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**Datasheet for the decision  
of 29 September 2015**

**Case Number:** T 0260/13 - 3.3.09

**Application Number:** 02790318.6

**Publication Number:** 1450618

**IPC:** A23G3/02, A23G3/20

**Language of the proceedings:** EN

**Title of invention:**

CARAMEL MIXTURE AND METHOD FOR MANUFACTURING THEREOF

**Patent Proprietor:**

Mars Inc.

**Opponent:**

Mondelez UK Holdings & Services Limited

**Headword:**

**Relevant legal provisions:**

EPC Art. 84, 123(2), 123(3), 56

**Keyword:**

Clarity (no issue in this opposition appeal proceedings)  
Added subject-matter (main request - no)  
Extension of protection (main request - no)  
Inventive step (main request - yes)

**Decisions cited:**

G 0003/14, T 0190/99

**Catchword:**



**Beschwerdekammern  
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Case Number: T 0260/13 - 3.3.09

**D E C I S I O N  
of Technical Board of Appeal 3.3.09  
of 29 September 2015**

**Appellant:** Mondelez UK Holdings & Services Limited  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of 5 December 2012 maintaining European  
patent No. 1450618 in amended form.**

**Composition of the Board:**

**Chairman** W. Sieber  
**Members:** N. Perakis  
D. Prietzel-Funk

## Summary of Facts and Submissions

- I. This decision concerns the appeal filed by the opponent against the interlocutory decision of the opposition division maintaining European patent No. 1 450 618 in amended form.

Granted claims 1, 2, 4 and 10 read as follows:

"1. Method for manufacturing an edible product, wherein caramel is manufactured which contains 50-85% by weight sugars or sugar replacers, 8-20% by weight fats and 7-18% by weight water, characterized in that egg white is whipped to an aerated foam, whereafter 1 part by weight of foamed egg white is mixed with 1-60 parts by weight of caramel at a temperature of 80-130°C such that an aerated caramel mixture is obtained."

"2. Method as claimed in claim 1, characterized in that 1 part by weight of whipped foamed egg white is mixed with 8-30 parts by weight of caramel."

"4. Method as claimed in any of the foregoing claims 1-3, characterized in that sugar syrup is added to the egg white."

"10. Method as claimed in any of the foregoing claims 1-9, characterized in that the foamed egg white and the caramel are mixed by being pressed together through a static mixer."

The above claims are identical to their corresponding claims as published (see WO 03/037101 A1) and any reference in this decision to one of these claims will automatically refer also to the corresponding claim as published.

- II. An opposition was filed by Cadbury Holdings Ltd (now Mondelez UK Holdings & Services Ltd) requesting revocation of the patent on the grounds that the claimed subject-matter lacked novelty and inventive step (Article 100(a) EPC).
- III. The documents filed by the opponent during the opposition proceedings included the following:
- D1: Extracts from *Sugar Confectionery & Chocolate Manufacture*, R. Lees & E.B. Jackson, 1973, Leonard Hills Books, pages 67, 69, 90, 187, 190-211, 214, 215, 308-309, 316, 317, 365-367;
- D5: US 6 077 557 A;
- D6: US 4 925 380 A; and
- D8: G.M. Campbell *et al.*, "Creation and characterisation of aerated food products", *Trends in Food Science & Technology*, 10 (1999), pages 283-296.
- IV. By an interlocutory decision the opposition division maintained the patent in amended form on the basis of claims 1-16 filed as first auxiliary request with letter of 5 October 2012 and promoted to as main request during the oral proceedings of 6 November 2012. Claim 1 of the main request reads as follows:
- "1. Method for manufacturing an edible product, wherein caramel is manufactured which contains 50-85% by weight sugars or sugar replacers, 8-20% by weight fats and 7-18% by weight water, characterized in that sugar syrup is added to the egg white and the egg white is whipped to an aerated foam, whereafter 1 part by weight of foamed egg white is mixed with 8-30 parts by weight of caramel at a temperature of 80-130°C such that an aerated caramel mixture is obtained, wherein the foamed

egg and the caramel are mixed by being processed together through a static mixer."

The opposition division considered that the claimed subject-matter complied with the requirements of Article 123(2) and (3) EPC, was novel and involved an inventive step.

- V. On 29 January 2013 the opponent (in the following the appellant) filed an appeal against the decision of the opposition division. In the statement setting out the grounds of appeal filed on 5 April 2013 the appellant requested that the decision of the opposition division be set aside and that the patent be revoked in its entirety. The letter included:

D9: Extracts from *Mixing in the Process Industries*, second edition, Butterworth-Heinemann, 2001, Chapter 12 "Static mixers", pages 225-228, 241, 243, 245-247.

- VI. By letter dated 25 July 2013 the patent proprietor (in the following the respondent) filed observations on the appeal and auxiliary requests 1-3. It requested as main request that the appeal be dismissed, and furthermore that D9 not be admitted into the proceedings.

- VII. With a communication dated 23 April 2015 the board gave its preliminary non-binding opinion on the outstanding issues raised in this appeal.

- VIII. By letter dated 29 July 2015 the respondent filed auxiliary request 4 and document D10, a declaration from the co-inventor, Jasper Peters, which contained additional technical evidence.

- IX. On 29 September 2015 oral proceedings were held before the board. During the discussion of the main request the appellant stated that it would not pursue a sufficiency attack against the subject-matter of the main request.
- X. The relevant arguments put forward by the appellant in its written submissions and during the oral proceedings may be summarised as follows:
- Claim 1 of the main request did not comply with Article 123(2) EPC. The combination in this claim of claims 1 and 4 as granted
    - i) introduced a sequence of steps (namely adding sugar syrup in the egg white in a first step and whipping the mixture to an aerated form in a subsequent step) which was not disclosed in the claims as granted (identical to the claims as published) and
    - ii) modified the granted (published) weight ratio egg white/caramel (the granted weight ratio related to the egg white/caramel, whereas in claim 1 of the main request it related to the weight ratio of the egg-white composition (i.e. comprising sugar syrup)/caramel).
  
  - The modified weight ratio also gave rise to an objection under Article 123(3) EPC, since the weight ratio extended the protection beyond that of claim 1 as granted (identical to that as published).
  
  - Furthermore, claim 1 of the main request did not comply with the requirements of Article 84 EPC because the manner in which the granted claims

were combined brought about a modification of the technical meaning of claim 1 with respect to the mixing ratio of foamed egg white with caramel, namely as to whether foamed egg white included sugar syrup or not.

- For the discussion of inventive step, D9, which reflected the common general knowledge of the process engineer in relation to static mixers, should be admitted into the proceedings.
- The subject-matter of claim 1 of the main request did not involve an inventive step. D1 should be considered as the closest prior-art document. The claimed method differed from the method disclosed by D1 in that sugar syrup was added to the egg white, in that the caramel composition contained water, and in that the foamed egg white and the caramel were pressed through a static mixer.
- The technical problem underlying the method of claim 1 was the provision of an alternative method for bringing together a foamed egg-white composition (commonly called "frappé") and caramel and for providing an aerated product with a stable structure. The skilled person (a team comprising a chef in the food industry and a process engineer), who had to bring together frappé and caramel on an industrial scale without excessive loss of aeration, was aware that mixing under minimal shear was necessary in order to avoid collapse of the frappé and loss of the entrained air. He also knew that this was made possible by using static mixers (reference was made to D5, D6, D8 and D9). Hence, he would find in those documents the motivation to replace the pulling machine of D1 by



any of the known static mixers. The remaining features would be derived in an obvious manner by routine experimentation. Anyway, these remaining features did not require any inventive skill as they did not show any synergistic effect.

- Furthermore, the cited technical problem was not solved over the entire scope of the claim, since claim 1 specified neither the type of static mixer to be used nor its operating conditions. D9 disclosed various types of static mixers which could be operated either under turbulent-flow or laminar-flow conditions. Those operating under turbulent-flow conditions were not expected to provide a caramel with a stable aerated structure.

XI. The relevant arguments put forward by the respondent in its written submissions and during the oral proceedings may be summarised as follows:

- Claim 1 of the main request complied with Article 123(2) EPC. The appellant's objection was based on an incorrect reading of claims 1 and 4 as granted. Contrary to the assertions of the appellant, there was no compulsory sequence regarding the steps of adding sugar syrup and whipping the egg white; these steps could be carried out in any order. But even if one adopted the interpretation of the appellant, paragraph [0011] provided support for the specific sequence of claim 1 of the main request, namely adding the sugar syrup to the egg white before whipping.
- Furthermore, the addition of sugar syrup to the egg white prior to whipping was not objectionable under Article 123(2) EPC. Claim 4 as granted

(identical to claim 4 as published) disclosed this feature.

- Moreover, the addition of sugar syrup to the egg white prior to whipping did not modify the meaning of weight ratio egg white/caramel of claim 1 as granted and was not objectionable under Article 84 EPC. This weight ratio remained the same after the combination of claims 1 and 4 as granted and still related to the weight ratio of pure egg white/caramel. Anyway, clarity was not an issue in opposition for a claim resulting exclusively from the combination of granted claims (see G 3/14). Even if there was an ambiguity regarding the meaning of the weight ratio, then the only technically sensible interpretation by a skilled person with a mind to understand the claim was that it concerned the pure egg white.
  
- Nor could the weight ratio of egg white/caramel in claim 1 of the main request give rise to an objection under Article 123(3) EPC. This feature resulted from the combination of granted claims, namely claims 1 and 4.
  
- D9, filed with the grounds of appeal, should not be admitted into the proceedings. The static mixer was already a feature of claim 10 as granted, which meant that the appellant was aware of the importance of the static mixer in the context of the claimed invention and should have submitted this document during the proceedings before the opposition division. Anyway, D9 was not more relevant than other documents already in the proceedings which disclosed the use of static

mixers for the manufacture of edible confectionery products (D5, D6 and D8).

- Contrary to the assertions of the appellant, the subject-matter of claim 1 involved an inventive step. D1 was considered as the closest prior-art document. It was acknowledged that D1 disclosed many of the features of claim 1 but spread over different chapters with different contents. Thus the skilled person did not find the motivation in D1 to combine all these features. Furthermore, D1 did not disclose
  - i) the addition of sugar syrup to the egg white,
  - ii) the mixing ratio of egg white with caramel and
  - iii) the use of a static mixer for mixing the foamed egg-white composition with caramel, let alone caramel with the claimed water content.
  
- The effect associated with the claimed method was the provision of an edible product comprising caramel which had a stable aerated structure. The importance of the weight ratio egg white/caramel was shown in the patent (see paragraph [0014]) and the importance of the static mixer was demonstrated by the technical evidence of D10 which compared the caramel aerated structure obtained when using a static mixer with that obtained from a pressure-mixer. The latter corresponded to the mixer used for the manufacture of the caramel confectionery products of D8 (see page 287, table 1).

- Contrary to the assertions of the appellant, the objective technical problem was not to provide an alternative caramel manufacturing method (alternative mixing device) to that of D1 but to provide a method for the manufacture of a caramel containing edible product with a stable aerated structure.
  
- The skilled person starting from D1 would not find any motivation in the art to modify the disclosed method and would not arrive at the claimed method with a reasonable expectation of success. On the one hand, there was no suggestion in D1 of the mixing ratio egg white/caramel. Moreover, this ratio was not arbitrary but had a technical significance as shown in paragraph [0014] of the patent. On the other hand, D1 did not disclose a static mixer but a pulling machine (page 192, table 51, footnote; page 366, entry "pulling"). D5 and D6, which disclosed static mixers, did not provide the necessary motivation since these mixers were used for different confectionery edible products, not necessarily with an aerated structure. D8 disclosed a pressure-mixer for the use of caramel, which did not reproduce the results sought, as shown by the experimental evidence of D10. D9 disclosed in general static mixers and various operating conditions, with no suggestion to use them for the manufacture of caramel products with aerated structures.
  
- The appellant had not submitted any technical evidence to show that the technical problem was not solved over the whole claimed range.

XII. The final requests of the parties were as follows:

The appellant requested that the decision under appeal be set aside and that the European patent be revoked.

The respondent requested that the appeal be dismissed, or, alternatively, that the patent be maintained on the basis of the claims according to the first, second or third auxiliary request submitted with the letter dated 25 July 2013, or according to the fourth auxiliary request submitted with the letter dated 29 July 2015.

### **Reasons for the Decision**

#### 1. Amendments

1.1 The appellant accepted that the subject-matter of claim 1 of the main request (claims 1-16 as upheld by the interlocutory decision under appeal) is a combination of granted claims 1, 2, 4 and 10. However it argued that the manner of combining the subject-matter of these four claims, in particular claims 1 and 4 as granted, gave rise to problems of added matter, extension of protection and clarity.

1.2 The appellant argued that the insertion of the specific embodiment of claim 4 as granted into claim 1 as granted, namely that "sugar syrup is added to the egg white", led to a specific order of method steps, according to which sugar syrup is firstly added to egg white and then the "resulting" egg-white composition is whipped to an aerated foam. In this regard the board agrees with the appellant that this is the order of steps inferred by the skilled person reading claim 1 of

the main request. Therefore the board cannot accept the respondent's position that claim 1 of the main request does not require any order but includes both alternatives, namely that the sugar syrup is either added to the egg white before whipping or that it is added to the foamed egg white after whipping.

The inferred order of steps in the method of claim 1 of the main request was already present in granted dependent claim 4, which required that "sugar syrup is added to **the egg white**" (emphasis added). The only antecedent for the term "the egg white" in claim 1 as granted, to which claim 4 as granted refers back, can be found in the method step "egg white is whipped to an aerated foam". In this method step "egg white" can only refer to egg white in its liquid state, because it is the liquid egg white that is whipped to an aerated foam. When claim 1 as granted refers to egg white in its foamed state, it specifies an aerated foam or foamed egg white. In the board's view the term "the egg white" in granted claim 4 therefore refers to the [liquid] egg white mentioned in granted claim 1. Thus, the order of steps inferred by the board and the respondent from the wording of claim 1 of the main request was already present in claim 4 as granted. It should be added at this juncture that such an order is also exemplified in the sole example in the patent specification. According to paragraph [0011] a mixture of egg white, water and a small part of sugar syrup was left for 24 hours. The egg white mixture was subsequently whipped until a foamy mass was created.

In view of the above, the order of steps implied in claim 1 of the main request cannot lead to an objection under Article 123(2) EPC.

1.3 The appellant further argued that the combination of claims 1 and 4 as granted led to a clarity problem in claim 1 of the main request with respect to the weight ratio of the foamed egg white and the caramel to be mixed with it. According to this argument, it was no longer clear whether the parts by weight of foamed egg white included sugar syrup, which it would if the sugar syrup was added prior to whipping the egg-white mixture to an aerated foam, or whether the parts by weight of foamed egg white did not include the sugar syrup. In other words, did the parts by weight of foamed egg white refer to the egg white per se to be mixed with caramel in the claimed proportion or to the egg-white composition (including sugar along with egg white) to be mixed with caramel in the claimed proportion?

1.3.1 The board acknowledges that there is indeed a clarity issue with regard to the meaning of the weight ratio of foamed egg white to caramel in claim 1 of the main request. However, since the order of steps in that claim was already present in claim 4 as granted, the clarity problem raised for claim 1 of the main request had already existed in the same way in claim 4 as granted. More specifically, in claim 4 as granted, according to which sugar is added to the [liquid] egg white, it had already been unclear whether the weight ratio related to pure foamed egg white or to a foamed egg-white composition (including sugar syrup). In view of the ruling of G3/14 of 24 March 2014, such a clarity issue, which results from the combination of granted claims, cannot be objected to under Article 84 EPC in opposition/opposition appeal proceedings for the purposes of Article 101(3) EPC.

1.3.2 Thus, there exists a lack of clarity in claim 1 of the main request which cannot be objected to. Nevertheless,

for the assessment of the remaining patentability issues, it is necessary to interpret the term objected to with a mind willing to understand the claim and not a mind desirous of misunderstanding it (see T 190/99).

Both parties argued that the weight ratio of 1 part by weight of foamed egg white with 1 to 60 parts by weight of caramel in claim 1 as granted (now limited to 8 to 30 on the basis of claim 2 as granted) was for 100% (pure) egg white and that the same was true for claim 4 as granted. In fact, claim 1 as granted mentioned only two components, namely caramel and egg white, and claim 4 as granted on the one hand depended on claim 1 as granted and on the other hand did not refer to a different basis for calculating the weight ratio. The board concurs with the parties in this respect.

However, the board cannot see why the subject-matter of claim 4 as granted should be interpreted differently when explicitly incorporated into claim 1 as granted, in particular when, as pointed out above, the same order of steps was present in claim 4 as granted. The board thus concludes that the skilled person taking into account the whole disclosure of the patent would interpret the weight ratio of foamed egg white/caramel in claim 1 of the main request as relating to the **pure** egg white, irrespective of the other constituents of the egg-white composition. The board also concurs with the respondent that this is the only technically meaningful interpretation of the claim. Thus, if additional components such as the sugar syrup and/or water (see claim 3 as granted) were to be taken into account for the calculation of the weight ratio, the actual amount of egg white present could be very low. This would be at odds with the explanation in the patent that the egg white is the relevant component for



the stability of the foam. As pointed out in paragraph [0005], the egg white in the foam "coagulates (solidifies) into a stable matrix, whereby the product retains its form and thereby has a long storage life".

1.3.3 The appellant argued that the above lack of clarity also led to an objection under Article 123(2) EPC. However, the board concurs with the respondent that this objection relates solely to clarity and has no impact on the requirements of Article 123(2) EPC. As already said above, claim 1 of the main request incorporates claims 1, 2, 4 and 10 as filed and, despite any apparent clarity problem, complies with Article 123(2) EPC. Thus, no objection as regards added matter can arise in this context.

1.4 Since the subject-matter of claim 1 of the main request is more restricted than that of claim 1 as granted - in view of the limiting embodiments from dependent claims 2, 4 and 10 as granted - it is narrower in scope than granted claim 1 and thus also complies with Article 123(3) EPC.

2. Admissibility of D9 and D10

2.1 D9 was admitted into the proceedings since both parties referred to it during the oral proceedings and since it was an excerpt from a textbook which merely illustrated the common general knowledge relating to static mixers.

2.2 The appellant did not object to the introduction of D10 into the proceedings and the board decided to admit it, since it contained relevant evidence regarding the performance of a static mixer to be used in the claimed process compared to another mixer disclosed in the prior art, namely the pressure-beater recommended in D8

for the aeration of caramel products (D8, page 287, table 1).

3. Inventive step

3.1 The claimed invention concerns a method for the manufacture of an edible product which contains caramel in an aerated form and is less sticky, retains its form better, has a better shelf-life and yet is still simple to produce (see patent, paragraphs [0001], [0003] and [0004]).

3.2 Both parties agreed that D1 represents the closest prior-art document. D1 is a reference book concerning sugar confectionery and chocolate manufacture and thus lies in the same technical field as the patent in suit.

3.2.1 D1 discloses at different places that:

- caramel is manufactured from fats and sugars in weight percentages falling within those of claim 1 (see chapter 10, page 191, point 10.1, and page 192, table 51, product "mint chews");
- caramel can comprise egg frappé but at an amount lower than that required by the ratio of claim 1 (chapter 10, page 192, table 51, discloses "mint chews" containing 2 parts egg frappé for 208 parts of caramel; chapter 10, page 198, lines 4-5, discloses a 2% level of egg white);
- egg albumen (synonym for egg white) is the most commonly used whipping agent, i.e. an agent used in confectionery manufacture as a means of holding air introduced into a product, to produce a uniform dispersion of air cells within the

confection leading to a lower specific weight and to a considerably modified texture (chapter 6, page 90, section 6.8);

- caramel is manufactured employing boiling temperatures of 125-130°C (chapter 10, page 191, section 10.1, point 6 and page 194, section 10.4, third paragraph); and
- when egg frappé is used in the manufacture of caramel, it should be added to the caramel after boiling and the batch should then be lightly pulled, i.e. by repeated folding on the revolving arms of a pulling machine (chapter 10, page 192, table 51, footnote 1; chapter 19 "Glossary", page 366, entry "pulling").

3.2.2 However, D1 does not disclose the following features of claim 1, namely that:

- sugar syrup is added to the egg white, let alone added before whipping the egg white;
- egg white and caramel are mixed at the specific weight ratio of 1 pbw of egg white with 8-30 pbw of caramel;
- the foamed egg white and the caramel are mixed by being pressed together through a static mixer.

3.3 The technical effect of the method of claim 1 of the main request is shown in the patent in suit (see paragraphs [0014] to [0016]) and the technical evidence of D10.

- 3.3.1 More precisely, the patent in suit states that tests were carried out on mixing ratios of foamed egg white/caramel that varied between 1:4 and 1:40 (this range encompasses the claimed ratio range) and caramel products were manufactured which had stable aerated structures.
- 3.3.2 D10 discloses two experiments each using a different mixing method. In the first experiment (i.e. the comparative example) mixing was carried out using a pressure-beater. The aerated caramel was not stable and there was no control over the amount of air bubbles even at the lowest speed-setting of the mixer. In view of these results it was concluded in D10 that the pressure-beater was not a suitable mixer for the preparation of stable aerated caramel product. In the second experiment (i.e. the inventive example) mixing was carried out using a static mixer, namely the one described in the patent (see paragraph [0014]). The aerated caramel was stable and the caramel matrix fixed the air bubbles in place and gave the caramel a robust stand-up.
- 3.3.3 Furthermore, the board agrees with the respondent that the appellant has not filed any technical evidence to support its assertion that the technical effect was not plausibly solved over the entire scope of the claim. It was indeed the duty of the appellant to put forward such evidence in these proceedings. The disclosure of D9 is irrelevant to the issue at stake, since it is of a rather general nature relating to the use of static mixers under laminar or turbulent flow conditions (pages 225 and 226, section 12.1; pages 245 and 246, section 12.3.3; and pages 245 and 246, section 12.4).

3.4 On the basis of the above, the technical problem underlying the claimed invention in view of D1 is the provision of a method for the manufacture of an edible product comprising caramel which has a stable aerated structure. The technical evidence cited above showed that the problem was successfully solved.

3.5 The skilled person starting from D1 and aiming at a method for manufacturing an edible product containing caramel with a stable aerated structure would not find in D1 or the other prior-art documents any motivation to add sugar syrup to the egg white prior to whipping, to whip the egg-white composition to an aerated form and to mix it with a caramel at a temperature of 80-130°C under a specific mixing ratio of egg white/caramel, the mixing being carried out by pressing the foamed egg-white composition and the caramel through a static mixer.

3.5.1 Firstly, the prior art does not provide any disclosure of the claimed ratio and the skilled person would not find in it any motivation towards such a ratio. Moreover, this ratio is not arbitrarily chosen, since it has a technical effect as stated in view of paragraph [0014] of the patent.

3.5.2 Secondly, the prior art neither discloses that static mixers should be used in caramel manufacture nor provides the skilled person with the motivation to use static mixers in caramel manufacture when stable aerated structures are sought. It is not disputed that D5 and D6 disclose the use of static mixers, but this has occurred in the manufacture of different confectionery edible products, not necessarily aerated ones.

D5 discloses the use of static mixers in the preparation of gelled food products in order to uniformly blend the constituents with minimal shear (see column 4, lines 14-20 and column 13, lines 46-50).

D6 discloses the use of static mixers for the manufacture of aerated confection products such as marshmallow and nougat (see column 2, lines 21-26; column 5, lines 42-56; column 6, lines 58-62 and column 8, lines 49-53).

D8 discloses the use of a pressure-beater as mixer in the manufacture of caramel edible products and thus points toward the use of mixers different from the claimed static mixers (page 287, table 1). Anyway, D10 showed that the mixers of D8 led to undesirable caramel products since their aerated structure was not stable.

D9 is a document on static mixers in general, with no hint to use them for the manufacture of caramel edible products.

Since the prior art neither disclosed nor suggested to the skilled person how the technical problem could be solved, the subject-matter of claim 1 of the main request involves an inventive step.

4. Dependent claims 2 to 7 relate to specific embodiments of the method of claim 1 and for the reasons set out above also involve an inventive step.
5. Claims 8 to 14 relate to caramel containing edible products obtained by the method of claims 1-7, which have a stable aerated structure, and for the reasons set out above involve an inventive step.

6. Claims 15 and 16 relate to a container comprising the caramel edible products obtained by the method of claims 1-7 and for the same reasons involve an inventive step as well.

## Order

### For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated