipping overrun of between 300 and about 500 ...".

Claim 24 of the *main request* ends here, whereas Claims 24 of auxiliary requests 1A and 1B contain, in addition, the following feature:

Auxiliary request 1A:
"...and having a water activity of about 0.75 to 0.93.";

Auxiliary request 1B:
"...said product being microbiologically stable and comprising an oil-in-water emulsion having from 15 to 45% water, sugar in a ratio to water of about 1-2:1, about from 2.5 to 45% fat, and minor but effective amounts of salt, emulsifier, stabilizer and flavouring, provided that the amount of fat is less than the amount of water, the solutes content is adequate to provide the product with a water activity of about from 0.8 to 0.9, in said sugar the amount of dextrose plus fructose is at least about 50% based upon the total sugar content.".

VI. In the oral proceedings, which took place on 29 July 2008, the Respondent presented a Scatter Plot exhibiting the correlation "Iodine Value versus MP (melting point)" for various fats. Furthermore the Respondent replaced auxiliary request 2A by a new auxiliary request 2A which differed from the old request only in that Claims 19 and 20 had been deleted.

Claim 1 of this auxiliary request 2A reads as follows:

"1. A whippable food product suitable for preparing a stable whipped confection, comprising an oil-in-water emulsion of

(1) a triglyceride fat component comprising at least 90% (w/w) of a first fraction wherein at least 50% or more of the fatty acids thereof are of C 14 length or less, said first fraction consisting essentially of palm kernel oil hydrogenated to an iodine value of about 1, and about 10% (w/w) or less of a second fraction of hardening fat wherein at least about 50% or more of the fatty acids of said second fraction are fully saturated and of C 16 or C18 length, and wherein at least about 20% of said fully saturated fatty acids thereof are of C 16 length;
(2) water; and
(3) an emulsifier component,
provided that said triglyceride fat component has a profile of solid fat index of
about 70 at 10°C (50°F)
about 40 to 75 at 27°C (80°F); and
less than about 20 at 38°C (100°F);
wherein said product is characterized by providing a whipping overrun of between 300 and about 500%.".

Claims 2 to 18 are, either directly or indirectly, dependent on Claim 1.

In view of the eventual outcome of this appeal (allowability of amended auxiliary request 2A) there is no need to discuss auxiliary requests 2B, 3A, 3B and 4A to 4C.

With its fax communication of 16 July 2008, the Board informed the Parties of its provisional opinion as to the formal admissibility of, *inter alia*, the main request and auxiliary requests 1A and 1B; the Board queried in particular whether the splitting of granted

Claim 1 into an amended Claim 1 and a new Claim 24 was in agreement with Rule 80 EPC. This was because, in the Board's view, the insertion of the feature *"at least a second fraction"* into Claim 1 did not change the meaning of the range *"10% or less"* in the sense that it would exclude therefrom the value *"zero percent"*, a value that was clearly within the original ambit of the claimed invention as shown by the preferred range of from 0 to 8 wt.% for the second fat fraction, expressly disclosed on page 22 of the WO 95/21535.
It followed that the intended splitting of the subject-matter of granted Claim 1 into subject-matter containing a first and at least a second fat fraction (according to amended Claim 1) on the one hand, and subject-matter without such second fat fraction (new Claim 24 directed to the use of hydrogenated palm kernel oil having an iodine value of about 1 as single triglyceride fat component) was not attained with the consequence that this amendment could not be regarded as being occasioned by a ground of opposition.

VII. During the oral proceedings the admissibility of Claims 1 and 24 of the main request and auxiliary requests 1A and 1B under Rule 80 EPC, as well as the issues of novelty and inventive step of the subject-matter claimed in the claims according to new auxiliary request 2A, were discussed.

VIII. The arguments of the Appellant can be summarised as follows:

(a) Rule 80 EPC - Main Request, Auxiliary Requests 1A, 1B

The introduction of the wording "at least a second fraction" into Claim 1 did not change the situation that the range "10% or less" for this fraction also included the value "zero percent", which made the second fat fraction an optional component. Thus, the amendment in Claim 1 did not overcome the novelty objection vis à vis D5 and was therefore not occasioned by an opposition ground.

(b) Novelty - amended Auxiliary Request 2A

The palm kernel oil used as the single fat component in the whippable composition of D5 was characterised by a range for the iodine value of "less than about 5", a Wiley melting point of 111°F and solid fat index values at various temperatures, inter alia 50°F, 80°F and 100°F. These features in conjunction demonstrated that the iodine values of the palm kernel oils according to D5 and the invention corresponded to each other because:

- no difference could be seen between the range "less than about 5" in D5 and the disclosure "about 1" according to Claim 1, which was also a range and overlapped the range "less than about 5" in D5;
- the Wiley melting point of 111°F in D5 was very close to the Wiley melting point of 113°F of the palm kernel oil used in the invention disclosed in paragraph [0052] of the patent specification in conjunction with the iodine value of about 1;

– there was a broad overlap between the solid fat index values at 50/80/100°F indicated in D5 and those given in Claim 1.

Moreover, it was disclosed in paragraph [0087] of the patent specification that the fully hydrogenated palm kernel oil with an iodine value of about 1 according to the invention had a hydrogenation degree which was as complete as commercially practicable. This implied that the commercially available hydrogenated forms of palm kernel oil, which were also used in D5, for instance in "Paramount C", had an iodine value in the range of about 1.

(c) Inventive Step - Auxiliary Request 2A

D5 was representative of the closest prior art. The claimed whippable food product differed from the product disclosed in this document only by a specific iodine value of the palm kernel oil. The skilled person, however, being aware of D5, was not prevented from using, within the given range of "less than about 5", a palm kernel oil with an iodine value of about 1. This all the more so, as no surprising technical effect was shown by the use of palm kernel oil with such a high hydrogenation degree.

IX. The Respondent's counterarguments with respect to points (a) to (c) were as follows:

(a) Rule 80 EPC

The separation of granted Claim 1 into amended Claim 1 and new Claim 24 addressed the novelty objection based on D5, which was raised by the Opponent in the first instance opposition proceedings.

In particular, the insertion of the words "at least" in amended Claim 1 *per se* unambiguously implied that the second fat fraction was now an essential component of the triglyceride fat component (1) which could not be left out, differently from the previous definition "10% or less".
Because D5 only disclosed a single fat component in the whippable food product, the subject-matter of Claim 1 was novel.

Likewise, the limitation in Claim 24 such that the triglyceride fat component (1) consisted essentially of hydrogenated palm kernel oil with an iodine value of about 1 established novelty over D5 (see sub-issue (b) below).

The separation of Claim 1 as granted into Claims 1 and 24, made in order to legitimately safeguard the broadest possible scope of the granted subject-matter, was therefore indeed occasioned by an opposition ground in accordance with Rule 80 EPC.

(b) Novelty

There was no direct and unambiguous disclosure in D5 of a palm kernel oil having an iodine value of about 1. D5 only indicated an iodine value of "less than about 5" for the hydrogenated palm kernel oil, which was a very general disclosure and could not anticipate the narrow range of "about 1" as claimed.

Moreover, the palm kernel oil used in the claimed invention could be distinguished also by its solid fat index, which was about 70 at 50°F in the event that the range "10% or less" for the second fraction had the meaning "zero percent", and which was 73.0 at 50°F for the palm kernel oil used in D5.
Further, the Appellant's argument that an iodine value of about 1 for the palm kernel oil used in D5 could be derived from its Wiley melting point of 111°F, which was very similar to the Wiley melting point of 113°F disclosed in paragraph [0052] of the patent specification in conjunction with an iodine value of about 1, was not convincing. As the Scatter Plot submitted in the oral proceedings, clearly showed, there was no linear or predictable relationship between the hydrogenation degree of a palm kernel oil, expressed by its iodine value, and its Wiley melting point.

Furthermore, it should be pointed out that the iodine value of a palm kernel oil varied with its hydrogenation degree and that a distinction should

be made between the iodine value of a palm kernel oil as disclosed in D5, which was simply "hydrogenated", and a "fully hydrogenated" palm kernel oil as used in the present invention in accordance with the specification of the patent in suit.

(c) Inventive Step

The problem to be solved by the present invention was the provision of whippable compositions with superior whipping overruns of between 300 and 500% and enhanced temperature stability of the whip.

Results of a performance test of whippable compositions containing as the single fat fraction a palm kernel oil with different iodine values are depicted in tables 1 to 3 in Annex 2 of the experimental report submitted with the letter of 19 April 2006. It could be clearly derived therefrom that sample 1, representing a composition according to the invention, had a better performance in overrun and texture at different temperatures than samples 2 and 3 using a palm kernel oil with an iodine value of, respectively, 4 and 9.
It was not obvious from D5 that these improved properties in overrun and temperature stability could be achieved with a fully hydrogenated palm kernel having a iodine value of about 1.

X. The Appellant requested that the decision under appeal be set aside and that the patent be revoked.

XI. The Respondent requested that the appeal be dismissed or that the patent be maintained on the basis of one of auxiliary requests 1A or 1B filed on 19 April 2006 or on the basis of auxiliary request 2A filed on 29 July 2008.

Reasons for the Decision

1. The appeal is admissible.

2. *Requirements of Rule 80 EPC; main request and auxiliary requests 1A and 1B*

In the grounds of opposition submitted with the notice of opposition dated 22 January 2003 the Opponent/Appellant raised the objection under Article 100(a) EPC that Claim 1 as granted embraced whippable food products comprising only a first fat fraction because the definition "10% or less" for the second fraction included the possibility that this amount was 0%. Such a composition was anticipated *inter alia* by the disclosure in document US-A 4 208 444 (now D5) and was therefore not novel.
With the amendment to Claims 1 according to the main request and auxiliary requests 1A and 1B the Respondent has sought to overcome this novelty objection.

According to Claim 1 as granted the amount of the second fraction of the triglyceride fat component (1) is defined as follows:
"... about 10% (w/w) or less of a second fraction ..." (emphasis by the Board).

This formulation has to be read in conjunction with the disclosure on page 9, lines 28 to 33 of the patent specification:
"In a preferred form ... the triglyceride fat component thereof comprises ... between about 0 and about 8 weight percent of a second fraction ...".
It cannot therefore be disputed that the term *"about 10% (w/w) or less"* includes the value "zero percent", which means that a second fat fraction is only an optional component.

In order to overcome the novelty problem associated with this fact, the definition for the second fraction in Claims 1 of the main request and auxiliary requests 1A/1B has been amended to:
"... and at least a second fraction ... said second fraction being ... present in an amount of about 10% (w/w) or less ...".

The Board cannot, however, accept the Respondent's argument that, by inserting the passage "at least a second fraction", the subsequent (unchanged) range "10% or less" now has a meaning different from that in the granted passage "about 10% or less of a second fraction" in the sense that the presence of a second fraction was now made obligatory. The reasoning of the Respondent that this was achieved by the insertion of the "positive" statement "at least a second fraction", which was absent from the granted version, ignores the fact that in the granted wording the term "a second fraction" is also presented with the same "positive" connotation, ie at first sight (wrongly) insinuating the presence of such second fraction. Thus this play on words cannot change the effective meaning of the

percentage range "10% or less" which, as set out above, includes 0%.

Furthermore, the argument that the term "at least" implies the obligatory presence of "at least something" is also not convincing because this term is quantitatively unrelated to the definition of the range "10% or less" and merely expresses that "a" does not mean "one single" but includes "one or more than one" of a second, third ... (optional) fraction.

This conclusion is completely in line with the specification; reference is made in this respect to the passage in paragraph [0054]: *"One aspect of the present invention provides for the blending of particular combinations of triglyceride fat (a first fraction and at least a second fraction) ..."* which has to be read together with the passage in paragraph [0027]: *"... said whippable food may contain as triglyceride fat component, fat provided from more than one fraction ..."*.

The Board therefore concludes that this amendment of granted Claim 1, accepted by the Opposition Division as establishing novelty over the disclosure of D5, fails to serve that purpose.

In this situation the splitting of the subject-matter of granted Claim 1 into two embodiments, that of amended Claim 1 requiring the presence of (at least) two fat fractions and that according to Claim 24 limited to a product comprising a specific single fat component not disclosed in granted Claim 1 cannot be considered to having been occasioned by an opposition

ground in accordance with the provisions of Rule 80 EPC.

Consequently, the main request as well as auxiliary requests 1A and 1B are not allowable.

3. *Novelty - Auxiliary Request 2A*

According to Claim 1, the first fraction of the triglyceride fat component (1) consists essentially of palm kernel oil hydrogenated to an iodine value of about 1, the second fat fraction being an optional component.

For the assessment of novelty the question arises whether D5 unambiguously discloses a whippable composition comprising as fat component a palm kernel oil hydrogenated to an iodine value of about 1, as required by Claim 1.

In paragraph [0052] of the specification of the opposed patent the palm kernel oil is further characterised by the following data:

- the solid fat index at 50/80/100°F is 73/49/9.8;
- the Wiley melting point of 113°F.

As stated by the Appellant (cf. point IX (b)) the hydrogenated palm kernel oil of D5 is characterised as follows:

- the iodine value is less than about 5;
- the solid fat index at 50/80/100°F is 73.0/47.0/7.7;
- the Wiley melting point is 111°F;

cf. column 3, lines 20 to 38.

Since - contrary to the Appellant's argument - the broader range "less than about 5" characterising the iodine value of the palm kernel oil in D5 does not unambiguously disclose an iodine value lying in the rather narrow range of "about 1" as required by Claim 1, it has to be assessed whether and to what extent the other parameters disclosed in D5, i.e. the solid fat index and the Wiley melting point, are able to supplement the information concerning the iodine value.

When comparing the solid fat indices in D5 versus those according to paragraph [0052] of the specification, differences are apparent at the temperatures of 80°F (47.0 vs. 49.9) and 100°F (9.8 vs. 7.7). The solid fat index is therefore not apt to prove the novelty-anticipating character of D5.
As regards the ranges "40 to 75" at 80°F and "less than 20" at 100°F given in Claim 1 and including the above values of D5 the Board points out that the fat index values of pure palm kernel oil described in paragraph [0052] are influenced by the presence of a second fraction which is optional according to Claim 1, which, however, is not part of the disclosure in D5.

The Appellant argued (point VIII (b)) that the very similar Wiley melting points of the palm kernel oils in accordance with the invention (113°F) and D5 (111°F) indicated a very similar iodine value of the oils in the region of about 1. This argument is, however, not convincing in view of the Scatter Plot submitted by the Respondent in the oral proceedings, which shows for palm kernel oils of different hydrogenation degree the

correlation between their iodine values and the corresponding Wiley melting points. The plot clearly indicates that - at least in the relevant temperature range of 100 to 114°F - no reliable conclusion can be drawn from the Wiley melting point as to a particular iodine value. The Wiley melting point can also therefore not provide evidence that D5 is a novelty-anticipating document.

Finally, the Board wishes to point out that the iodine value of a fat/oil, as a measure of its saturation or hydrogenation degree, indicates whether a fat/oil is (almost) completely or only partially hydrogenated. The Board refers in this context to paragraphs [0013] and [0087] of the patent specification wherein the palm kernel oil is characterised as "fully hydrogenated" in combination with an iodine value of about 1. This implies a higher hydrogenation degree of the palm kernel oil of the invention than that of D5 which is only characterised as "hydrogenated" in conjunction with the iodine value of "less than about 5".

Since there is no unambiguous disclosure in D5 that the palm kernel oil used has an iodine value in the range of about 1, the claimed whippable composition is novel over D5.

No novelty objection has been raised on the basis of any of the other citations and also the Board is satisfied that the claimed subject-matter is not anticipated by their disclosures.

The subject-matter of Claim 1 of auxiliary request 2A is therefore novel over the cited prior art.

4. *Inventive Step - Auxiliary Request 2A*

The claimed whippable composition, which exists in the form of an oil-in-water emulsion, is characterised by the following compositional data:

(a) a triglyceride fat component (1) comprising major amounts of a first fraction which essentially consists of palm kernel oil hydrogenated to an iodine value of about 1; and optionally minor amounts of a second fat fraction of hardening fat; the fat component having a certain profile of solid fat index;
(b) water (2)
(c) emulsifier (3).

The composition provides a whipping overrun of between 300 and 500%.

In addition to the high whipping performance of the composition, the whipped confections produced therefrom should also have desirable organoleptic properties and improved temperature and whipped stability (paragraph [0018] of the patent specification).

The closest prior art is represented by D5, which also discloses a whippable oil-in-water composition of good eating qualities, foam stability and overrun. The composition comprises:

(a) as the single fat component a hydrogenated palm kernel oil having an iodine value of less than 5 and a

profile of solid fat index partially overlapping with the claimed index ranges;
(b) water; and
(c) an emulsifier;

and has a whipping overrun of up to 300%
(column 2, lines 29 to 50 and column 3, lines 22 to 38).

The claimed composition differs therefrom in that the iodine value of the palm kernel oil is in the narrow range of about 1.

The Respondent's experimental evidence submitted with its letter dated 19 April 2006 demonstrates in Annex 2 (Tables 1 to 3) an improved overrun performance (measured by determining overrun, whip time, decorating time and visual texture after 2 hours) and improved temperature performance (expressed by surface crazing weepage/syneresis and melting/sliding off the cake after 5 days at 82/88°F) for the claimed composition (palm kernel oil with an iodine value IV 1, sample 1) in comparison with compositions using palm kernel oil with an IV 4 (sample 2, representing prior art according to D5) and an IV 9 (sample 3).

Therefore the problem to be solved is seen in the provision of whippable compositions with improved overrun performance and thermal stability.

There is no indication in D5 or the other cited documents that overrun performance and thermal properties are substantially influenced by the hydrogenation degree of the fat fraction. The skilled person would therefore not be induced to replace the

"hydrogenated" palm kernel oil of "IV less than 5" according to D5 by a "fully hydrogenated" oil of "IV 1" in order to solve the problem posed.

The subject-matter of Claim 1 and dependent Claims 2 to 18 according to auxiliary request 2A is therefore based on an inventive step.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the Opposition Division with the order to maintain the patent on the basis of Claims 1 to 18 of auxiliary request 2A, dated 29 July 2008 after any necessary consequential amendment of the description.

The Registrar The Chairman

G. Nachtigall P. Kitzmantel