

Appeal No. 2010-1449  
(Reexamination Serial Nos. 95/000,066 & 95/000,069)

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UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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**C. BROWN LINGAMFELTER,**  
*Appellant*

V.

**DAVID J. KAPPOS, DIRECTOR, U.S. PATENT AND TRADEMARK OFFICE,**

AND

**MEADWESTVACO PACKAGING SYSTEMS, LLC,**

AND

**GRAPHIC PACKAGING INTERNATIONAL, INC.**

*Appellees*

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APPEAL FROM THE UNITED STATES PATENT AND TRADEMARK  
OFFICE, BOARD OF PATENT APPEALS AND INTERFERENCES

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BRIEF OF APPELLEE DAVID J. KAPPOS

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RAYMOND T. CHEN  
Solicitor

BENJAMIN D. M. WOOD  
THOMAS W. KRAUSE  
Associate Solicitors

OFFICE OF THE SOLICITOR  
U.S. Patent & Trademark Office  
Mail Stop 8, P.O. Box 1450  
Alexandria, Virginia 22313-1450  
(571) 272-9035

*Attorneys for the Director of  
the United States Patent and  
Trademark Office*

November 21, 2011

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Claim 1:

1. A container for holding a multiplicity of cylindrical cans, each can having a can diameter and a can height, the container *comprising*:

*twelve* cylindrical cans, each can comprising a can diameter and a can height, each can further comprising a longitudinal axis;

*a rear wall having a rear wall height of about a whole multiple of the can diameter;*

a front wall having a front wall height, the front wall height being less than the rear wall height by at least about 1.2 times the can diameter, the front wall being substantially parallel to the longitudinal axes;

a bottom wall having a bottom wall length of about a whole multiple of the can diameter;

a top wall having a top wall length less than the bottom wall length by at least about the can diameter; and

two side walls, each of the side walls having a front edge running from the front wall to the top wall, wherein at least part of each edge is oblique with respect to the front wall and the top wall, the sidewalls separated by about the can height.

A1770 (disputed limitations emphasized).

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### STATEMENT OF RELATED CASES

- (a) The Director is not aware of any other appeal involving the underlying decision in this case that was previously before this or any other appellate court.
- (b) The Court's decision in this appeal may affect the outcome of patent-infringement litigation involving the patent at issue: *Lingamfelter v. Coca-Cola Enterprises, Inc. et al.*, Civ. No. 04-1261-KAJ (D. Del.), and *Graphic Packaging International, Inc. v. Lingamfelter*, Civ. No. 04-0842-JEC (N.D. Ga.). These cases are stayed pending the outcome of the instant appeal.

## I. STATEMENT OF THE ISSUES

There are 29 claims at issue in this appeal, including seven independent claims. Independent claims 1 and 28 are generally directed to a rectangular paper container for storing and dispensing canned beverages; the container's front/top corner – which includes portions of the front, top and sides – is removable to provide access to the canned beverages. Ellis also discloses a paper container for storing and dispensing canned beverages; Ellis' container has a removable front/top corner, which includes portions of the front, top, and sides. The issues on appeal are:

1. Whether Ellis anticipates claims 1, 2, 4, 5, 28, and 29, and in particular:
  - a. Whether the Board properly construed the term “a rear wall height of about a whole multiple of the can diameter” to encompass Ellis' rear wall height of 1.93 can diameters; and
  - b. whether the Board properly construed the term “comprising . . . twelve cans” to mean at least twelve cans;
2. Whether claims 1, 2, 4, 5, 11, 13, 14, 28, and 29 would have been obvious over Ellis alone;
3. Whether claims 1, 2, 4, and 5 would have been obvious over Ellis in view of Imazato, which describes a carton for dispensing canned beverages

- having a top front opening that can be enlarged by peeling back the top and front walls;
4. Whether claims 1-29 would have been obvious over various combinations of Imazato, Ellis, and five other references; and
  5. Whether the USPTO's admission and consideration of Third-Party-Requestor declarations is an appealable issue reviewable by the Court in this action.

## II. STATEMENT OF THE CASE

Third-Party Requesters/Appellees MeadWestvaco Packaging Systems, LLC ("MWV") and Graphic Packaging International, Inc. ("GPI") each initiated an *inter partes* reexamination of U.S. Patent No. 6,789,673 (the "673 patent") owned by Appellant C. Brown Lingamfelter ("Lingamfelter"). A120, 511-14, 525-30. The U.S. Patent and Trademark Office ("USPTO") subsequently merged these proceedings. A550-54. The Examiner rejected claims 1-18, 22, and 25-29 on the following grounds:

1. Claims 1, 2, 4, 5, 28, and 29: anticipated by U.S. Patent No. 3,178,242 to Ellis et al. ("Ellis");
2. Claims 1, 2, 4, 5, 11, 13-14, 28 and 29: unpatentable as obvious over Ellis;

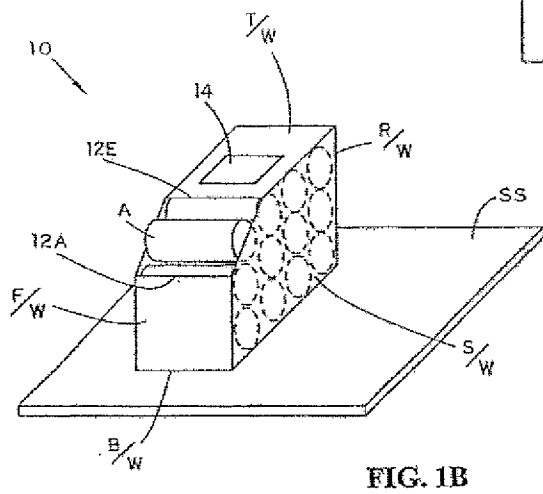
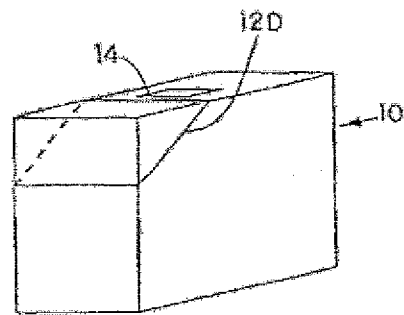
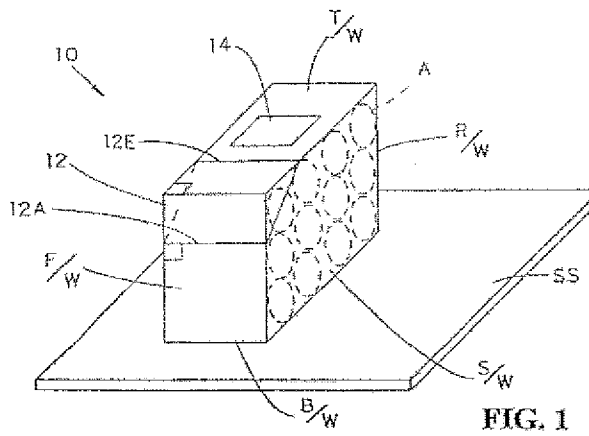
3. Claims 1, 2, 4-5: unpatentable over Ellis in view of Laid Open Japanese Application No. 7-9721 to Imazato (“Imazato”);
4. Claims 1, 2, 4-7, 9, 10, 15, 16, 18, 28, and 29: unpatentable over Imazato in view of Ellis and U.S. Patent No. 3,265,283 to Farquhar (“Farquhar”);
5. Claims 3, 8, 12, 17 and 22: unpatentable over various combinations of Imazato, Ellis, Farquhar, and further in view of either an admission of prior art in the ’673 patent, or U.S. Patent No. 2,718,301 to Palmer (“Palmer”);
6. Claims 25-27: unpatentable over Ellis in view of UK Patent Application No. GB 2 186 550 A to Wonnacott (“Wonnacott”).

A2510-11. The examiner refused to reject claims 11, 13, and 14 as unpatentable over Imazato in view of Ellis and Farquhar, as proposed by MWV. A75-76,

2511-12. The examiner also refused to reject claims 19-21, 23 and 24 as unpatentable over Ellis, Imazato and either Wonnacott or U.S. Patent No.

6,105,854 to Spivey et al. (“Spivey”), as proposed by GPI. A86-90; 2586-87.

In a decision entered January 12, 2010 (the “Original Decision”), the Board affirmed the Examiner’s rejections listed above (the Board’s reversal of other rejections are not at issue because they are not appealed by the Third-Party Requesters). A2, 67-70. But the Board reversed the examiner’s refusal to adopt MWV’s and GPI’s proposed rejections noted above, and denominated these as



new grounds of rejection under 37 C.F.R. § 41.77(b). A93. Lingamfelter requested that reexamination be reopened as to these rejections. A2792. The Examiner subsequently maintained these rejections and the Board, in a decision on reconsideration entered March 15, 2011, affirmed. Lingamfelter now appeals all of the rejections affirmed in both the January 12, 2010 and March 15, 2011 decisions.

### III. STATEMENT OF THE FACTS

#### A. The Invention: A Container for Dispensing Canned Beverages

The '673 patent discloses and claims a paper container, or carton, for dispensing canned beverages, and methods of dispensing the cans using the container. According to Lingamfelter, a "typical[]" container for beverage cans is "rectangular cardboard" with 12 cans "usually in a 4x3 matrix arrangement." A125 (1:22-25). These containers "provide a convenient means to carry the beverage cans but are not handy for dispensing the cans." *Id.* (1:32-34). Lingamfelter's invention "provides for a modification to the currently available twelve pack to convert the carrying container to a dispensing container." A125 (1:37-39).

As shown in Figure 1 (facing page) the preferred embodiment of Lingamfelter's container, like the typical twelve pack described above, has a top wall **T/W**, two sidewalls **S/W**, a bottom wall **B/W**, a front wall **F/W** and twelve

cylindrical aluminum 12-ounce beverage cans **A** in a 4x3 row-column arrangement. A122 (Fig. 1); A125 (2:41-45). Lingamfelter added to the typical twelve pack a scored or perforated line around the front top corner to define a removable portion **12**. This scored line consists of a diagonal or “oblique” line **12D** across the two sidewalls between the front wall and the top wall, connected to a line across the top wall **12E**, and a line across the front wall **12A**. A122 (Figs. 1, 3); A125 (2:53-60). When the corner **12** is removed to provide access to the cans, the preferred height of the remaining front wall is between 1.5 and 1.80 times the diameter of a single can. A125 (3:6-18). This permits easy access to the second row of cans but is high enough to prevent the second course of cans from falling out of the open container. *Id.*

There are 29 claims at issue in this appeal. Claims 1, 6, 11, 15, 19, 25, and 28 are independent. A1770-75. They differ as to (1) whether they recite a container *per se*, or a method of dispensing cans using the container; (2) whether they recite an open container – *i.e.*, with the removable portion removed – or a closed container, with the removable portion defined by a scored line; (3) whether they expressly require that the cans be arranged in vertically stacked rows (*i.e.*, rows and columns) and thus would exclude containers holding cans arranged in staggered or offset rows; and (4) whether a number of cans – 12 – is specified. A1770-75.

Independent claims 1 and 28 are directed to open containers without specifying any particular number or arrangement of cans. Claim 1 reads:

1. A container for holding a multiplicity of cylindrical cans, each can having a can diameter and a can height, the container *comprising*:

*twelve* cylindrical cans, each can comprising a can diameter and a can height, each can further comprising a longitudinal axis;

*a rear wall having a rear wall height of about a whole multiple of the can diameter;*

a front wall having a front wall height, the front wall height being less than the rear wall height by at least about 1.2 times the can diameter, the front wall being substantially parallel to the longitudinal axes;

a bottom wall having a bottom wall length of about a whole multiple of the can diameter;

a top wall having a top wall length less than the bottom wall length by at least about the can diameter; and

two side walls, each of the side walls having a front edge running from the front wall to the top wall, *wherein at least part of each edge is oblique with respect to the front wall and the top wall*, the sidewalls separated by about the can height.

A1770 (disputed limitations emphasized). Independent claim 11 is directed to the unopened version of the same container. A1771-72. Independent claim 6 is directed to an open container of items arranged in rows and columns. A1770-71. Independent claim 15 is directed to a method of opening the container and using it to dispense items arranged in rows and columns. A1772. Claim 19 is

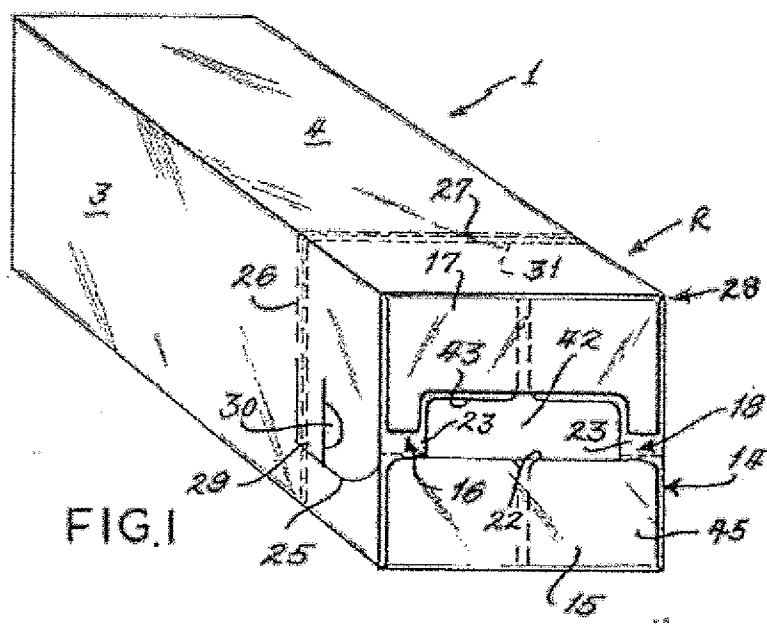


FIG. 1

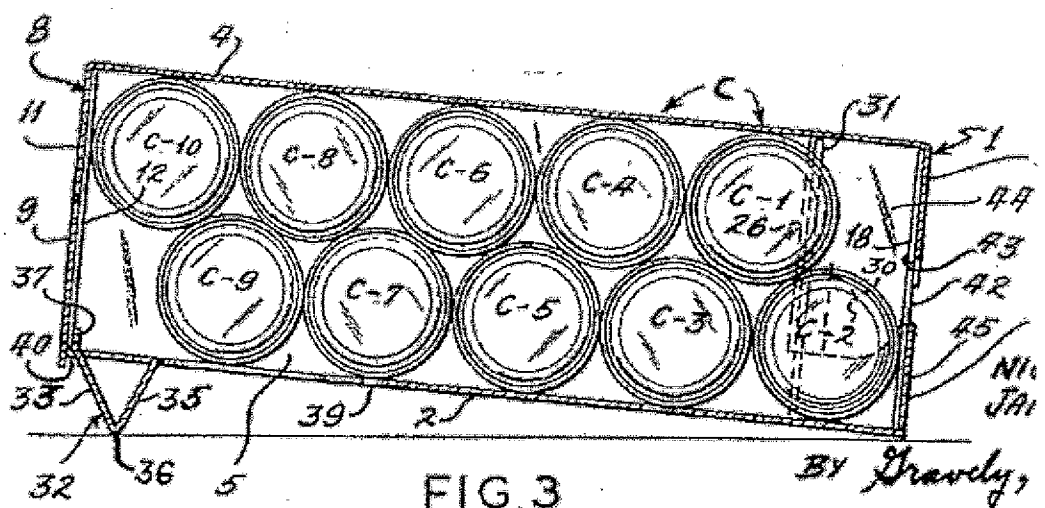


FIG. 3

BY *Gravely,*

NI  
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unique in that it is drawn to a container with a removable portion comprising only the front and top walls; *i.e.*, it omits the requirement for an oblique edge or line on the side walls. A1773. Independent claim 25 is also unique; it is drawn to a method of manufacturing a container by folding a paper sheet member around a plurality of cans. A1773-74.

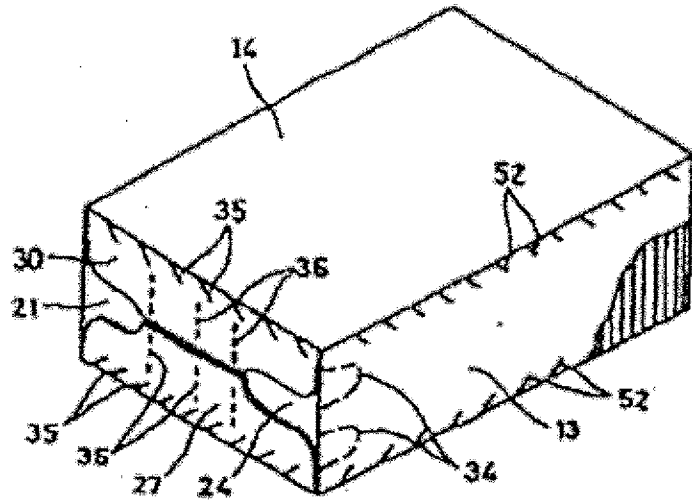
The dependent claims stand or fall with their respective independent claims, with the exception of dependent claims 3, 8, 12, 17, and 22, which additionally recite “a handle defined at least partially by a cut-out in the top wall” (the “top-wall-handle claims”). A1770-73.

## **B. The Prior Art**

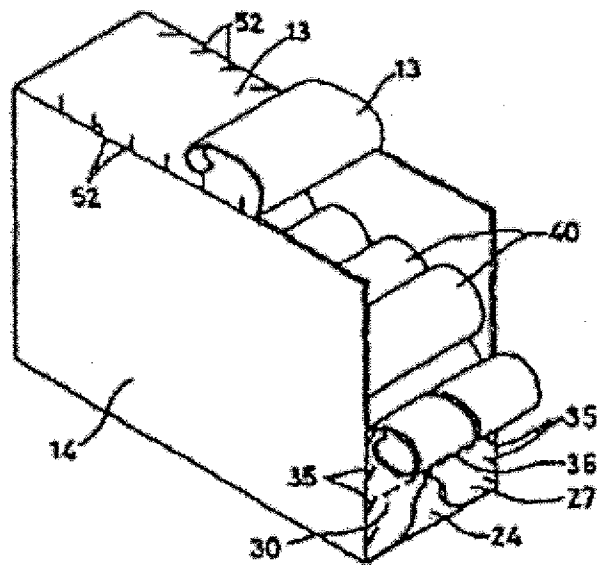
### **1. Ellis**

Ellis discloses a rectangular carton with a removable top front corner portion, from which cylindrical cans are removed in a predetermined order. A3286 (1:10-14). As shown in Figure 1 (facing page), carton **1** comprises front removable portion **R** that is formed from portions of the top wall **4**, front wall **14**, and side walls **3** and **5**, and defined by scores **21**, **26**, **27**, and cuts **25**. A3286 (2:22-49); A3285 (Figs. 1-3). Ellis' carton **1** also has a backstand **32** used to elevate the rear of the carton when it is resting on a flat surface such as a refrigerator shelf. A3286 (2:50-54). The cans inside the carton are arranged in staggered rows so that they can be removed in a predetermined order when

(图 11)



(图 12)



backstand **32** is engaged and section **R** is removed. A3285 (Fig. 3 (facing page)); A3287 (3:38-58). Stops **45** on the front of the carton prevent cans from falling out of the package. *Id.* (3:41-44).

Carton **1** may hold conventional twelve-ounce beer cans having a diameter of  $2 \frac{11}{16}$  inches. A3286 (2:11-13). Further, the rear wall height of carton **1** is equal to the side-wall width, which is  $5 \frac{3}{16}$  inches. A3286 (2:19-21). With the can diameter of  $2 \frac{11}{16}$  inches, the rear wall height is therefore 1.93 can diameters. The length of the carton **1** “may be so dimensioned as to carry any number of cans or cylindrical objects, odd or even in number.” A3287 (3:74-4:2).

## 2. Imazato

Imazato discloses a container for storing and dispensing canned beverages. Figures 10, 11 and 12 of Imazato (facing page) depict a corrugated cardboard box with side flaps **12** and **14**, bottom flap **11**, ceiling flap **13**, and lid flaps **27** and **30**. A180-81 (¶¶ 8-11); A189-90 (Figs. 10-12). Cans are stored in the container in a row-and-column arrangement, with, e.g., four rows each containing five cans. A182 (¶ 13); A188 (Figs. 5, 6). Imazato’s container can be opened by peeling back the ceiling flap **13** along guide **52**, and peeling back lid flaps **27** and **30** along guides **35**. A190 (Fig. 12); A184 (¶ 20). This creates

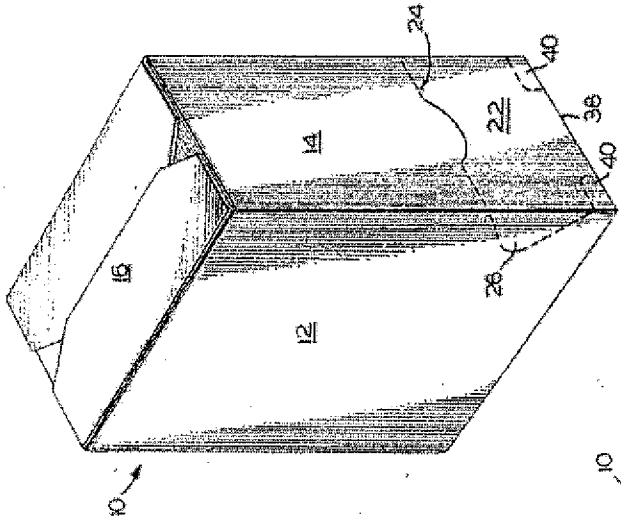


FIG. 1

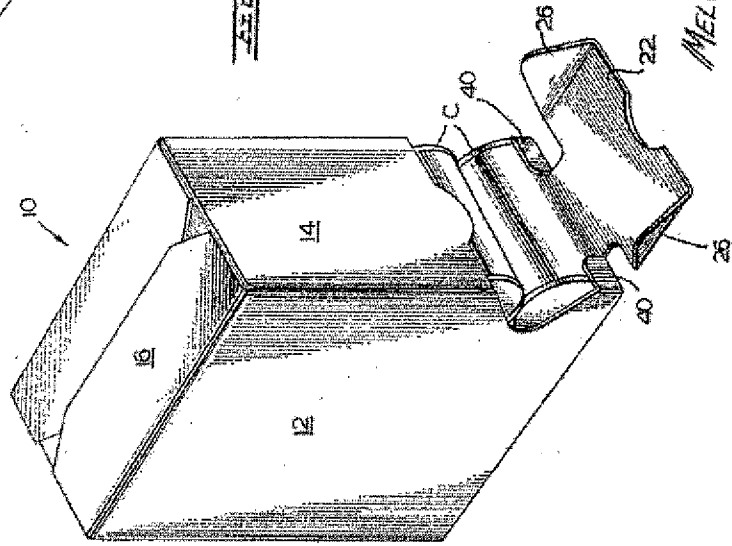


FIG. 2

INVENTOR

MELVILLE T. FARQUHAR

an opening in the upper front portion of the container, from which cans can be dispensed and, *inter alia*, loaded into a vending machine. A190 (Fig. 12).

### 3. Farquhar

Farquhar discloses “a case or carton of fibreboard or similar stock having novel dispensing flap means whereby articles such as cans may be readily dispensed singly as desired from the carton.” A3292 (1:11-14). Referring to Figures 1 and 2 (facing page), carton **10** has side panels **12** connected to forward end panel **14**. A3289 (Figs. 1, 2); A3292 (1:68-2:8). At the bottom of forward end wall **14** is placed a “dispensing flap” **22** defined by separation line **24**. Line **24**, which consists of perforations and slits, extends across wall **14** to both of side walls **12**, and defines substantially triangular ear portions **26** in each side wall. A3292 (2:17-39). The carton is opened by pulling back on dispensing flap **22** and folding it down at the bottom of wall **14**, as shown in figure 2. A3289 (Fig. 2); A3292 (2:52-68).

### 4. Wonnacott

Wonnacott discloses a carton for cylindrical cans **31** including front access flaps **23**, **24** that can be torn back along perforated lines **22a** and **22b**.

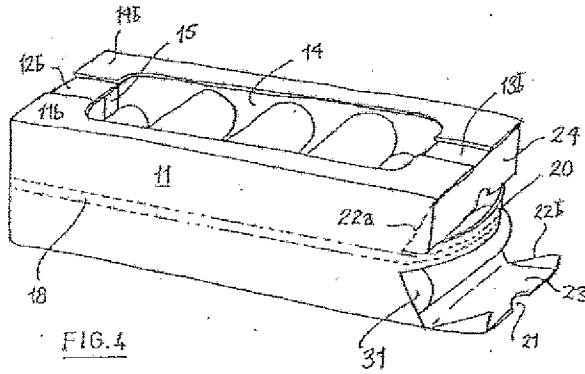


FIG. 4

Wonnacott

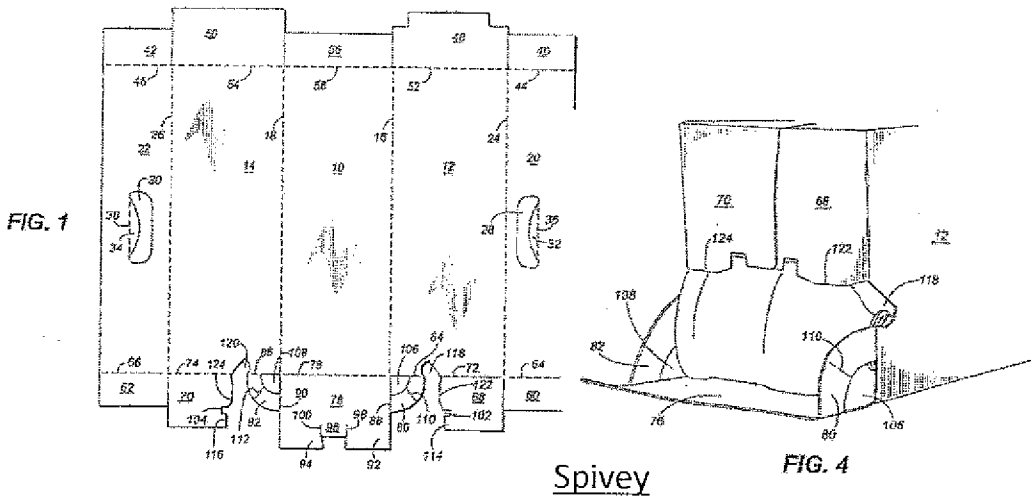
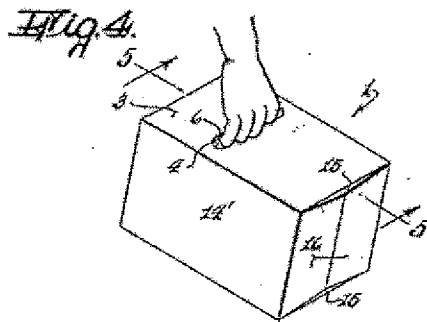


FIG. 1

FIG. 4

Spivey



Palmer

A220 (Fig. 4) (facing page); A222 (ll. 15-21, 46-52). Wonnacott also teaches that the carton can be loaded either by folding a blank around a “double row array” of cans, or by slipping two rows “into a partially erected carton.” A221 (1:35-38). Wonnacott discloses an embodiment that is “particularly suitable for one-by-one dispensing (e.g., from a refrigerator) with the rows of cans one above the other.” A222 (2:30-35).

## 5. Spivey

Spivey describes a paperboard carton to hold and dispense cans or bottles. A3299 (2:57-59). As shown in Figures 1 and 4 (facing page), Spivey’s carton comprises a bottom panel 10, side panels 12 and 14, and top flaps 20 and 22. A3296 (Fig. 1); A3298 (Fig. 4); A3300 (2:65-3:3). Each of top flaps 20 and 22 has a hand aperture (28 and 30, respectively) to facilitate carrying the carton. A3300 (3:18-20). The carton also comprises a dispensing flap 76 at the end of bottom panel 10. *Id.* (3:52-57). Spivey’s carton holds cans or bottles in a row-and-column arrangement. A3297-98 (Figs. 2, 4).

## 6. Palmer

Palmer discloses a carton for holding cylindrical cans arranged in rows and columns. A3283 (1:47-50). As shown in Figures 4 and 8 (facing page), elongated, generally U-shaped cuts are made to form finger grips on opposite

side walls 3 and 3' on carton 10. A3281 (Fig. 4); A3282 (Fig. 8); A3283 (1:52-54).

## 7. Admitted Prior Art

The Examiner and the Board identified the following quotations in the '673 patent as admissions that prior-art beverage cartons were provided with handles for carrying the cartons:

The twelve pack containers provide a convenient means to carry the beverage cans but are not handy for dispensing the cans.

A125 (1:32-34).

The typical twelve pack beverage container . . . sometimes includes a handle 14 thereon, the handle typically being walls defining a cut out in the top wall for the receipt of a hand thereinto.

A125-26 (2:65-3:3)

## C. The Board Decisions

In its Original Decision, the Board affirmed the majority of the Examiner's rejections of claims 1-18, 22, 25-29, but reversed all of the Examiner's rejections of claims 19-21, 23 and 24. The Board began by addressing the construction of several disputed claim terms. First, the Board disagreed with the Examiner that the term "columns" of cans, found in independent claims 6, 15, and 19, simply means "a formation of things," because such construction was "unreasonably broad." A27. Instead, the Board

determined that “in the context of the present case where ‘rows and columns’ are recited together, one of ordinary skill in the art would understand the plain meaning of ‘column’ as requiring a vertical arrangement which is perpendicular to the rows.” A28-29. This construction excludes Ellis’ staggered-row arrangement, and therefore the Board reversed a number of the Examiner’s rejections based on his view that Ellis discloses cans arranged in rows and columns. A34. The Board also disagreed with the Examiner that the term “oblique score,” found in independent claims 11 and 15, encompasses a complete cut through the packaging. A41-42. According to the Board, while “cuts can form *a part* of a score so as to weaken the scored portion of the carton, to construe a single cut as an entire score is unreasonable since such a cut entirely separates the portion of the carton, rather than weakens it.” A41 (emphasis in original). The Board thus reversed a number of rejections that were based on the Examiner’s construction of “score.” A42.

The Board agreed with the Examiner, however, that the term “comprising twelve . . . cans,” found in independent claims 1 and 19, means *at least* twelve cans, because the claims use the open-ended transitional term “comprising.” A40. The Board also agreed that the term “about” in the claim 1 limitation “a rear wall having a rear wall height of *about* a whole multiple of the can diameter,” and in similar limitations in the other six independent claims,

encompasses Ellis' rear wall height, which the Examiner found to be 1.93 can diameters. A29-30. The Board was not persuaded by Lingamfelter's argument that a person of ordinary skill in the art would interpret "about" to allow only for slight manufacturing tolerances, finding insufficient support for such a construction in the specification and the other evidence that Lingamfelter proffered. A31-32. Accordingly, the Board affirmed the Examiner's anticipation rejections of claims 1, 2, 4, 5, 28 and 29. A42.

The Board next considered the Examiner's various obviousness rejections. Regarding the rejection based on Ellis alone, the Board disagreed with Lingamfelter that there is no suggestion in Ellis to provide for, *e.g.*, 13 cans, which would result in a bottom wall length of about a whole multiple of cans. A42. The Board noted that Ellis teaches that the disclosed carton can be sized to carry any number of cans, odd or even. A43. The Board also disagreed with Lingamfelter that enlarging Ellis' opening would destroy Ellis' ordered dispensing feature, which the Board found to be unrelated to the size of the opening at the top wall. A44.

The Board next considered but rejected Lingamfelter's argument that Imazato teaches away from providing score lines on the sidewalls of paper cartons. The Board reasoned that while a person of ordinary skill would have understood that score lines weaken a paper carton to some extent, there was no

evidence that a skilled artisan would believe that a carton with scored sidewalls would always render a paper carton unacceptably weak. A48. The Board also pointed out that both Ellis and Farquhar teach perforations or cuts in carton sidewalls, indicating that a skilled artisan would have known that scoring a carton's sidewalls need not critically weaken the carton. A49.

The Board also agreed with the Examiner that claims 3, 8, 12, 17, and 22, all of which require a handle cut-out placed on the top wall of the carton, would have been obvious over Imazato, Ellis, and Farquhar, in view of either the Admitted Prior Art or Palmer. A53-57. The Board rejected Lingamfelter's argument that a person of ordinary skill would have refrained from placing a handle cut-out on the top of the carton to avoid weakening it. The Board reasoned that adding an advantageous feature to a container that may weaken is a design trade-off familiar to the ordinary package designer. A55.

The Board then carefully considered Lingamfelter's evidence of commercial success of the "Fridge Pack" and similar containers, but found it insufficient to overcome the Examiner's *prima facie* case of obviousness. The Board found that Lingamfelter failed to establish a nexus between the merits of the claimed invention and the commercial success of the Fridge Pack. A64. The Board also found that the commercial-success evidence was not commensurate in scope with the claims. A65.

The Board then turned to the cross appeals of the Third-Party Requesters. The Examiner had refused to adopt MWV's proposed rejection of claims 11, 13 and 14 as unpatentable over Imazato, Ellis and Farquhar because he viewed the problems addressed by Imazato and Ellis to be different, so that there was no reason to replace the opening of Imazato with Ellis' removable section. A77. The Board disagreed that the proposed rejection constitutes a "wholesale" replacement of Imazato's opening with Ellis' opening. Instead, the rejection incorporates Imazato's can-dispensing opening in the top and front walls with Ellis' and Farquhar's side wall openings, to facilitate removal of cans. A77-78.

The Board also disagreed with the Examiner's refusal to adopt GPI's proposed rejection of claims 19-21, 23 and 24 as unpatentable over Ellis, Imazato and Wonnacott or Spivey. Based on his view that Ellis disclosed cans arranged in rows and columns, the Examiner believed that it was "not necessary" to modify Ellis with Wonnacott or Spivey. A87. But since the Board had rejected the Examiner's construction of "columns," the Board concluded that this rejection was appropriate. *Id.*

In its March 15, 2011 decision on reconsideration, the Board affirmed these latter rejections, and also addressed Lingamfelter's new argument that the Examiner and the Board acted outside their statutory authority and violated Lingamfelter's rights under the Fifth Amendment's Due Process Clause when

they accepted and considered the Third-Party Requesters' declaration evidence. Lingamfelter had argued that 35 U.S.C §§ 301 and 311 only authorized the Third-Party Requesters to proffer, and the USPTO to accept, evidence pertaining to prior art patents and printed publications. A20. The Board was not persuaded, noting that §§ 301 and 311 relate to the evidence that can be considered when instituting an *inter partes* reexamination, and the type of evidence that forms the basis of any rejections of claims in a reexamined patent. A117. Thus, they do not specifically address the type of evidence that can be considered in the course of *inter partes* reexamination. *Id.* The Board declined to address Lingamfelter's Due Process Clause argument, stating that it was not authorized to do so. A118.

#### IV. SUMMARY OF THE ARGUMENT

Lingamfelter's invention comprises a typical container for holding and carrying cylindrical beverage cans, plus a removable top front corner portion through which the cans can be removed. Ellis discloses a container for holding beverage cans that also has a removable top front corner. Substantial evidence supports the Board's finding that Ellis anticipates independent claims 1 and 28. All of Lingamfelter's claims are either anticipated by Ellis or rendered obvious over various combinations of Ellis, Imazato, Farquhar, and other references. The Board carefully considered Lingamfelter's evidence of commercial success

and properly found it insufficient to overcome the strong *prima facie* case of obviousness.

## V. ARGUMENT

### A. Standard of Review

While this Court has not yet expressly ruled on the standard of review of an *inter partes* reexamination decision, the Director believes the same standards of review should apply to the review of a Board decision in an *inter partes* reexamination as would apply to the review of a Board decision in an *ex parte* patent appeal or in an *inter partes* patent interference. Under that standard, the Appellant has the burden of showing that the Board committed reversible error. *In re Watts*, 354 F.3d 1362, 1369-70 (Fed. Cir. 2004). Claim construction is a matter of law that is reviewed *de novo*. *In re Bigio*, 381 F.3d 1320, 1324 (Fed. Cir. 2004) (citing *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1454 (Fed. Cir. 1998) (*en banc*)). During *inter partes* reexamination, however, the USPTO gives claims their “broadest reasonable interpretation.” *In re Yamamoto*, 740 F.2d 1569, 1571 (Fed. Cir. 1984). Accordingly, this Court reviews the reasonableness of the USPTO’s claim constructions. *Id.*

Obviousness is a question of law reviewed *de novo* based on underlying findings of fact. See *In re Harvey*, 12 F.3d 1061, 1063 (Fed. Cir. 1993). What the prior art teaches, and whether a reference teaches away, are questions of fact.

*In re Hyatt*, 211 F.3d 1367, 1371 (Fed. Cir. 2000); *Para-Ordnance Mfg. v. SGS Importers Int'l, Inc.*, 73 F.3d 1085, 1088 (Fed. Cir. 1995). Whether a prior art reference anticipates a claim is also a question of fact. *In re Baxter Travenol Labs.*, 952 F.2d 388, 390 (Fed. Cir. 1991).

This Court reviews the Board's underlying factual findings for substantial evidence. *In re Gartside*, 203 F.3d 1305, 1316 (Fed. Cir. 2000); *see also In re Harvey*, 12 F.3d 1061, 1063 (Fed. Cir. 1993). This Court has defined substantial evidence as that which "a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1312 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229-30 (1938)). "[W]here two different, inconsistent conclusions may reasonably be drawn from the evidence in the record, an agency's decision to favor one conclusion over the other is the epitome of a decision that must be sustained upon review for substantial evidence." *In re Jolley*, 308 F.3d 1317, 1329 (Fed. Cir. 2002).

**B. Lingamfelter Should Have Objected to the Admission of Third-Party Requesters' Declarations by Petition to the Director**

Lingamfelter argues that the Examiner and Board acted outside of their statutory authority when they accepted and considered declarations submitted by the Third-Party Requesters. Br. at 19-25. Lingamfelter also argues that by doing so, the Examiner and the Board violated his due process rights under the Fifth Amendment. Br. at 25-27.

The admission and consideration of Third-Party-Requester's declarations is not an appealable issue that is properly before this Court. See MPEP §§ 1002, 1201. The issue is outside the Board's limited jurisdiction to review patentability determinations, and thus Lingamfelter should have made its objection by petition to the Director under 37 C.F.R. § 1.181 and, if necessary, brought suit against the USPTO in a U.S. District Court under the Administrative Procedure Act. Lingamfelter failed to file such a petition, and indeed, failed to raise any objection with the Examiner in the course of the initial *inter partes* reexamination. Instead, he waited until after the Board issued its Original Decision adverse to his interests. Thus, even if this Court determines that the admissibility of the Third-Party declarations is an appealable issue that could have been raised in the Board appeal, it should consider such objection waived. A procedural objection, even one that implicates a person's rights under the Due Process Clause of the Fifth Amendment, must be timely made or it is waived. See *Bolvito v. Mukasey*, 527 F.2d 428, 438 (5<sup>th</sup> Cir. 2008) (holding that petitioners waived their claims that the conduct of an immigration hearing violated their due-process rights because petitioners failed to raise their objections at the hearing).

**C. The Board Correctly Determined That Ellis Anticipates Claims 1, 2, 4, 5, 28 and 29**

The Board found that Ellis anticipates independent claims 1 and 28, and their dependent claims (except for the top-wall-handle claims). Lingamfelter disputes this finding based on what it contends are two claim construction errors by the Board: Its construction of the term “a rear wall height of about a whole multiple of the can diameter,” and of the term “comprising twelve cans.” As discussed below, the Board’s constructions are correct and its anticipation rejections of claims 1 and 28 should stand.

**1. The Board Correctly Construed The Term “a rear wall height of about a whole multiple of the can diameter”**

The Board construed the term “a rear wall having a rear wall height of *about* a whole multiple of the can diameter,” appearing in independent claims 1, 11, and 28, to encompass Ellis’ rear wall height of 1.93 can diameters. A34-35. Lingamfelter argues that the Board construed this term too broadly, because it permits Ellis’ staggered row arrangement rather than a strict row-and-column arrangement. Br. at 28. In essence, Lingamfelter urges this Court to incorporate a row-and-column arrangement limitation into the claims that do not specifically require it. This is error, particularly when the Examiner and the Board are required to give claim terms their broadest reasonable interpretation. *See In re Yamamoto*, 740 F.2d 1569, 1571 (Fed. Cir. 1984) (holding that claims are given

their broadest reasonable interpretation in reexaminations); *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1369 (“We have cautioned against reading limitations into a claim from the preferred embodiment described in the specification, even if it is the only embodiment described, absent clear disclaimer in the specification.”).<sup>1</sup> The USPTO limits a claim based on the specification or prosecution history only “when those sources expressly disclaim the broader definition.” *Bigio*, 381 F.3d at 1325. *Lingamfelter* points to nothing in the specification or prosecution history that expressly disclaims a rear wall height of 1.93 can diameters, or expressly restricts a “rear wall height of about a whole multiple of the can diameter” to something more than 1.93 can diameters.

*Lingamfelter* also suggests that the Board construes the claim 1 limitation “a bottom wall length of about a whole multiple of the can diameter” to cover a bottom wall length that is  $\frac{1}{2}$  of a can greater than a whole multiple of the can diameter. *Br.* at 30. This is incorrect. The Board relies on *Ellis*’ teaching that “the length of the carton 1 may be so dimensioned as to carry any number of cans or cylindrical objects, odd or even in number.” A3287 (3:74-4:2); A38. As the Board stated, “in the instance where the carton is implemented for holding thirteen cans in two rows, for example, the bottom wall length would have a

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<sup>1</sup> *Lingamfelter*’s reliance on *Ortho-McNeil Pharm., Inc. v. Caraco Pharm. Labs, Inc.*, 476 F.3d 1321, 1326 (Fed. Cir. 2007) is thus misplaced. The Court in *Ortho* discusses construction of a claim in the context of infringement litigation, rather than in the context of reexamination.

length of about a whole multiple of the can diameter.” A38. Thus, the Board relies on Ellis’s teaching that its carton can be dimensioned to accommodate many different quantities of cans, not its construction of “about.”

**2. The Board Correctly Construed The Term  
“comprising . . . twelve cans”**

Lingamfelter also takes issue with the Board’s construction of “comprising twelve . . . cans,” which appears in independent claims 1 and 19, to mean at least twelve cans. Br. at 30-31. Lingamfelter asserts that this term should be construed to mean exactly twelve cans, rather than twelve or more cans as the Board held. *Id.* But as discussed above, the Board is required to interpret claims as broadly as reasonably possible. *Yamamoto*, 740 F.2d at 1569. Moreover, as the Board noted, the transitional term “comprises” is open-ended and does not exclude additional, unrecited elements. A38 (Original Decision at 37, citing *Sandisk Corp. v. Memorex Prods., Inc.*, 415 F.3d 1278, 1284 (Fed. Cir. 2005)). A carton that holds 13 cans satisfies the “comprising twelve . . . cans” limitation because it literally holds twelve cans – plus an additional can. Even in the context of infringement litigation, where claim terms are not given their broadest reasonable interpretation, a claim that recites a specific number of elements will be limited to that number only when the addition of an element “eliminates an inherent feature of the claim.” *SunTiger, Inc. v. Scientific Research Funding Group*, 189 F.3d 1327, 1336 (Fed. Cir. 1999). Lingamfelter

has not identified any inherent feature of claims 1 and 19 that would be eliminated were the claimed container construed to hold more than 12 cans. Nor does Lingamfelter identify anything in the specification that it contends expressly disclaims more than twelve cans. Indeed, most of the claims on appeal are not limited to twelve cans.

**D. The Board Correctly Determined That Claims 1-29 Would Have Been Obvious**

**1. The Board Correctly Determined That Independent Claims 1, 11, And 28 Would Have Been Obvious Over Ellis Alone**

The Board determined that independent claims 1, 11, and 28 would have been obvious over Ellis alone. A42-44. Lingamfelter argues that the “staggering can arrangement is essential to satisfy the objects of Ellis’ invention, which are all directed to dispensing cans in a predetermined order and, at a certain can, reminding a user to reorder.” Br. at 33. Lingamfelter contends that Ellis would thus be rendered unsatisfactory for its intended purpose of ordered dispensing if modified to have rows and columns, as supposedly required by these claims. Br. at 34.

This argument is unavailing for the simple reason that none of the claims subject to this rejection expressly require the row-and-column can arrangement. A70-72, 74-75. But Lingamfelter argues that “the specification and the context of the claims require a row and column arrangement.” Br. at 28. That is, asserts

Lingamfelter, these claims “implicitly” recite a row-and-column arrangement because they use the term “about” in defining the carton’s dimensions. *Id.* This is presumably based on Lingamfelter’s narrow construction of “about,” which is limited to small manufacturing tolerances, and would thus exclude, *e.g.*, Ellis’ staggered-row arrangement that results in a rear-wall height of 1.93 can diameters.

But Lingamfelter provides no evidence that a person of ordinary skill in the art would interpret “about” to imply a row-and-column arrangement of cans. On the contrary, this is unlikely to be the case. Those claims that expressly require the row-and-column arrangement – claims 6, 15, and 19 and those that depend from them – also use the term “about” in reciting the carton’s dimensions. *See, e.g.*, A1770 (claim 6) (“A container holding a multiplicity of substantially identical items arranged in a plurality of rows and columns . . . comprising . . . a rear wall having a rear wall height of about a whole multiple of the row height.”). If the use of “about” in this manner implies the row-and-column limitation, the express row and column limitation would be redundant.

More importantly, it would be inappropriate for the Board to infer a limitation from the specification or “context” of the claims when it is obligated to give claims their broadest reasonable interpretation. As noted above, when giving a claim its broadest reasonable interpretation, it is appropriate to limit a

claim on the basis of the specification or prosecution history only when those sources “expressly disclaim the broader definition.” *Bigio*, 381 F.3d at 1325. An “implicit” limitation is simply not permissible under the broadest-reasonable-interpretation rubric. If Lingamfelter disagreed with the Examiner’s interpretation that these claims do not require a row-and-column arrangement, it should have added that limitation in the course of the *inter partes* reexamination.

Lingamfelter also argues that this rejection is improper because if Ellis’ carton is modified to accommodate an odd number of cans, thus satisfying the limitation that the bottom-wall length be equal to about a whole multiple of the can diameter, the carton would not satisfy the twelve-can limitation. Br. at 34. This argument is unpersuasive. As discussed above, the requirement that the container comprise twelve cans is satisfied with more than twelve cans, given Lingamfelter’s use of the open-ended transitional term “comprising.”

## **2. Claims 1, 2, 4, and 5 Would Have Been Obvious Over Ellis In View Of Imazato**

The Examiner alternatively rejected claims 1, 2, 4, and 5 as obvious over Ellis in view of Imazato, relying on Imazato only for the teaching that the opening in the top or ceiling flap can be enlarged as necessary to facilitate dispensing the cans. A1611 (Right of Appeal Notice at 40); A2540 (Exam. Ans. at 36); A184-85 (¶¶ 20-21). The Examiner used this teaching to satisfy the claim requirement that the top wall length is “less than the bottom wall length by

at least about the can diameter.” A1770 (claim 1); A1611.<sup>2</sup> The Board affirmed on this basis. A45-46.

Lingamfelter argues that it is improper to combine Ellis with Imazato because they “each disclose different cartons, with different dispensing openings, designed to solve different problems.” Br. at 35. That is, Lingamfelter asserts, “Imazato teaches a two-part, peel down/peel back opening to facilitate loading a vending machine. In contrast, Ellis relates to a ‘self-dispensing carton from which each cylindrical object or can therein is removed in predetermined order from the front portion of said carton which is adapted to be placed in a home refrigerator.” *Id.* Thus, according to Lingamfelter, Imazato and Ellis “teach away from their combination.” Br. at 36. This argument misses the mark. “It is not necessary that the inventions of the references be physically combinable to render obvious the invention under review.” *In re Sneed*, 710 F.2d 1544, 1550 (Fed. Cir. 1983). Imazato is relied upon here only for teaching the common sense notion that a larger carton opening makes it easier to remove cans from the carton than would a smaller opening. A46; A184-85 (¶¶ 20-21). Lingamfelter does not dispute this notion. A person of ordinary skill would readily apply that teaching to Ellis to enlarge

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<sup>2</sup> The Examiner also found that Ellis itself discloses this limitation. A1598 (Right of Appeal Notice at 27). Lingamfelter does not dispute this finding on appeal.

its top-wall opening as needed to facilitate dispensing of cans from it. See *DyStar Textilfarben GmbH & Co. v. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1368 (Fed. Cir. 2006) (holding that a person of ordinary skill may be motivated to combine prior art references “even absent any hint of suggestion in the reference themselves. In such situations, the proper question is whether the ordinary artisan possesses knowledge and skills rendering him *capable* of combining the prior art references.”).

**3. Claims 1, 2, 4-7, 9-11, 13-16, 18, 28, and 29 Would Have Been Obvious Over Imazato In View of Ellis and Farquhar**

The Board affirmed the Examiner’s rejection of claims 1, 2, 4-7, 9, 10, 15, 16, 18, 28 and 29 as obvious over Imazato in view of Ellis and Farquhar, and entered a new ground of rejection of claims 11, 13, and 14 based on the same combination. A46-49, 77-80; *see also* A100-03 (affirming the latter rejection on reconsideration). Imazato describes all of the limitations of these claims except for side wall front edges or score lines that extend between the front wall and top wall, and that are at least partially oblique. Ellis teaches side wall front edges that are partially oblique. A3285 (Fig. 1, cut 25); A3286 (2:30-37). Farquhar discloses oblique side wall front score lines and also describes the desirability of removing a portion of the side walls to expose the ends of the cans to make them easier to remove from the carton. A3289 (Figs. 1, 2); A3292

(2:17-24); A3292-93 (2:69-3:6). Thus, a person of ordinary skill would have found it obvious to add side wall front edges or score lines to make it easier to remove cans from the carton by grasping them at the ends. *See KSR Int'l, Co. v. Teleflex, Inc.*, 550 U.S. 398, 416 (2007) (“The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.”).

Lingamfelter argues, however, that Imazato teaches away from using sidewall openings because the complete sidewalls are needed to ensure package stability and to help guide the cans into a vending machine. Br. at 37-39.

Teaching away occurs when a reference discourages one skilled in the art from following the claimed path, or when the reference would lead one skilled in the art “in a direction divergent from the path that was taken by the applicant.” *In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994). According to Lingamfelter, Imazato positioned its “cut out guides 35” on the front wall to “ensure ‘no loss of strength caused by the cut off guides 35.’” Br. at 37 (quoting Imazato, A183). Lingamfelter also asserts that for cartons with top wall openings like Imazato, “users reach into the carton to dispense most of the cans, without the need for side access.” Br. at 38.

These arguments are unavailing. First, substantial evidence supports the Board’s finding that Imazato does *not* teach that side-wall cut-ins are

specifically avoided to “ensure” the strength of the carton. A48. At most, Imazato teaches that the cut-ins on the front wall do not result in loss of strength to the carton:

[S]ince the cut off guides 35 are formed by oblique cut-ins along fold lines 26 and 29 formed in the source of the lid flaps 27 and 30, there is no loss of the strength caused by the cut off guides 35.

A183 (¶ 16). Based on this passage, strength retention could be the result of a number of factors, such as the use of “oblique” cut-ins rather than cut-ins that run parallel to the fold lines 26, 29. As stated above, “where two different, inconsistent conclusions may reasonably be drawn from the evidence in the record, an agency’s decision to favor one conclusion over the other is the epitome of a decision that must be sustained upon review for substantial evidence.” *Jolley*, 308 F.3d at 1329. Further, even if Imazato avoided placing cut-ins down the entire length of the sidewalls to avoid loss of strength, it does not necessarily follow that scored lines at the top front corner must also be avoided. In this regard, it was well within the Board’s broad discretion to give little weight to the contrary opinion of Lingamfelter’s declarant, Dr. Singh, as it was, in the Board’s words, “conclusory and not further substantiated by objective evidence.” A49 (citing A752 (Singh Decl., ¶¶ 26-27)). *See In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d at 1368 (holding that the Board “has broad discretion as to the weight to give to declarations offered in the course of

prosecution,” and was entitled to “conclude that the lack of factual corroboration warrants discounting the opinions expressed in the declarations”).

Lingamfelter’s argument that intact side walls were needed to guide cans into a vending machine is likewise unavailing. First, Lingamfelter does not show that a cutout at the top front corner would destroy this guiding function. Moreover, Imazato’s carton does not function simply by “pour[ing] cans into the vending machines,” as Dr. Singh opines. A2874. Rather, as Lingamfelter acknowledges, access to the cans can be accomplished by simply “reaching into the carton,” as is done with the Ellis carton. Br. at 38.

Lingamfelter also argues that it was “common wisdom” among package designers to make dispensing openings just large enough for their intended purpose. Br. at 37-43. Assuming this is true, it is still completely plausible that a package designer would choose to design a package for ease of access to its contents. As Lingamfelter has stated, “one of ordinary skill in the package design is aware of the often conflicting considerations related to cost, package strength and integrity, and consumer friendliness. Seeking a design that optimally harmonizes these considerations is the job of the package designer.” Br. at 43. The ordinary package designer would know from Ellis and Farquhar (not to mention common sense) that side cutouts provide easier access to cans inside the package. Whether the designer chooses to incorporate side cutouts for

this purpose, or avoid them to achieve a stronger package, is simply a design choice that is well within the scope of ordinary skill. *See DyStar*, 464 F.3d at 1368 (holding that there may be motivation to combine references even without any suggestion in the references themselves, in which case “the proper question is whether the ordinary artisan possesses knowledge and skills rendering him *capable* of combining the prior art references”).

**4. The Board Correctly Found That The “Top Handle Claims” Would Have Been Obvious**

Claims 3, 8, 12, 17 and 22 are further limited to containers having a “handle defined at least partially by a cut-out in the top wall” of the carton. A1770-73. The Examiner rejected these claims as obvious over various combinations of Imazato, Ellis and Farquhar, in view of either the Admitted Prior Art or Palmer. In particular, the Examiner determined that handles were well known in the art to facilitate carrying cartons of beverage cans, and thus it would have been obvious to incorporate a handle into such a carton. A1637. The Board affirmed. A55.

Lingamfelter argues that the Board never made a *prima facie* case because it did not provide a reason why a person of ordinary skill in the art would incorporate a handle into a carton for carrying beverage cans. This is incorrect. The Board affirmed the Examiner’s rejections, which were based on the

Examiner's finding that a person of ordinary skill in the art would incorporate a handle on the carton to facilitate carrying the carton:

[The '673 patent] admits that it is conventional to provide a cut-out handle in the top wall of a can container and to provide can containers that are convenient to carry. Apparently, the intended function of such [a] handle is to carry the container. Accordingly, it would have further been obvious in view of this admission by [the '673 patent] to have provided a cut-out handle in the top wall of Imazato for the purpose of carrying the container of Imazato.

A1637 (Right of Appeal Notice at 66) (emphasis in original). The USPTO thus made out a *prima facie* case and the burden shifted to Lingamfelter to rebut it. He failed to so.

Lingamfelter argues that it would not have been obvious to add a handle on the top wall of a container that also has an opening on the top wall because doing so would weaken the top wall. Lingamfelter cites U.S. Patent No. 4,785,991 to Schuster ("Schuster") in support of this position. Br. at 47 (citing A2972-80). Lingamfelter also argues that Imazato teaches away from adding a handle to its container because Imazato's peel-back top could not accommodate it. Br. at 48. But neither of these points demonstrates that the Board erred in affirming this rejection. Lingamfelter fails to identify any specific language in Schuster that discourages a person of skill in the art from placing a cutout handle in the top wall of a carton with a top wall opening. Indeed, Schuster appears only to teach how to design a top-wall handle with added strength which may be

required for some packages. A2977 (1:34-41). Imazato is no more helpful to Lingamfelter's cause. It does not appear to discuss providing a handle on the top wall of the disclosed carton; much less that a top-wall handle is incompatible with the peel-back slits on the top wall. As this Court has stated, "[c]ase law does not require that a particular combination must be the preferred, or the most desirable, combination described in the prior art in order to provide the motivation for the current invention." *In re Fulton*, 391 F.3d 1195, 1200 (Fed. Cir. 2004).

**5. Claims 19-21 and 23-24 are Obvious Over Ellis in view of Imazato and Wonnacott or Spivey**

In its January 12, 2010 decision, the Board reversed the Examiner's refusal to reject claims 19-21 and 23-24 as obvious over Ellis in view of Imazato and either Wonnacott or Spivey. The Examiner's refusal was based on his misapprehension that Ellis already described cans arranged in rows and columns (based on his construction of the word "columns"), and therefore combining Ellis with Wonnacott or Spivey was "not necessary." A88. Having reversed the Examiner's construction of "columns," the Board revisited this rejection and found that "it would have been obvious to one of ordinary skill in the art to arrange the cans in the carton of Ellis to be in rows and columns as suggested by either Wonnacott or Spivey. The Patent Owner's claimed invention is merely a predictable variation of the carton of Ellis to accommodate an arrangement of

cans well known in the art.” *Id.* The Board affirmed this rejection on reconsideration. A104-07.

Lingamfelter argues that one would not use Ellis’ carton to hold cans in a row-and-column arrangement because it would destroy Ellis’ “primary purpose” of dispensing cans in specific order. Br. at 45. According to Lingamfelter, the Board incorrectly considered Ellis’ primary purpose as disclosing a can-dispensing carton, and ignored the fact that Ellis’ top wall opening existed only for its ordered dispensing purpose. Br. at 44-46.

This argument is unpersuasive. As the Board pointed out, a person of ordinary skill in the art is also a person of ordinary creativity, not an automaton. A104 (citing *KSR*, 550 U.S. at 418-19). A skilled artisan would be not fixated by Ellis’ so-called primary purpose of ordered dispensing, but would certainly see its structure as applicable in other well-known contexts, such as dispensing cans arranged in rows and columns. See *KSR*, 550 U.S. at 420 (“familiar items may have obvious uses beyond their primary purposes, and in many cases a person of ordinary skill will be able to fit the teachings of multiple patents together like pieces of a puzzle”).

**E. Lingamfelter’s Secondary-Consideration Evidence is Insufficient to Overcome the Board’s Strong Obviousness Case**

When the USPTO demonstrates a *prima facie* case of obviousness, as was done here, the burden shifts to the applicant to show non-obviousness. *See In re*

*Rijkaert*, 9 F.3d 1531, 1532 (Fed. Cir. 1993). Even “substantial evidence of commercial success, praise, and long-felt need” may be insufficient to overcome a strong showing of obviousness.” *Leapfrog Enter. Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1162 (Fed. Cir. 2007). Although any proffered evidence of secondary considerations must always be considered, such evidence does not control the obviousness determination. *Newell Cos. v. Kenny Mfg. Co.*, 864 F.2d 757, 768 (Fed. Cir. 1988). Lingamfelter’s evidence of commercial success is far from substantial, as discussed below, and is insufficient to overcome the examiner’s *prima facie* case of obviousness.

Lingamfelter has submitted evidence of commercial success of the invention, in the form of declarations and exhibits from Dr. John T. Gourville. Dr. Gourville declares that the “Fridge Pack,” “Fridge Vendor,” and similar packages have achieved commercial success that demonstrates nonobviousness. A3503-09 (Gourville Decl., ¶¶ 10-30); A2817-28 (¶¶ 17-50). The Fridge Pack and Fridge Vendor holds 12 cans in two six-can rows in a row-and-column arrangement (i.e., a “2x6 configuration”) and has a top/front corner dispenser. A3532, 3535.

For evidence of commercial success to have probative value, the patent owner must establish a “nexus” between the evidence and the merits of the claimed invention, *i.e.*, that the commercial success “resulted from the merits of

the claimed invention as opposed to the prior art or other extrinsic factors.” *In re Kao*, 639 F.3d 1057, 1068-70 (Fed. Cir. 2011). It is necessary but not sufficient that the successful product be an embodiment of the claimed invention; it must also be shown that the product’s success is the result of a claimed feature. *Id.*, 639 F.3d at 1073 (noting that successful product was an embodiment of the claimed invention but holding that there was no nexus between commercial success evidence and claimed invention).

The issue here is not whether the Fridge Pack is commercially successful, or whether it is an embodiment of the claimed invention, but whether the Fridge Pack’s success “resulted from the merits of the claimed invention.” *Id.* at 1068-70. Substantial evidence supports the Board’s finding Lingamfelter failed to make this showing. The apparent appeal and benefit of the Fridge Pack is its slim design, i.e., its 2x6 configuration, which “allow[s] consumers easy access to more cans in the refrigerator, encouraging greater rates of consumption and repeat purchases.” A3505 (Gourville Decl., ¶ 18 (quoting Gourville Decl. Tab G)). The ’673 patent does not expressly claim or even disclose this configuration.

Lingamfelter argues that the Fridge Pack’s success is the result of the combination of the row/column arrangement of the cans and the front/top corner dispenser. Br. at 54-55. The Board properly rejected this argument, since a 3x4

carton, which also uses the row/column configuration and a front/top corner dispenser, was not shown to be commercially successful, and in fact was completely replaced by the 2x6 container. Lingamfelter responds that over 300,000,000 3x4 cartons were sold, but as the Board pointed out, the significance of that number is difficult to evaluate in the absence of market-share data. A110-11; see *In re Huang*, 100 F.3d 135, 140 (Fed. Cir. 1996) (holding that in the absence of reliable market-share evidence, sales figures provide “a very weak showing of commercial success, if any”).

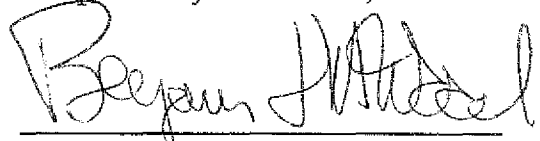
Lingamfelter’s remaining arguments concern how much weight the Board gave to other allegations of commercial success, such as Pepsi’s licensing of the ’673 patent, Coke’s rejection of a slim, bottom-dispensing carton, allegations that the invention was stolen, etc. Br. at 60-63. This Court grants broad deference to the Board in weighing secondary consideration evidence. *In re Inland Steel Co.*, 265 F.3d 1354, 1366 (Fed. Cir. 2001). The Board acted well within its broad discretion in giving these allegations little weight. For example, the terms of Pepsi’s ’673 patent license were undisclosed, so it was impossible for the Board to determine its significance. A110. And while Coke representatives “expressed no interest” in a slim, bottom-dispensing carton at a meeting in 1999, it also “expressed no interest” in a slim, top-dispensing carton. A782-83. Lingamfelter has not shown that Coke’s lack of interest at that time

had anything to do with the placement of the dispenser. And the allegations that the invention was stolen are just that: allegations, made by one competitor against another. The Board's determination not to give such allegations substantial weight cannot be considered error.

## VI. CONCLUSION

Because the Board's decision is supported by substantial evidence and is in accordance with the law, it should be affirmed.

Respectfully submitted,



RAYMOND T. CHEN  
Solicitor

BENJAMIN D. M. WOOD  
THOMAS W. KRAUSE  
Associate Solicitors

OFFICE OF THE SOLICITOR  
U.S. Patent & Trademark Office  
Mail Stop 8, P.O. Box 1450  
Alexandria, Virginia 22313-1450  
(571) 272-9035  
*Attorneys for the Director of the  
United States Patent and  
Trademark Office*

November 21, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that on November 21, 2011, I caused two copies of the foregoing BRIEF FOR APPELLEE—DIRECTOR OF UNITED STATES PATENT AND TRADEMARK OFFICE to be served by first-class mail

Appellant's counsel of record:

DANIEL D. CHAPMAN  
Jackson Walker LLP  
112 East Pecan Street, Suite 2400  
San Antonio, TX 78205-1521  
(210) 978-7759

JAMES F. VAUGHAN  
Womble Carlyle Sandridge & Rice, PLLC  
Atlantic Station  
271 17th Street, NW, Suite 2400  
Atlanta, GA 30363-1017

BOWER, R. BRUCE  
Finnegan, Henderson, Farabow  
303 Peachtree Street, NE,  
SunTrust Plaza, Suite 3500,  
Atlanta, GA 30308



MERYL E. VLATAS

Paralegal

United States Patent & Trademark Office

Office of the Solicitor

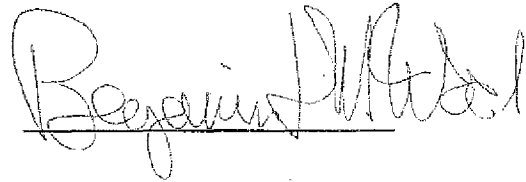
P.O. Box 15667

Arlington, Virginia 22215

571-272-9035

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I certify pursuant to FRAP 32(a)(7) that the foregoing brief complies with the type-volume limitation. The total number of words in the foregoing brief, excluding the table of contents and table of authorities, is 9,060, as calculated by the Microsoft Word 2010 program.

A handwritten signature in cursive script, appearing to read "Benjamin D. M. Wood", written over a horizontal line.

Benjamin D. M. Wood