Nos. 2015-2082, -2084

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

INTERCONTINENTAL GREAT BRANDS LLC,

Plaintiff-Appellant,

v.

KEEBLER COMPANY, KEEBLER FOODS COMPANY, KELLOGG NORTH AMERICA COMPANY, KELLOGG SALES COMPANY, KELLOGG USA, INC.,

Defendants-Cross-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, No. 1:13-cv-00321, Judge Matthew F. Kennelly

NON-CONFIDENTIAL BRIEF FOR PLAINTIFF-APPELLANT INTERCONTINENTAL GREAT BRANDS LLC

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December 30, 2015

CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellant Intercontinental Great Brands LLC certifies the following:

1. The full name of every party or *amicus* represented by us is:

Intercontinental Great Brands LLC

2. The names of the real party in interest represented by us is:

Intercontinental Great Brands LLC

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

Intercontinental Brands LLC is the parent corporation of Appellant Intercontinental Great Brands LLC; Mondelēz Global LLC is the parent corporation of Intercontinental Brands LLC; and, Mondelēz International, Inc. is the parent corporation of Mondelēz Global LLC. Appellant Intercontinental Great Brands LLC discloses that no publicly held corporation owns 10% or more of its stock.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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CONFIDENTIAL MATERIAL OMITTED

The material omitted on page 2 describes the Kellogg's marketing strategy and marketing research; the image omitted on page 5 shows Kellogg's packaging research and development; the material omitted on page 15 described Kellogg's marketing strategy and marketing research; the material omitted on page 16 describes the Kellogg's packaging development strategy, marketing research, and a Kellogg sales plan indicating a dollar amount of projected gross sales. The omitted material has been designated confidential by Kellogg pursuant to the protective order entered by the district court in this case.

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STATEMENT OF RELATED CASES

No appeal was previously taken in this case to this or any other appellate court. Counsel for Appellant (hereinafter "Kraft"[1]) is unaware of any other case that may directly affect or be directly affected by this Court's decision in this appeal.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this patent case under 28 U.S.C. §§1331, 1338(a). Final judgment was entered on August 25, 2015, and Appellant timely appealed on September 21, 2015. A1. This Court has jurisdiction under 28 U.S.C. § 1295(a)(1).

INTRODUCTION

In 2005, Kraft introduced the first resealable package for cookies, known as "Snack-N-Seal." It was the first time that consumers were offered a package that allowed easy access to the cookies inside with a convenient resealing mechanism

[1] In 2012, Kraft Foods Inc. entered into a series of internal reorganization transactions. The North American grocery business was "spun off" and is held by Kraft Foods Group, Inc. The global snack business, including Oreos, Chips Ahoy! and Fig Newtons, was retained by Kraft Foods Inc., which changed its name to Mondelēz International, Inc. Mondelēz International, Inc. is the parent company of Intercontinental Great Brands (previously known as Kraft Foods Holdings, Inc.), the holder of the patent at issue. Intercontinental Great Brands originally licensed the patent to Kraft Foods Inc., which widely used it with the above-named Nabisco brand of cookies. For simplicity, we refer to the patentholder-appellant as "Kraft."

to preserve the freshness of the unused product without removing the frame from the wrapper. Kraft's iconic cookie brands Oreos, Chips Ahoy!, and Fig Newtons are sold in the Snack-N-Seal package. Consumers initially viewed the new packaging with skepticism, but it quickly took the market by storm and won the industry's highest award for packaging innovation. This innovation is embodied in U.S. Patent No. 6,918,532 (the "'532 patent"), the patent at issue in this appeal.

It was not only consumers and industry panels, however, that saw Snack-N-Seal as a breakthrough innovation. Soon after the introduction of Snack-N-Seal, Defendants-Appellees (together "Kellogg") decided that they too needed a resealable cookie package, remarking that Kraft's package was the new "[redacted]" and "[redacted]" for the cookie market. A5006; A5188; A5257; A5201. But rather than innovate, Kellogg decided to steal Kraft's invention, going so far as to call its copy "[redacted]" in its internal documents. A4942-44; A4950-51. This litigation began after Kellogg started selling some of its cookies in its strikingly similar resealable packaging.

Notwithstanding significant evidence that Kraft's patented design was innovative, the district court ruled the '532 patent invalid as obvious on summary judgment. That ruling depends on several errors, including improperly treating strong objective indicia of nonobviousness as a mere afterthought, resolving genuine factual disputes against Kraft, and failing to give proper deference to the

decision of the Board of Patent Appeals and Interferences ("Board") upholding the patent in reexamination. The district court separately erred in introducing a new claim construction at summary judgment, directly opposite to the construction in its *Markman* decision only months before, which led the court to grant summary judgment of no literal infringement.

Once the court's legal errors are corrected, summary judgment of invalidity and no literal infringement cannot stand. The summary judgment decision should be reversed and the case remanded for trial.

STATEMENT OF ISSUES ON APPEAL

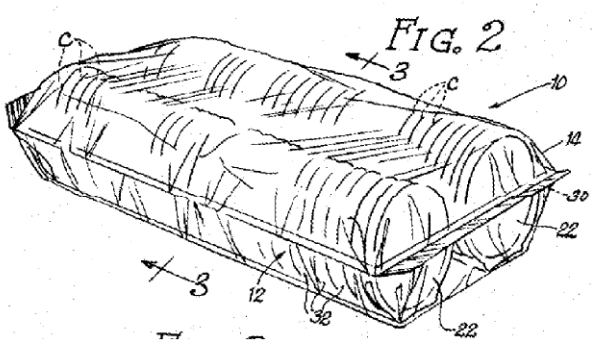
1. Whether the district court erred in ruling on summary judgment that independent claims 1 and 34 and dependent claims 3, 4, 6, 26, 32, 33, 35, 36, 37, 39 and 42 of the '532 patent are obvious.

2. Whether the district court erred in its construction of "sealing layer" and in entering summary judgment of no literal infringement based on that construction.

STATEMENT OF FACTS

I. THE PROBLEM: IDENTIFYING A LOW-COST PACKAGING SYSTEM THAT EARNED CONSUMER ACCEPTANCE

Before the '532 invention, cookies were packaged in a frame covered by a wrapper.[2] The Graham prior art reference (U.S. Patent No. 3,740,238), on which the district court relied, shows such a traditional cookie package:



A1905; A1909. Consumers would tear open one end of the package, pull out the tray, remove cookies, and force the tray back inside the wrapper hoping not to tear it further. Consumer dissatisfaction with this traditional frame-in-wrapper package was well-known. A5282; A5289 (the "bags tear during initial opening and were hard to reseal," it is "difficult to place cookie/cracker tray back in bag," and the snacks "do not stay fresh"). Consumers would commonly transfer the snacks to a zip-lock bag or other container. A5289; A806; A6340(310:13-18); A6341(315:3-

[2] The wrapper is also known as "flow-wrap," which refers to an "outer surrounding wrapper." A2925-26.

CONFIDENTIAL MATERIAL FILED UNDER SEAL REDACTED

12). Nonetheless, consumers were "unwilling to pay a lot more for better packaging." A5289.

Kraft and Kellogg each researched new package options in an effort to solve this problem. Both companies considered resealable options, such as a tray with a lid, a slide zipper, a sticker, a tin tie, or a top seal. Kellogg considered numerous options, all of which it rejected:



A5236; A4959; A5176; A5188; A5205-07; A5222-23; A5231; A6335(229:1-22); A6336(235:10-236:25), A6343(392:51-393:20). Kellogg spent years trying to solve the problem. A6342(324:4-11).

II. THE SOLUTION: KRAFT'S SNACK-N-SEAL AND THE '532 PATENT

In 2002, Kraft decided to address consumer dissatisfaction with traditional cookie packaging head on. A5380. It hired outside consultants James Mandle and Charles Flynn, two of the eventual named inventors on the '532 patent. A5380. Mandle and Flynn delivered a book of ideas for new packaging that would require little capital investment. A5380-81. One of these ideas involved using an access opening in the package's top with a reclosable sealing layer that, when pulled back, exposed substantially all of the cookies inside, allowing the cookies to be selected individually without removing the frame from the package. A5381.



A5297. Kraft separately conducted a packaging brainstorming meeting at MIT to generate over a hundred more packaging ideas. A5380-81.

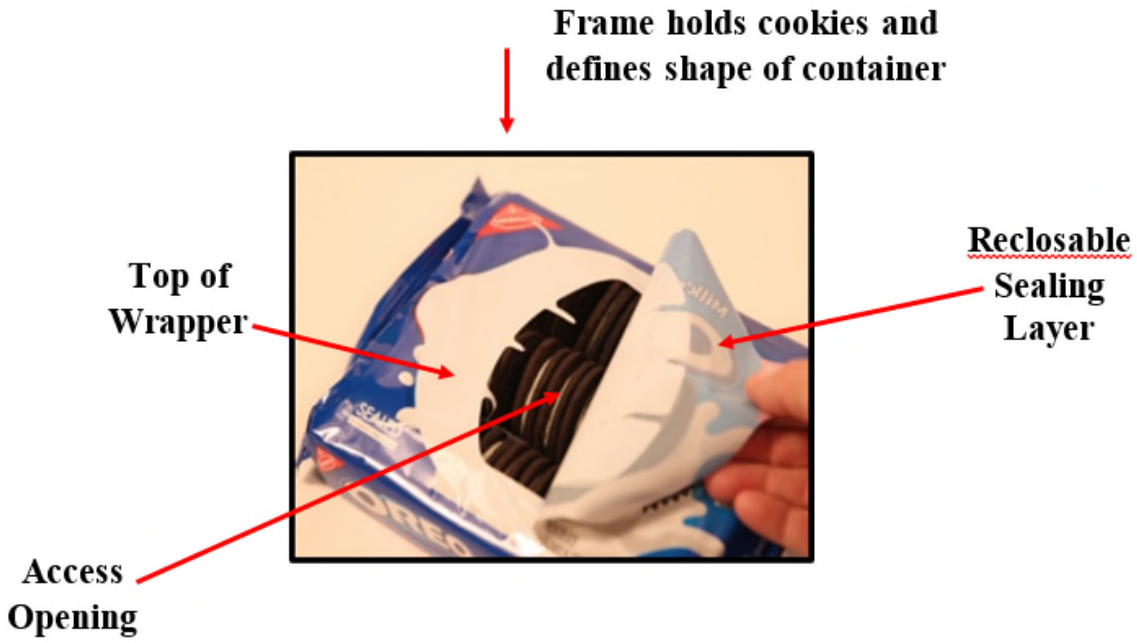
Kraft then took the consultants' ideas and the MIT ideas and narrowed them through testing. A5381-82. Although the resealable idea showed some promise, it

also drew skepticism from preliminary consumer testing: consumers did not believe the package would reseal over and over again or provide freshness. A5297; A5381-82; A5364. Nonetheless, it was the best option Kraft identified: the package was resealable, simple to use, and met the four basic packaging fundamentals —containment of product, protection of product, utility (filling and dispensing), and communication regarding the product at a very low additional cost. A5374; A5381.

On April 16, 2003, Kraft filed the patent application that later issued as the '532 patent. The specification describes a "new and improved resealable container having a reclosable sealing layer which can be pulled back and reclosed against a top portion of the container." A92(1:6-8). The "purpose of the present invention is to provide a new and improved container for food products such as rigid food articles, for example, cookies and the like, which container provides adequate protection for the contents thereof, while concurrently facilitating opening of the container wrapper and resealing the seal to protect the contents thereof until the contents are fully consumed." A92(1:39-46).

Claim 1 of the '532 patent identifies four key parts of the invention: (1) a frame, (2) a wrapper, (3) an access opening in the top of the wrapper to allow hand access to substantially all of the contents, and (4) a sealing layer that releases to provide hand-access to the top opening and recloses to seal the top access opening

by sealing against or overlapping with the top wrapper. A94(5:28-51). The claims require the wrapper to form the bottom and sides and to continue around the edge of the frame to make the top of the container, which has a hand-sized opening in it. *Id*.(5:34-41). Notably, the "top" as claimed is defined as the part of the wrapper that extends over the sides of the frame and includes the top access opening. *Id*. It is the ***sealing layer*** that closes and seals the top opening by overlapping with the top of the container and releasing to provide access to the opening in the top. *Id*.(5:42-51). The claims do not limit how the sealing layer is attached to the top, nor do they limit whether the sealing layer is a separate piece of material or made of the same material as the wrapper, as long as the sealing layer seals the top opening. The district court's *Markman* order thus defined the sealing layer as "distinct" from the top, but (correctly) specified that "[t]his does not mean … that the sealing layer must be physically separated from the top of the container or, more specifically, from the wrapper that forms the top of the container." A45.



A3478.

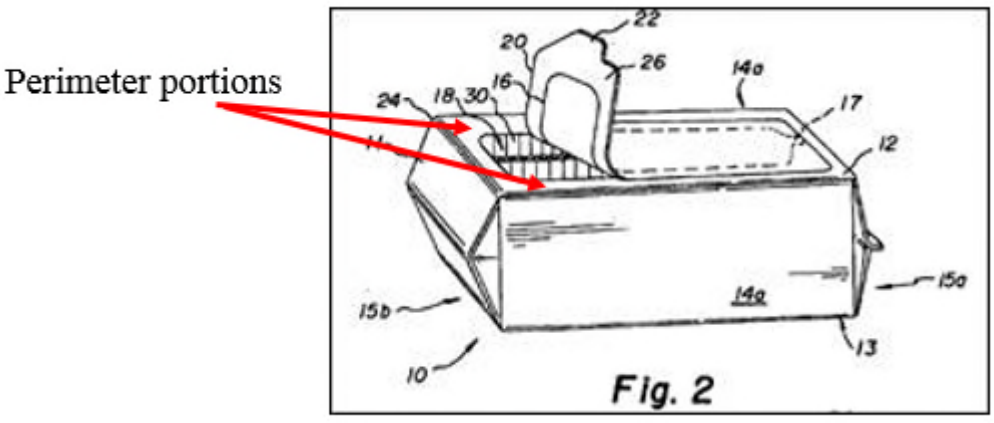
Claim 1 of the ’532 patent recites:

> 1. A polygonal shaped food container comprising:
>
> a **frame** defining the polygonal shape of the container, said container having a top, a bottom and side connecting the top and bottom, the frame containing a food product comprised of discrete food articles;
>
> a **wrapper** surrounding said frame, said wrapper forming the top sides and bottom of the container;
>
> **said top having an access opening sufficiently large to provide hand access to substantially all of the discrete food articles contained within the frame**, such that substantially any one of the discrete food articles can be accessed and removed individually through said access opening; and
>
> **a sealing layer**, **adhesively sealed to said top around said opening**, said sealing layer including a starter portion located near a side of the top which can be grasped by

> a user, said sealing layer being releasable when said starter portion is pulled in a direction away from said side to in turn pull and thereby release at least a portion of said sealing layer **to provide the hand access to said top access opening** and **reclosable against said top to seal said opening when said sealing layer is moved back against the said top**.

A94(5:29-51) (emphasis added).

Independent claim 34 of the ’532 patent is similar to claim 1, using the word “overwrap” instead of “wrapper.” A100(1:57-2:24). Unlike claim 1, however, in claim 34 the frame (not the food) must support the top of the wrapper so the top wrapper is “in a plane generally parallel to the bottom of the frame.” Claim 34 also expressly requires “the overwrap top” to have “at least a pair of facing overwrap perimeter portions inward of the periphery portion of the frame,” and perimeter portions that capture the frame in the overwrap to guard against unintentional removal of the frame through the opening. A100(1:65-67; 2:10-13). The “perimeter portions” are the top of the wrapper portions of Figure 2 below:



A85.

Dependent claims add further requirements to the claimed frame. A100(claims 26, 32, 33, 35, 36, 42). Claim 26 depends from claim 1 and requires the frame to have an upper periphery portion, among other things. *Id*. Claims 32 and 36 require that the frame have dividers. *Id*. Claims 33 and 37 require the frame to contain "cookies susceptible to damage" and that "the frame and wrapper cooperate to protect the cookies from damage." *Id*. Claims 35 and 42 require the frame (not the food) to be the support "for elevating the wrapper at the top of the container." *Id*.

Dependent claims also recite: a "starter portion compris[ing] a tab which projects past an edge of said top at one side of the container, said tab being accessible beyond the edge to be grasped" (claim 3); "graphics" on the sealing layer that match the top of the container (claim 4); and "tamper-evident structure" (claim 6); and "that the sealing layer covers substantially the entire top" (claim 39). A94; A100.

The specification describes one preferred embodiment, in which the sealing layer is made by applying an adhesive label to a flap cut in the top of the wrapper, identified as sealing layer 20 in the patent's Figure 2. A93(3:12-23); A85; *see supra* p. 10. During prosecution, Kraft disclosed a second embodiment, which it used for its Oreos packaging, wherein the sealing layer was made out of laminated

material with laser cuts between layers, creating the reclosable sealing layer and the area where the sealing layer overlaps with the top of the container to seal the top opening. A731; A2923-24. Kraft only marketed Oreos using this manufacturing method. A5382.

Chips Ahoy! (2005)
(sealing layer is made by an adhesive label applied over a flap cut in the wrapper)



Oreos (2007)
(sealing layer is made by splitting laminated layers of wrapper)



A5944; A5875; A3478; A5944; A6537.

Kraft demonstrated and disclosed both embodiments to the Examiner during the initial examination and to the Board during reexamination. A731; A2924; A757-762; A764; A768; A771; A778; A783; A785; A787; A805-07; A811-13; A820; A824; A827; A830; A835; A838-40; A842-48; A850-53; A855-858; A860.

III. SNACK-N-SEAL IS PRAISED, WINS AWARDS, AND INCREASES SALES

Kraft's commercial introduction of Snack-N-Seal in 2005 changed the cookie packaging landscape. Previously, consumer testing in June 2003 revealed that consumers were "dissatisfied with current snack food packaging" and complained that bags tore when opened and were hard to re-seal, that it was difficult to replace the cookie trays into the bags, and that the snacks did not stay fresh. A5282; A5289. Food & Drug Packaging (October 2007) highlighted that, before Kraft's Snack-N-Seal packaging, the "tray pack for Oreo cookies long cried for improvement; consumers complained that the cookies went stale in the unsealable pack before they could all be consumed." A738-39; A778; A875-76.

Kraft's Snack-N-Seal invention solved the problem and earned industry praise where others failed. A805-07; A811-13; A881. In 2006, Snack-N-Seal won a DuPont Gold Award, which is one of the "highest industry awards innovative packaging can receive." A735-37; A751-52; A757-62; A764; A874-75. Kraft's entry for the DuPont Award focused on the patented invention, noting that "the

package gives consumers a reclosure solution for this format, which had not been previously achieved." A736; A760; A875. CNNMoney.com (October 2006) named Kraft's Chips Ahoy! one of six products that "out designed the competition." A738; A785; A876. Baking Management stated that, with Snack-N-Seal, "Kraft's packaging team was able to deliver a true innovation to the market place." A738; A768. Food & Beverage Packaging praised Snack-N-Seal as an "example of a food manufacturer responding to consumer feedback" and highlighted Kraft's 2006 DuPont Award for innovation. A738; A782-83.

Consumers and commentators also praised Snack-N-Seal effusively. A806-807 ("What a concept!"); A824 ("I saw the new package and had no expectations for it to work. I was very wrong! The new resealable package held tight time after time … I am majorly impressed by the innovative packaging and would recommend to anyone. We no longer have to transfer our Oreos to a plastic container!"); A794-95 ("Whoever invented it should be made president of the company."); A802 ("This design should receive an award of some kind."); A793 ("I think this is a very unique idea with packaging. It intrigued me. Leave it to [Kraft] to come up with something so nifty. It's very convenient. I like the cookies too.").

Kraft also had the unusual opportunity to test and compare sales of cookies marketed in traditional packages to the same cookies in the new patented Snack-N-

Seal package. Market Management Analytics, an independent firm, isolated the impact of Snack-N-Seal on sales and found a 4% boost in sales due to the new packaging. A744-45; A838; A1343-45. This is a significant effect; for packaging, a 1% increase in sales is viewed as successful. A744-45. Another independent firm, Ipsos, compared Oreos and Chips Ahoy! in the traditional package to the same cookies in Snack-N-Seal, and found that consumers preferred the Snack-N-Seal packaging "three to one over traditional packaging." A745; A844; A880-81. AC Nielsen also found a 13% increase in sales of Chewy Chips Ahoy! sold in Snack-N-Seal packaging. A745-46; A855-858; A860. Ipsos made similar findings. A860.

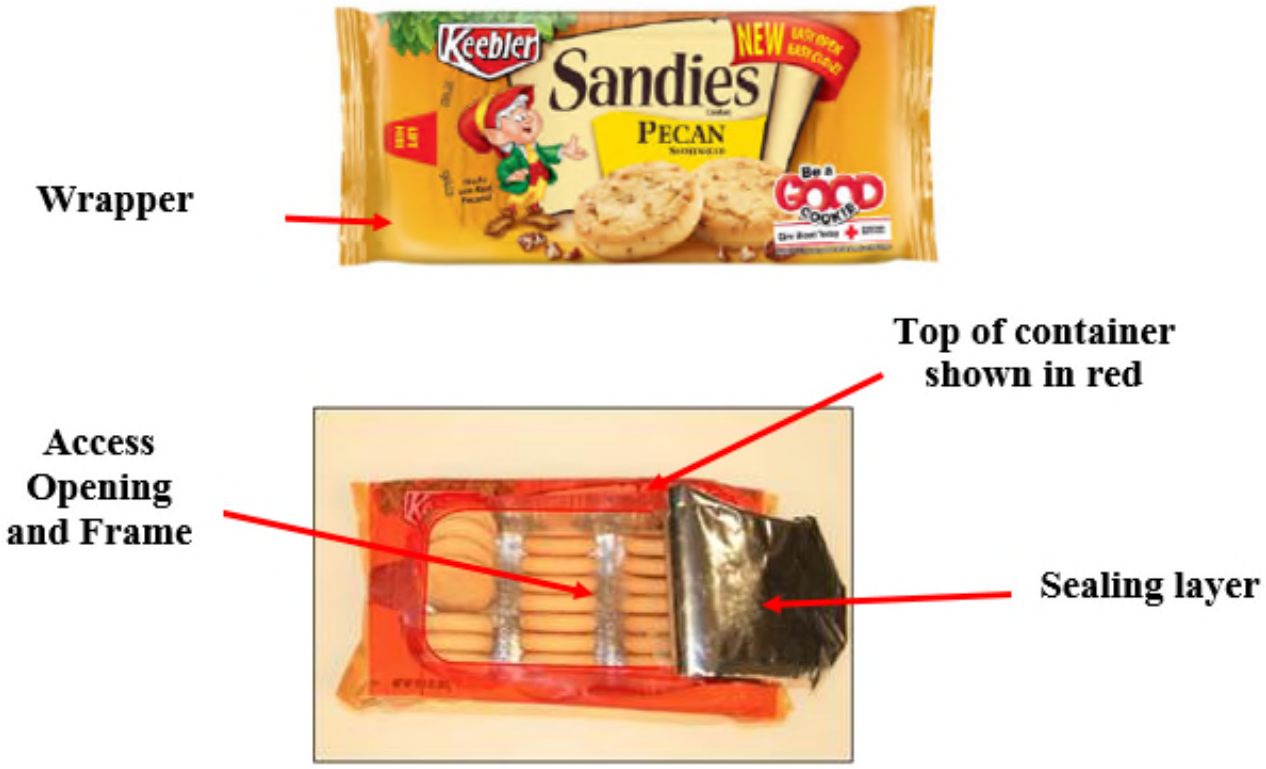
IV. KELLOGG DELIBERATELY COPIES KRAFT'S PATENTED INVENTION

Kellogg watched the launch of Kraft's Snack-N-Seal packaging with great interest, and reverse engineered the packaging shortly afterwards. Kellogg used Snack-N-Seal as the standard for internal research and development, calling its copied product "[redacted]." A5226-31; A3288; A4942-44; A4950-51; A4958. Kellogg considered at least [redacted] kinds of resealable packages against the copied '532 design, but none matched the consumer acceptance and low cost of Kraft's '532 invention. A5171-72; A5388; A6335(229:1-22); A6336(235:10-236:25); A6343-44(392:51-393:20). Kellogg found that Snack-N-Seal "[redacted]

[redacted]" compared to other resealable designs. A4962. Kellogg's corporate witness testified: "As we tested Snack 'N Seal, it went from very much skepticism on the part of consumers, and as it was in the marketplace for a longer period of time, became more familiar with the consumers, it became the package that was acceptable to them." A6342(323:6-14). This is confirmed by Kellogg's own documents, which noted at first that Kraft's "[redacted]." A5196. Subsequently, however, Kellogg called Snack-N-Seal the "[redacted] in the cookie package industry, and mapped out a [redacted]. A5257; A4981-83.

To develop its commercial product, Kellogg hired an outside consultant, who was formerly employed by the company that manufactured Kraft Snack-N-Seal, "[redacted]." A5244. After Kraft's '532 patent emerged from reexamination unchanged, Kellogg met with its legal department again to "[redacted]" A5242. Kellogg decided to use a frame covered with a wrapper having an access opening in the top and a resealable layer. Kellogg manufactured the top of its container in two parts: a colored wrapping film and a clear adhesive collar affixed

to the top. A5408; 5493-94. The collar borders on the top opening and provides an area that overlaps with and seals to the sealing layer. *Id.*



The district court found the "evidence shows that Kellogg intentionally copied [Kraft's] packaging." A29.

V. AGENCY PROCEEDINGS

During the initial prosecution of the '532 patent, the Examiner issued obviousness rejections based on traditional wrappers surrounding food held in a frame, resealable diaper wipe containers, and stacked food accessible through an opening in the top/side of the package. The Examiner also considered the Graham

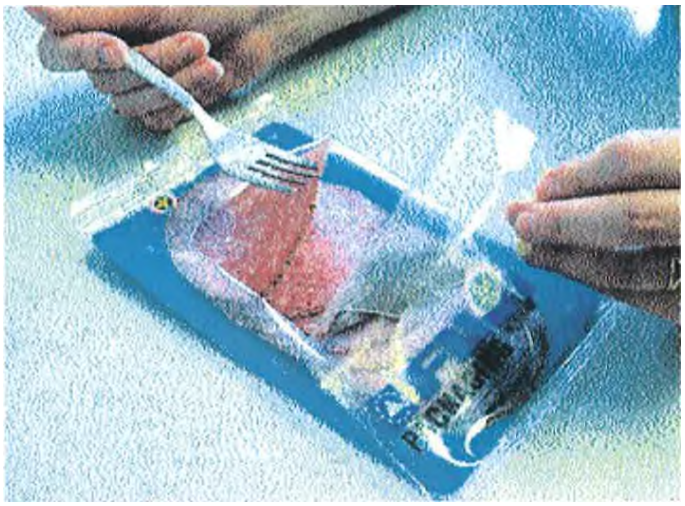
prior art reference, which discloses a cookie frame completely surrounded by flow-wrap, with no resealable access opening. A417; *see supra* p. 4. The claims were amended to highlight that the claims were directed to accessing discrete (not stacked) food items from the top (not side) of a package. A375-76; A381; A398; A411. Providing a hand-sized access opening that allowed for substantially all of the cookies to be accessed from the top opening was also highlighted. The Examiner allowed the claims and the '532 patent issued on July 19, 2005. A414, A83.

Shortly after Snack-N-Seal was introduced into the marketplace, Regath, the patent holding company of a packaging company called MacFarlane, requested a reexamination of Kraft's '532 patent. Regath asked the Patent and Trademark Office ("PTO") to reconsider patentability in light of two foreign trade journals detailing MacFarlane's foreign packages. A603-07. These journal articles are "Packaging News" and "Machinery Update" (2002)—with the latter being the "primary" reference ultimately relied on by the district court. A97; A658. MacFarlane developed various packages having differently shaped openings and different resealable labels. MacFarlane refers to the resealable label as "Re-Seal It," which is a Swedish technology. A634(584:24-585:23); A6299-6305. No Re-Seal It package was commercially available or publicly known or used in the United States before the filing of the application for the '532 patent.

In its Request for Reexamination, Regath charted the claims of Kraft's '532 patent against Packaging News and Machinery Update (2002). A620-42. Regath told the PTO that "Packaging News discloses a food container that accepts rigid or discrete food articles, and Machinery Update simply illustrates the wrapper of the Packaging News container more clearly." A618; A485-86. The Examiner initialed and considered both articles. A679. The Examiner found that Machinery Update is "shown to disclose the same limitations as Packaging News for the independent claims (just fewer of them). Machinery Update, therefore, is substantially equivalent to the disclosure of Packaging News." A672-73.

Packaging News describes three packages. First, as an inventor of the '532 patent explained, it describes what is considered "traditional flow-wrap without a tray" with Re-Seal It technology. A867; A898. This container is described in the second paragraph of the article as using a "Fuji FW3710B flow-wrapper" machine; the article also states that "Re-Seal It allows flow-wraps of bacon, sliced cooked meat, cheese and similar food products …to be opened and then resealed." A4713. This package is also depicted in the photograph and described in Machinery Update (2002). A4423.

Stacked Meat Package of Packaging News and Machinery Update (2002):



A4423.

Second, the last paragraph of Packaging News describes the use of Re-Seal It with "trays of high value food such as sushi or canapes," referred to herein as the "sushi package." A4713. This same package is described in Machinery Update (2002) as having an "aperture that can extend around the edge of the pack" to allow for tray removal and service of food. A4424.

Third, Packaging News shows a "sausage package" made with "a tray with a lid having the Re-Seal It technology." A898; A867. Packaging News contains a photograph, captioned "The Re-Seal It system in action," showing a tray holding sausages and with wrapping film only on the top of the package, along with a resealable label over the die-cut opening in the film. A4713. This same photograph is reproduced in Machinery Update (2001), a short article on the same technology. A4708.

Sausage package of Packaging News and Machinery Update (2001):



Paramount Packaging: *Re-Seal It flow-wraps provide longer 'larder life'*

A4708.

Describing Re-Seal It, Packaging News notes that, because "Re-Seal It does not involve 'the expense of plastic profile,' the "flow-wrapper can also run at normal speed," and that the "system operates without conventional wrapping film, first die-cutting three sides of a rectangle to produce a flap, which is held in place by small notches" using the "Fuji flow-wrapper's film feed system." A4713.

Although Packaging News discloses three different packages, the sausage package was the focus of rejections during reexamination. The Examiner rejected the claims as obvious over Graham's traditional cookie package with flow-wrap

around the frame, combined with "the access opening and sealing layer of Packaging News." A1906-07; A1914.[3]

Kraft offered the PTO detailed reasons why Graham and Packaging News are not properly combinable, given that they involve diverging packaging technologies and the record showed no motivation to combine them. Kraft explained that a skilled artisan would not add a reclosure feature to Graham, because "Graham is designed for initial opening at one of its ends, while the packaging of Packaging News is designed for multiple openings and reclosings." A1769. The Graham package has a "generally loose, very thin, flexible wrap" that permits one package to nest within another. *Id*. The film on the top of Packaging News (as shown in the photograph) is a "stiffer and thicker lid and filmic label that will not permit nesting in the same way as Graham." *Id.*; *see* A1769-70 (nesting "would jeopardize the integrity of the reseal structure" of Packaging News).

Kraft contrasted the trays in Graham and in Packaging News and detailed why a skilled artisan would not have combined the references. The Graham tray is intended to be "resiliently flexible" to conform to the cookies and to "spring outwardly when shock forces are exerted against the cookies." A1771. The tray in

[3] The Examiner also rejected claims based on modifying a packaging tray wrapped with cellophane (Gilley) "by adding the access opening and sealing layer of Packaging News." A1911-14.

Packaging News, by contrast, is "significantly more rigid and is not conformable to the food products." A1771. Graham is also configured for "one-time opening" and uses "inexpensive, very-thin flexible wrap" and "thin, inexpensive trays." A1771. Packaging News, by contrast, "uses an expensive, thick lid film," adds an expensive label for reclosure, and uses "a thick tray made with expensive barrier resins." A1771.

In addition, Kraft explained that if the goal was to create a resealable package, there are many potential solutions – not just the one shown in the '532 patent – and only hindsight would lead to the patented solution. A1774. Resealable options include: use of tin ties, twist ties, adhesive tape for reclosing one end, a clip to pinch the end of the package, a zipper strip at the end or side of the package, and a pinch seal strip at an end or side of the package. A1773-75.

After the Examiner rejected the claims, Kraft appealed to the Board. The Board reversed all rejections, including the combination of Graham's traditional cookie package and the resealable layer from Packaging News, and allowed all claims unchanged. A1914-16. The Board criticized the Examiner's use of "impermissible hindsight" and found that the significant evidence of objective indicia of nonobviousness rebuts the "tenuous contention of obviousness based on the combination of Graham and Packaging News." A1915.

VI. PROCEEDINGS BELOW

A. Markman Ruling.

Kellogg marketed its copy of Snack-N-Seal in its Sandies and Simply Made lines of cookies. Kraft sued Kellogg for infringement, asserting 13 claims of the '532 patent at the time of summary judgment. As relevant here, the district court's *Markman* order construed "sealing layer" as "a distinct layer that seals to the top" of the container. A45. The court explained that its construction "does not mean, however, that the sealing layer must be physically separated from the top of the container." *Id*. The court stated: "In other words, 'distinct' and 'separate' have different meanings in this context." A45. The court construed "frame" as "a tray with bottom and sides." A47-48.

B. Kraft's Evidence Of A Genuine Dispute Of Material Fact Regarding Obviousness.

Kellogg moved for summary judgment of obviousness and noninfringement. Kellogg's summary judgment motion asserted obviousness based on any combination of five prior art references: Machinery Update (2002), Fuji Seal, Unitka, Kao, and an alleged prior art MacFarlane package. A4162. Kellogg's only citation to Machinery Update (2001) was as circumstantial evidence of a foreign prototype. *See* A4168 n.22 (referred to as Machinery Update 2). Notably, Kellogg did *not* assert the combination the district court ultimately relied on – a combination of packages in Machinery Update (2002 or 2001) combined with

Graham's traditional cookie frame and wrapper – and did not rely on Packaging News. Kellogg's expert offered no opinion on that supposed combination; the district court devised that combination on its own.

As for Machinery Update (2002), the testimony of Kellogg's expert, Dr. Keith Vorst, was the following conclusory sentence:

> [T]o the extent [Kraft] purports to identify any differences between Machinery Update and the limitations of the Asserted Claims, it is my opinion that one of ordinary skill in the art would know to supply such limitation(s) based on the disclosure of Machinery Update itself and/or his or her knowledge and experience.

A4789.

By contrast, Kraft offered detailed expert testimony that a skilled artisan would not have found the asserted claims obvious over Machinery Update and the prior art relied on by Kellogg. Kraft's expert, Dr. Sher Paul Singh, is an engineer with degrees in Mechanical Engineering, Packaging, and Agricultural Engineering, was a professor at the School of Packaging at Michigan State University for over 26 years, and now serves as President of Packaging Forensics Associates, Inc. and Professor Emeritus at Michigan State University. A5368. Dr. Singh has over 31 years' experience in the packaging industry and is a lifetime Certified Packaging Professional. A5368. Dr. Singh addressed Kellogg's broad, general obviousness statement, opining that the combinations proposed by Kellogg's expert would "destroy the functionality of each of the packages disclosed in the references,

which have different principles of operation and require different materials and construction." A6134-35. As Dr. Singh explained, the flow-wrap of sliced meat shown in the photograph of Machinery Update (2002) is a "pillow-pouch or bag package for shingled, sliced meat with a reclosure feature and no frame." A6146. No frame is shown in the photograph or described in the article. A6146; A6153. "It is well known to a skilled artisan that flow-wraps of bacon, sliced meat, and cheese are commonly made without any sort of frame." A6146. Additionally, in the stacked meat package of Machinery Update (2002), "only the top most layer of meat may be removed by hand from the top opening," whereas the '532 patent claims require access to discrete food items. A6148-49. Dr. Singh additionally relied on the reexamination record, which showed why the combination of a traditional cookie package and Re-Seal It (as shown in Packaging News) would not be obvious. A5375; A6135, *see supra* pp. 17-23.

Dr. Singh also addressed the "sushi" package mentioned in Machinery Update (2002), explaining that it is "deliberately designed to allow removal of the tray." A6167. The sushi package is described as using a reclosure feature with a side aperture for removal of the tray. A6147-48. Dr. Singh distinguished such a package from the patented invention, which has a top access opening that "allows hand access to substantially any one of multiple, individual discrete food articles" and that "keep[s] the frame within the wrapper." A6148 (explaining that the

claims were amended to distinguish over a side opening). These two packages "are for two very different kinds of food product and one of skill in the art would not have combined the features of a package designed to store sliced meat with those of a package for sushi that includes a tray." A6166.

Kraft also submitted evidence rebutting Kellogg's assertion that Packaging News contained a misprint. Kellogg asserted that the statement in Packaging News that Re-Seal It technology "operates **without** conventional wrapping film" should be read as though it stated the exact opposite, that the "system operates **with** conventional wrapping film." A4713; A4424(emphases added); A6528. Kraft explained that Regath submitted Packaging News and Machinery Update to the PTO during the reexamination and charted these references against the claims with no mention of any misprint. A97; A658. Regath would be uniquely situated to identify any misprint, given that its parent company, MacFarlane, co-owns the "Re-Seal It" packages described in Packaging News. A6427(71:22-72:17). Nor did Regath request a correction by Packaging News, even though—as Kraft demonstrated— it is common practice to correct an error, if one exists, in a publication's subsequent version. A6311(279:20-25); A6315(382:10-15); A6441(203:17-20); A6429(79:24-80:2).

Dr. Singh explained how a skilled artisan would understand the statement in Packaging News that Re-Seal It "operates **without** conventional wrapping film."

Specifically, Packaging News states that Re-Seal It used some kind of wrapping film and a "Fuji FW 3710B flow-wrapper." A6253-54. Dr. Singh explained that "[w]hether that wrapping film would be viewed as 'conventional' is subject to individual views. It is reasonable to consider conventional wrapping film as the type of wrapping film having no pre-cut holes." A6254. He viewed the Packaging News photograph as unclear; while he acknowledged that the photograph *could* be viewed as having flow-wrap around the package, he stated that he would need to see a three-dimensional package to know for sure. A6810-11.

Dr. Singh's reading of Packaging News was reinforced by the testimony of Gladys Odette Moncayo (*nee* Sierra-Gomez), an inventor of the '532 patent who holds Bachelor's and Master's degrees in chemical engineering and an M.B.A. and has over 12 years of experience with film development, packaging design, and commercialization of packaging materials and designs. Ms. Moncayo explained that the Packaging News photograph shows a tray and lid system, ***without*** surrounding flow-wrap. A896; A898. Ms. Moncayo testified that she reviewed Packaging News during the '532 patent reexamination, but did not believe the article contained any misprint. A6388(957:15-958:14) ("I read them independently and that's how I analyzed the documents, independently."); A6382(695:20-696:4) ("[I]f there is an error in the publication along while it was

presented, I would have expected a correction…. I never saw any corrections"); A6382-83(696:25-698:3; 698:9-19).

C. Summary Judgment Decision.

1. The court accords no deference to the Board's reexamination decision.

Although the district court recognized that Machinery Update (2002) was before the PTO and the Board during the reexamination, and "the examiner wrote his initials next to [Machinery Update's] listing," the district court declined to give any deference to the Board's allowance of the claims over Re-Seal It technology as reported in Packaging News. A8; A679. Ignoring that Packaging News and Machinery Update (2002) both disclose the same stacked meat and sushi packages, the court noted that the Board did not expressly reference Machinery Update (2002). A8. The Examiner never issued a rejection based on Machinery Update, likely because the Examiner found it "substantially equivalent to the disclosure of Packaging News." A8. The court concluded, however—notwithstanding Kraft's contrary evidence from Dr. Singh and inventor Moncayo—that Packaging News contained a "misprint" that meant it was not substantially equivalent to Machinery Update. A8-9. Specifically, the court ruled that the statement in Packaging News that the "system operates **without** conventional wrapping film, first die-cutting three sides of a rectangle to produce a flap, which is held in place by small notches" should be read as though it stated that the "system operates **with**

conventional wrapping film." A8-9 (emphases added). The court believed that the image "appears to show wrapping film, and the text states that the technology 'allows flow-wraps of bacon, sliced cooked meat, cheese and similar food products.'" A8. The court stated that "***[t]his suggests***, contrary to [Kraft]'s assertion, that the article's statement that the system operates 'without' conventional wrapping film is a misprint." A8-9 (emphasis added).

Separately, the court stated that the Board's decision did not deserve deference because it did not expressly reference Machinery Update (2002) in its decision. A9. The court did not discuss the Board's additional reasons for allowing the claims, including refusal to use hindsight, lack of any motivation to combine, and strong objective indicia of nonobviousness. A1914-15.

2. The court combines the different packages of Machinery Update (2002 and 2001) with Graham to find obviousness based on "common sense," notwithstanding significant objective indicia of nonobviousness.

The district court next sought to identify the elements of Kraft's patented invention in a combination of Graham and Machinery Update—a combination Kellogg had not asserted and regarding which Kellogg's expert had not testified. The two related Machinery Update articles at issue show different packages that the court found "disclose all of the limitations recited in claims 1 and 34, with the exception of the 'frame' limitation." A11. The court "primarily" relied on two of the packages in Machinery Update (2002): (1) "flow-wraps of bacon, sliced

cooked meat, cheese and similar food products that are consumed over a period of time to be opened, then reclosed to avoid drying out in the refrigerator," as depicted in a photograph in Machinery Update (2002); and (2) the description of a package for "trays of high value prepared food such as Sushi or canapé," described as having an "aperture" that "can extend around the edge of the pack itself," allowing the tray to be removed from the package for food service. A11-12. Both packages are disclosed almost verbatim in Packaging News. A4713.[4]

The court found that neither Machinery Update article disclosed the claimed frame. A11. For the that limitation, which the district court construed as "a tray with bottom and sides" (A12-13), the court looked to Graham, the same reference considered by the Board, as an example of a traditional frame-and-wrapper cookie container. The court concluded that all "of the independent claim limitations existed in the prior art at the time of the invention; traditional cookie trays meet the 'frame' limitation and Machinery Update discloses the other claim limitations." A16.

The court ruled that no evidence of a motivation to combine was needed, because the court could rely on what it called "common sense." A18. The court's

[4] The court also cited to the sausage package depicted in a photograph in Machinery Update (2001), which is the same photograph as in Packaging News. A11; A14-15; A4708; A4713.

conclusion disregarded Dr. Singh's evidence that a skilled artisan would not be motivated to combine the stacked meat package of Machinery Update (2002), which shows "a pillow-pouch or bag package for shingled, sliced meat with a reclosure feature and no frame," with a sushi package with sushi on a removable tray to be eaten at once. A6146. The court disregarded evidence that it is well-known that flow-wraps of meat are "commonly made without any sort of frame" and that changing the tray into a frame for the sushi package would serve no purpose but increased cost, which is to be avoided in package design. A6146-48; A6251-52; A6166-67; A4424.

The court recognized the evidence of initial industry skepticism surrounding Kraft's invention, including from Kellogg's own corporate witness. A19-20; A6342(323:10-14). The court weighed Kellogg's admission against Kraft, discounting Kellogg's witness's testimony since the "witness did not elaborate on this point, although his earlier statement that Kellogg had been interested in a resealable cookie package for years contradicts the notion that consumers were skeptical about resealable containers." A20. But even Kellogg's own documents demonstrated skepticism about the believability of the invention. A5196.

The court also drew inferences against Kraft with respect to motivation to combine. A21. Instead of crediting Dr. Singh's opinion that a skilled artisan would not be motivated to combine the different packages of Machinery Update,

the court found that "[b]ecause there is no genuine dispute that all elements of claims 1 and 34 are disclosed in the prior art and it would have been predictable for a person of skill in the art to combine those elements, Kellogg has made a strong prima facie showing of obviousness as to independent claims 1 and 34." A22-23.

After finding obviousness, the court finally considered objective indicia, on which Dr. Singh and inventor Moncayo had also given detailed testimony. A6243-52; *see supra* pp. 13-17. The court ruled that Kraft "presented substantial evidence of secondary considerations of non-obviousness" on commercial success, long-felt but unsolved need, praise by others, and copying. A28-29. Nonetheless, the court concluded that "the secondary considerations do not overcome Kellogg's extremely strong prima facie showing that the invention was obvious in light of *Machinery Update.*" A30.

3. The court reconstrues "sealing layer" and limits the claims to the preferred embodiment, and then grants summary judgment of no literal infringement.

As noted above (pp. 24), the court's *Markman* order construed the "sealing layer" in the '532 patent as "a distinct layer that seals to the top" of the container, noting that this "***does not mean***, however, that the sealing layer must be physically separated from the top of the container." A45 (emphasis added); *see also id.* ("In other words, 'distinct' and 'separate' have different meanings in this context."). On summary judgment, however, the court reversed course, stating that the sealing

layer "***must be*** a separate piece of material." A32 (emphasis added). The court further found that "the word 'layer' and the surrounding language in the claim and specification indicated that the top and the sealing layer must be ***separate*** pieces of material." A33 (emphasis added).

The reconstruction had a significant effect on the determination of literal infringement. The sealing layer in Kellogg's accused products is distinct from the package's top; the sealing layer overlaps and seals against the top, which is made of the wrapper and the affixed adhesive collar, and which defines the access opening. The court found a question of fact on doctrine of equivalents, but found no literal infringement because, under its new claim construction, Kellogg's "sealing layer" was not a "separate piece of material" from the top. A32-34. The court's ruling also called into doubt whether Oreos, an embodiment that Kraft demonstrated to the PTO and Board as an example of the patented invention, was encompassed by the claims. *Id*.

SUMMARY OF ARGUMENT

The district court erred by finding obviousness before considering the objective evidence of nonobviousness. The objective indicia should have been reviewed alongside any prior art combination; once that is done, there is plainly a genuine issue of fact that a jury should have weighed.

The court also erred by creating its own prior art combination based only on what it believed was "common sense," with no evidence of a motivation to combine the references as it did. The court's conclusion—which improperly disregarded Kraft's expert's opinion and the reasonable inferences therefrom—fell into the very trap of hindsight that objective indicia are meant to avoid. If the court had considered the evidence as a whole and in the light most favorable to Kraft, it would have at least found a genuine dispute of fact for resolution by the jury. In addition to the "substantial evidence of secondary considerations of non-obviousness" (A28), Kraft provided detailed evidence of why a skilled artisan—operating without hindsight and without knowledge of Kraft's patented invention—would not have been motivated to combine Graham (traditional cookie package) and the packages in Machinery Update to make the claimed invention. A reasonable jury could have credited Dr. Singh's evidence on these points along with that of inventor Moncayo, as well as the evidence Kraft provided during reexamination, all of which demonstrated why a skilled artisan would not have combined a traditional cookie package like Graham with the Re-Seal It technology depicted in Machinery Update.

The court also erred by giving no deference to the Board's finding of nonobviousness. The Board found no motivation to combine the references absent use of hindsight. A1914-15. Further, it found that one would have to outright

ignore the objective indicia in order to believe that the combination of references rendered the invention obvious. A1915. In order to disregard the Board's finding, the court re-interpreted the disclosure in Packaging News—based on a disputed finding of a misprint in that reference—and mistakenly ruled that the Board forfeited any right to deference because it did not expressly reference Machinery Update (2002). A8-9. But the scope of the prior art should at the very least have been an issue for the jury, which would have been instructed to consider the claims in light of their presumed validity.

Finally, the court's grant of summary judgment of no literal infringement depended on an incorrect construction of "sealing layer." At *Markman*, the court construed the claimed sealing layer as a distinct, but not separate, layer that seals to the top of the container. A45. Distinct means "readily distinguishable," "recognizable," and "clearly defined." A4985. At summary judgment, however, the court changed its construction to require that the sealing layer be a "separate piece of material" that seals to the top of the container. A32. That construction was wrong and improperly limited the claims to the preferred embodiment.

The claims are broader; they provide that the sealing layer must seal to the top around the access opening, but they do not limit how the sealing layer is made, how it is attached to the container, or whether it is of the same or different material than the top of the container. A94(5:42-51) All the claims require is that the

sealing layer overlap with part of the top and seal the top's access opening. *Id*. This can be achieved through a separate piece of material, as in the preferred embodiment; by separating laminated layers to allow for the sealing layer to overlap with the top wrapper as in the Oreos package; or by affixing an adhesive collar around the top access opening to receive the sealing layer as in Kellogg's products. All meet the "sealing layer" limitation.

Once the construction of "sealing layer" is corrected—either to restore the court's original construction of a distinct layer that need not be separate from the container, or Kraft's original proposed construction identifying that the sealing layer must seal an opening only in the top, not the side/end surface, of the package—a jury issue on the factual determination of literal infringement remains.

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment is reviewed "without deference." *Plantronics, Inc. v. Aliph, Inc*., 724 F.3d 1343, 1353 (Fed. Cir. 2013). Obviousness is a question of law based on underlying questions of fact. The underlying facts "include: (1) the scope and the content of the prior art; (2) differences between the prior art and the claims at issue; (3) the level of ordinary skill in the pertinent art; and (4) relevant objective considerations, including commercial success, long felt but unsolved needs, [and] failure of others." *Id*. (internal quotation marks omitted).

Claim construction is a legal issue that this Court reviews *de novo*, but subsidiary factual issues that go beyond the intrinsic evidence are reviewed for clear error. *Teva Pharm. USA v. Sandoz, Inc.*, 135 S. Ct. 831, 842 (2015).

II. THE COURT IMPROPERLY TREATED THE STRONG OBJECTIVE INDICIA OF NONOBVIOUSNESS AS AN AFTERTHOUGHT AND RELIED ON HINDSIGHT TO FIND OBVIOUSNESS

"[A]ll evidence pertaining to the objective indicia of nonobviousness must be considered before reaching an obviousness conclusion." *Plantronics*, 724 F.3d at 1355. Objective indicia are not used to "overcome" a prime facie case of obviousness or to "save" a patentee from a finding of summary judgment. A29-30; *Plantronics*, 724 F.3d at 1355 (rejecting the district court's post hoc analysis of objective considerations of nonobviousness). Instead, they are considered along with all factors of obviousness and act as a check to guard "against hindsight bias" that arises when the inventor's success is used to "construct a selective version of the facts." *In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litig.*, 676 F.3d 1063, 1079 (Fed. Cir. 2012). Objective indicia prevent a court from falling into this kind of "trap … And, it is precisely why fact finders must withhold judgment on an obviousness challenge until [the fact finder] considers all relevant evidence, including that relating to the objective considerations." *Id.*

As this Court explained in *In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litigation*, had the district court "considered the objective evidence in its entirety before making an obviousness finding, and considered that evidence in light of the actual burden imposed upon a patentee and a patent challenger," the evidence would have led the court to find at least a genuine dispute of fact regarding the content of the prior art and the motivation to combine the prior art references. *Id.* at 1080; *see also Leo Pharm. Prods., Ltd. v. Rea*, 726 F.3d 1346, 1357 (Fed. Cir. 2013) (finding that objective indicia are "*part of* the whole obviousness analysis, not just an afterthought"); *Crocs, Inc. v. ITC*, 598 F.3d 1294, 1310 (Fed. Cir. 2010) (finding that objective indicia "can be the most probative evidence of non-obviousness").

Here, the district court found obviousness by locating the claims' various elements in prior art references, and then invoked "common sense" to combine them. However, "'common sense' may not be so apparent in view of objective evidence of nonobviousness (*e.g.*, commercial success and copying), particularly when all reasonable inferences are drawn in favor of the patentee." *Plantronics*, 724 F.3d at 1355; *see also Procter & Gamble Co. v. Teva Pharm. USA, Inc.*, 566 F.3d 989, 998 (Fed. Cir. 2009) (observing that secondary considerations of nonobviousness "may often be the most probative and cogent evidence [of non-obviousness] in the record"); *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*,

851 F.2d 1387, 1391 (Fed. Cir. 1988) (noting that the "commercial response to an invention is significant to determinations of obviousness, and is entitled to fair weight"). By writing off the patent before turning to objective indicia, the court erroneously fell into the hindsight trap.

The district court found "substantial evidence of secondary considerations of non-obviousness," including strong evidence of commercial success, copying, long-felt need, skepticism, and industry praise, all of which were shown to have a clear nexus to the patented invention. *See supra* pp. 6-7, 13-17. The district court erred by weighing this evidence only after it had already concluded that "common sense" provided a motivation to combine; a legally proper analysis would have concluded that the objective indicia would permit a reasonable jury to conclude that skilled artisans were ***not*** motivated to combine the asserted references to produce Kraft's claimed invention.

The court also erred by weighing unrefuted evidence of skepticism *against* Kraft. A19-20. The court recognized that Kellogg's corporate witness testified that consumers were skeptical of the invention, but disregarded that evidence because Kellogg's witness did not go into further detail on this point. *Id.* In addition, the patent survived reexamination on virtually the same prior art combination (Graham's cookie package with the resealing label of Packaging News), with the Board chastising the Examiner's use of hindsight bias in finding

the claimed combination obvious, but the district court found it could disregard this evidence. A8-9; 1913; A1915-16.

Nonetheless, the district court made clear that it did not view any of the objective indicia on the same analytical plane as its combination of prior art references, concluding that "the secondary considerations do not ***overcome*** Kellogg's extremely strong prima facie showing that the invention was obvious in light of *Machinery Update.*" A29-30 (emphasis added). The court also repeatedly noted its finding of obviousness before considering the objective indicia. A18; A19; A22; A23; A27; A28; A30. This is exactly the kind of "post-hoc analysis of objective considerations" this Court has held erroneous. *Plantronics,* 724 F.3d at 1355 (finding error in district court's evaluation of secondary considerations after it made a prima facie obviousness conclusion, where the district court's stated "[e]ven accepting as true Plantronics' assertions on these secondary considerations, they do not save Plantronics from summary judgment here since such secondary considerations simply cannot overcome a strong prima facie case of obviousness"). Objective evidence of nonobviousness "is not evaluated for its 'separate knockdown ability' against the 'stonewall' of the prima facie case," but instead is considered "together with all other evidence, in determining whether the invention as a whole would have been obvious" to a skilled artisan. *Applied Materials, Inc.*

v. Advanced Semiconductor Materials Am., Inc., 98 F.3d 1563, 1570 (Fed. Cir. 1996).

When properly considered as a co-equal factor, rather than a meaningless afterthought, the objective indicia show at least a genuine question as to whether a skilled artisan would have been motivated to combine the references to create the claimed invention. The jury should be allowed to hear and resolve that dispute.

III. THE DISTRICT COURT IMPROPERLY RESOLVED GENUINE FACTUAL DISPUTES AGAINST KRAFT

Patents are not limited to "complex inventions difficult for judges to understand and foreclosed to those who make less mysterious inventions." *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1572 (Fed. Cir. 1987). The patent system is open to "*all* the useful arts, not just the esoteric." *Id.* Simplicity can be deceptive and is often a "difficult thing to design, extremely difficult." *Id.* Here simplicity in packaging refers to making the package simple ***for consumers to use***, a specific meaning tied to consumer acceptance; it does not mean the package as a whole was simple to achieve. A5374-75.

The district court combined packages in Machinery Update (2002 and 2001), then changed them by adding the frame of Graham. The court then revised its own combination by changing the height of the Graham frame, which did not meet certain claim limitations that require that the frame (not the food) to support the

wrapper at the top.[5] A24-25. The court did all of this without expert evidence and based only on what it considered "common sense," but was in fact hindsight. *Id*.

On summary judgment, when invoking "'common sense' or any other basis for extrapolating from prior art to a conclusion of obviousness, a district court must articulate its reasoning with sufficient clarity for review." *See TriMed, Inc. v. Stryker Corp.*, 608 F.3d 1333, 1342 (Fed. Cir. 2010). Findings of obviousness based on common sense "must contain explicit and clear reasoning providing some rational underpinning why common sense compels a finding of obviousness." *Plantronics*, 724 F.3d at 1354 (internal quotation marks omitted). "Merely saying that an invention is a logical, commonsense solution to a known problem does not make it so." *TriMed*, 608 F.3d at 1343. Here, the district court had no evidence supporting a motivation to combine (Kellogg's expert did not opine on the same combination) or to change the prior art (combining packages and adding a deep frame) to meet the claims. The district court did not provide explicit findings justifying its claim of "common sense," other than to state in conclusory fashion that a skilled artisan would have "thought to combine a resealable container and a

[5] Claims 34, 35, and 42 require the frame to support the wrapper at the top of the container. A100. In Graham, the food itself supports the wrapper at the top of the container. A27.

frame big enough to contain cookies" since the result "would have been entirely predictable and grounded in common sense." A18. The failure to provide an explicit rationale for its conclusion that Kraft's breakthrough invention was the result of mere "common sense" was error.

The district court also erred by weighing against Kraft substantial evidence of the lack of any motivation to combine, including the fact that Kellogg specifically considered and rejected the combination and Dr. Singh's evidence. This was error. A reasonable jury could have found that a skilled artisan, like Kellogg's own internal experts, would not be motivated to combine the prior art references or modify them (by adding or changing the frame) to create the claimed invention.

A. A Reasonable Jury Could Find That A Skilled Artisan Was Not Motivated To Combine The Prior Art To Create The Patented Invention.

Major players in the relevant market sought a redesigned cookie package for years, considered and rejected many alternatives, and recognized Kraft's Snack-N-Seal as the long-awaited solution. The "crucial structural distinctions set forth in the claim limitations gave the claimed inventions the distinction that led the industry . . . to prefer [this] structure over anything in the prior art." *Panduit*, 810 F.2d at 1572.

What the court found to be "common sense" was clearly not common sense even to Kellogg's own packaging experts. In fact, Kellogg personnel ***rejected*** the idea of combining a traditional cookie package with the resealable technology that Kellogg now argues, and the district court purported to find as a matter of law, was reflected in Machinery Update (2002). A6328(99:17-23); A6366(81:8-82:6); A6367(85:13-86:19); A6368(91:14-93:20); A6369(96:8-19). Specifically, Kellogg asserted that it attended a foreign packaging trade show in 2002 and saw a Re-Seal It prototype package with a shallow tray and wrapper, which it kept confidential. A4166; A6329(110:17-23); A6347(583:23-584:21). Kellogg's internal experts reviewed the Re-Seal It package for potential use with Keebler cookies, but quickly rejected it.[6] A4640; A6328(99:17-23); A6366(81:8-82:6); A6367(85:13-86:19); A6368(91:14-93:20); A6369(96:8-19). Kellogg's own rejection of the prior art structure, along with the overwhelming response of the marketplace and industry to Kraft's patented invention, shows that Kraft's invention was not predictable or obvious from the prior art. *See Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 711 F.3d 1348, 1368 (Fed. Cir. 2013) (finding that

[6] On summary judgment, Kraft moved to exclude the confidential Re-Seal It prototype from consideration as prior art, since the package was not sold or publicly known in the United States before the '532 patent application was filed. The district court did not address the motion. A10 n.3.

evidence and testimony on secondary considerations showed the invention was "far less obvious than" the prior art, on its face, suggested).

Kraft's expert provided a detailed opinion on why a skilled artisan—operating without hindsight and without knowledge of Kraft's patented invention—would not have been motivated to combine the packages in Machinery Update with Graham to make Kraft's patented invention. A6135. Dr. Singh reaffirmed the position offered by Kraft in the '532 patent reexamination identifying why Graham and Packaging News (which discloses the stacked meat package of Machinery Update (2002) and the same photograph as in Machinery Update (2001)) are not properly combinable – a position ultimately adopted by the Board.[7] A6135; A1914-15. A skilled artisan would not add a reclosure feature to Graham because it is designed for one-time use, by "opening at one of its ends, while the packaging of Packaging News is designed for multiple openings and reclosings." A1769. During reexamination, Kraft also highlighted the differences in the trays: the Graham tray is inexpensive and "resiliently flexible" to conform to the cookies, while the Packaging News tray is expensive, "significantly more rigid," and "not conformable to the food products." A1771. A skilled artisan

[7] Dr. Singh's report did not separately address the district court's combination of Machinery Update (2002) and Graham, because Kellogg's expert Dr. Vorst had not done so either. Dr. Vorst also did not address Packaging News as a prior art reference.

looking to develop a low-cost cookie package would not have combined Graham with the hard, shallow tray of Packaging News, which uses expensive premium components.

Dr. Singh also explained (by adopting the reexamination analysis) that there is no reason an ordinarily-skilled artisan, operating without the benefit of Kraft's invention, would have selected the resealable label of Packaging News for use with a cookie package over less expensive solutions. A1771; A6135. Adding the label of Packaging News to the package of Graham "will not necessarily provide longer 'larder life' as compared to known reclosing features such as clips." A1773. There are many reclosure variations possible to address the known problem, such as tin ties, twist ties, adhesive tape for reclosing one end, a clip to pinch the end of the package, a zipper strip added to the end or side of the package, and a pinch seal strip added to an end or side of the package. A1774-75. That broad range of alternatives is strong evidence that the patented solution was nonobvious. *See Takeda Chem. Indus. Ltd. v. Alphapharm Pty. Ltd.*, 492 F.3d 1350, 1359 (Fed. Cir. 2007) (finding that claimed compounds would not have been obvious in light of prior art that "disclosed a broad selection of compounds any one of which could have been selected as a lead compound for further investigation").

Dr. Singh separately addressed Kellogg's general obviousness combinations, including demonstrating why a skilled artisan would not combine the stacked meat

and sushi packages in Machinery Update (2002). Such a combination would "destroy the functionality of each of the packages disclosed in the references, which have different principles of operation and require different materials and construction." A6134-35. In the stacked meat package, "only the top most layer of meat may be removed by hand from the top opening." A6148-49. As Dr. Singh explained, there is no reason why a pillow-pouch package for sliced food, as depicted in the photograph in Machinery Update (2002), would be modified by adding a frame from a sushi package. A6146-53.

Dr. Singh also opined that a skilled artisan would understand the sushi package of Machinery Update (2002) as being "deliberately designed to allow removal of the tray" from a side opening for food service. A6167. The article describes the sushi package as having a different opening location from the stacked meat and use of a tray intended to be removed from the outer wrapper – the opposite of the claimed invention. A6147-48 (noting that the '532 claims were specifically amended to distinguish from a side opening). Dr. Singh highlighted that the stacked meat and sushi packages "are for two very different kinds of food product and one of skill in the art would not have combined the features of a package designed to store sliced meat with those of a package for sushi that includes a tray." A6166.

A reasonable jury could have credited Dr. Singh's testimony and Kellogg's own rejection of the same combination, particularly given that Kellogg offered no evidence on motivation to combine. A6156.

B. The Court Erred In Construing The Scope And Content Of The Prior Art, Dismissing The Opinions Of Kraft's Expert, And Weighing Facts Against Kraft.

No evidence supported a motivation to combine the separate sushi and stacked meat packages discussed in Machinery Update (2002). Nonetheless, the court found that no reasonable jury could find otherwise, because the two packages were depicted on the same page of the article and both use Re-Seal It labels. A17. In doing so, the court failed to take the record in the light most favorable to Kraft, notably disregarding Dr. Singh's testimony that the Machinery Update sushi package had an opening that extended around the package's edge. The court instead found that the sushi package's "aperture ***can*** extend around the edge of the pack itself" but need not do so. A12. But there is no record support for the court's factual finding regarding the content of Machinery Update (2002), and certainly no reason to think that a jury could not reasonably agree with Dr. Singh's contrary understanding. *See Monarch Knitting Mach. Corp. v. Sulzer Morat GmbH*, 139 F.3d 877, 881 (Fed. Cir. 1998) (finding that the court imported "the ultimate solution into the problem facing the inventor" and took "an overly narrow view of the scope of the prior art"); *Sealant Sys. Int'l, Inc. v. TEK Global, S.R.L.*, 616 F.

App'x 987, 995-96 (Fed. Cir. June 11, 2015); *Cheese Sys., Inc. v. Tetra Pak Cheese & Powder Sys., Inc.*, 725 F.3d 1341, 1353-56 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 1542 (2014); *N. Telecom, Inc. v. Datapoint Corp.*, 908 F.2d 931, 934-936 (Fed. Cir. 1990).

The district court separately acknowledged that, even were a skilled artisan to combine the "top opening of the meat container and the tray of the sushi container" in Machinery Update (2002), Kraft's '532 patent still additionally claims the use of a frame not disclosed anywhere in Machinery Update. A16. For all asserted claims except claims 34, 35, and 42, the district court found such a frame in Graham's traditional frame-and-wrapper packaging. The district court ignored the evidence accepted in the reexamination, and adopted by Dr. Singh, showing why a skilled artisan would not have been motivated to make such a combination, and cited no evidence to support its proffered conclusion on motivation to combine or to modify the prior art references. That the record is devoid of any such evidence is not surprising, given that even Kellogg did not rely on this combination.

As for claims 34, 35, and 42, those claims additionally require the frame, not the food, to support the wrapper at the top of the container. In claims 34 and 35, the top edge of the frame must support the wrapper so that it is parallel to the bottom of the package: the "upper periphery portion of the frame" must support

"the overwrap perimeter portions so that the overwrap perimeter portions are in a plane generally parallel to the bottom of the frame." Claim 42 requires the frame of claim 1 to be "the only support for elevating the wrapper at the top of the container." For these claims, the court—without any supporting expert testimony—modified the Graham frame by making it deeper, asserting that "a deep frame surrounded by a wrapper already existed in cookie packaging." A25. Once again, however, the district court's new prior art combination was based on impermissible hindsight, unsupported by actual testimony of a skilled artisan, and refuted by the strong objective indicia of nonobviousness. *See Kinetic Concepts, Inc. v. Smith & Nephew, Inc*., 688 F.3d 1342, 1369 (Fed. Cir. 2012) (rejecting district court reasoning that a patent was obvious because its elements were independently known in the prior art).

The court also erred in its consideration of the additional limitations in the dependent claims. A23. Dr. Singh explained that numerous dependent claim limitations were missing from Machinery Update (2002), including matching graphics on the sealing layer and top of the container (claim 4), a starter portion extending past the edge of the side of the top (claim 3), a frame with specific kinds of dividers (claims 32, 36), and a frame and wrapper that function together to

protect cookies from damage (claims 33 and 37).[8] A6151-53; A6159-60; A6163-64. The court decided these factual disputes against Kraft despite there being no motivation to combine Machinery Update and Graham. At the very least, a jury issue remains on these claims as well. *See Cyclobenzaprine*, 676 F.3d at 1079 (noting that secondary considerations act as a check against "'judicial hunches' . . . encouraged by hindsight bias" and help "resist the temptation to read into the prior art the teachings of the invention in issue").

C. The Case Law Cited By The District Court Is Not Applicable.

The district court cited inapplicable case law to justify its erroneous decision. In *Perfect Web Technologies, Inc. v. InfoUSA, Inc.*, it was conceded that steps A-C of a bulk e-mail distribution method were found in the prior art, and step D merely repeated the first three steps. 587 F.3d 1324, 1327 (Fed. Cir. 2009). There were few potential solutions for the problem; if one solution did not work, it would be common sense to simply "try again" with the other possibility. *Id*. at 1327, 1331. By contrast, the record here shows Kellogg considering at least nine possible solutions before copying the patented one. *See supra* pp. 5-6, 23.

Similarly, in *Ball Aerosol and Specialty Container, Inc. v. Limited Brands, Inc*., a motivation to combine existed because there was a "design need or market

[8] For the same reasons as explained *supra* p. 38-50, independent claims 1 and 34 are valid, as are dependent claims 6, 26 and 39.

pressure to solve a problem and there [were] a finite number of identified, predictable solutions." 555 F.3d 984, 991 (Fed. Cir. 2009) (internal quotation marks omitted). The Court further emphasized that the patentholder did not dispute that "the level of ordinary skill in the art was that of an ordinary layman of average intelligence," and the "minimal indications of commercial success" failed to outweigh clear indications of obviousness in the prior art *Id*. at 992, 994. In contrast, here there were many potential solutions, but only Kraft's produced overwhelming commercial success and industry praise. A5236; A4959; A5176-78; A5188; A5205-07; A5222-23; A5231; A6335(229:1-22); A6336(235:10-236:25), A6343(392:51-393:20). And while the technology is familiar to everyday people, that does not mean the patented invention was simple to invent or create; Kellogg's research and development failures prove otherwise. The parties agreed that a skilled artisan would have "*at least* a bachelor's degree in mechanical engineering or packaging design and several years of practical experience designing packages" or "a degree in a related field such as chemistry or chemical engineering and significant practical experience designing packages." A4184 (emphasis added); A4384; A4754-55. Accordingly, unlike *Ball Aerosol*, this is not a case involving a simple technology like the candle tin that yielded only "minimal" considerations of nonobviousness.

Cross Medical Products v. Medtronic Sofamor Danek, Inc., 424 F.3d 1293 (Fed. Cir. 2005), which the district court cited, actually undermines the court's summary judgment here. *Cross Medical* found that "a genuine issue of material fact exists with respect to motivation to combine." *Id.* at 1322. It did not enter summary judgment of obviousness as the district court did in this case. And the nonobviousness record is stronger here than in *Cross Medical*, which did not reference any objective indicia of nonobviousness. Here, Dr. Singh and Kellogg's own experience established why the "knowledge generally available" to a skilled artisan did not lead to combining any package described in either Machinery Update article with a frame deep enough to contain cookies and support the wrapper. These "genuine issues of material fact on the underlying facts related to obviousness" should have been resolved by a jury, not the district court as a matter of law. *Id.* at 1324.

Finally, *Stone Strong, LLC v. Del Zotto Products of Florida, Inc.*, is inapposite as well as nonprecedential. 455 F. App'x 964 (Fed. Cir. 2011). In *Stone Strong*, the asserted references were not before the PTO, there were only a limited number of solutions, the patented solution was apparent from a prior art figure, and the secondary consideration of copying was weak because the accused product was "materially different from the patented invention." *Id.* at 971. Here, there were numerous possible solutions, which Kellogg spent years investigating;

Kellogg considered the very combination at issue and rejected it; and the court found that Kellogg deliberately copied Kraft's invention after it took the market by storm.

* * *

In summary, significant record evidence showed that numerous skilled artisans, though highly motivated to solve the problem somehow, were not motivated to combine the prior art references as the district court did in hindsight and without any supporting expert testimony. Kellogg's internal experts considered combining a resealable package having a Re-Seal It label, tray and overwrap, which Kellogg describes as "structurally identical" to Machinery Update (2002 and 2001), with a traditional cookie package, but quickly rejected the idea. A6328(99:17-23); A6366(81:8-82:6); A6367(85:13-86:19); A6368(91:14-93:20); A6369(96:8-19). Kraft, Kellogg, and consumers recognized a long-felt but unsolved need, which Kraft and Kellogg spent years trying to solve through actual experimentation with many different concepts. When Kraft invented Snack-N-Seal, Kellogg recognized it as a game-changer that became the new standard in the industry. Commercial success, industry praise, and copying by Kellogg are well-documented. *See supra* pp. 6-7, 13-17.

Given these facts, the district court's finding on summary judgment that "it would have been predictable for one skilled in the art to combine" traditional

cookie packages with a combination of the packages shown in the Machinery Update articles and then to add a frame similar to but different from the one in Graham simply cannot stand. A28. Kraft was entitled to have a jury consider the question in light of all the evidence. *See, e.g.*, *Cross Medical*, 424 F.3d at 1324; *Plantronics*, 724 F.3d at 1357; *TriMed*, 608 F.3d at 1343.

IV. THE DISTRICT COURT MADE AN IMPROPER FACTUAL FINDING REGARDING THE REEXAMINATION, WHICH LED IT INCORRECTLY TO REFUSE DEFERENCE TO THE AGENCY'S DECISION

A party "challenging validity shoulders an enhanced burden if the invalidity argument relies on the same prior art considered during examination by the [PTO]." *Tokai Corp. v. Easton Enters, Inc.*, 632 F.3d 1358, 1367 (Fed. Cir. 2011). Here, the district court acknowledged that Machinery Update (2002) was considered during the reexamination proceeding. A8. The Examiner initialed Machinery Update (2002), and relied on the package shown in the photograph from Machinery Update (2001) as shown in Packaging News. *See* A679; A669; A4708; A4713; MPEP § 609. During reexamination, the Board addressed any "reason to cut a hole in the top wrapper of Graham and add that reclosable flap" of Packaging News. A2935-36. Despite relying on a combination of a traditional cookie package with a resealable label, the court refused to give deference to the fact that the expert agency had allowed the claims over Packaging News, Machinery Update (2002), and Graham. A8-9. That was error.

The district court refused to defer to the Board's allowance of the claims because the Board supposedly "did not consider Machinery Update." A9. Yet the Board plainly did consider the same combination, namely cutting an access opening in the wrapper of a traditional cookie container and adding a resealable layer. A2936. Packaging News also discloses the stacked meat and sushi packages of Machinery Update, but they were not the focus of the rejections. Although the Board did not review (because the Examiner did not issue) an express rejection based on Machinery Update (2002), there is no legal requirement that a prior art reference draw a rejection before deference applies. Here, the patent issued over the same prior art references; that suffices to trigger the enhanced burden pursuant to the statutory presumption of validity under 35 U.S.C. § 282. *See Tokai Corp.*, 632 F.3d at 1367; *Applied Materials*, 98 F.3d at 1569 ("The presumption of validity is based on the presumption of administrative correctness of actions of the agency charged with examination of patentability."); *Hyatt v. Kappos*, 625 F.3d 1320, 1334 (Fed. Cir. 2010) (acknowledging the deference due to the PTO as "the knowledgeable agency charged with assessing patentability").

The district court's disregard of the agency proceedings appears to rest primarily on two related but genuinely-disputed factual findings, which should have been left to the jury. The district court found (over Kraft's contrary evidence) first that Packaging News contained a misprint, and second that the Board's

decision to overturn the Examiner's obviousness rejection relied "primarily" on a misunderstanding of Packaging News. A9. Both of these factual findings concern the scope and content of Packaging News, and specifically whether the photographed package discloses a tray with a lid (and thus operates "without conventional wrapping film," A4713). The Board and the Examiner interpreted the photograph shown in Packaging News as having a tray and lid, without flow-wrap surrounding the entire package. A1846-47; A1912. This interpretation was based on three parts of Packaging News: the photograph showing no film extending around the sides of the tray, the statement that the system "does not involve 'the expense of plastic profile,'" and the statement that the "system operates ***without*** conventional wrapping film, first die-cutting three sides of a rectangle to produce a flap, which is held in place by small notches." A4713 (emphasis added).

In addition, the record shows that Regath, the third party requestor and owner of the Re-Seal It technology depicted in Packaging News, never suggested that Packaging News contained a misprint or requested a correction, nor did anyone else. A6427(71:22-72:17); A6441(203:17-20); A6429(79:24-80:2). Although Dr. Singh acknowledged that, if one reviewed the photograph alone, one could view the photograph as including wrapping film around the package, he also explained that the structure of the entire sentence in Packaging News indicates that

cutting a hole in flow-wrap is not "conventional," such that a skilled artisan would view Packaging News as correctly stating that its depiction operates "without conventional wrapping film." A6810-11. Inventor Moncayo likewise explained her understanding of Packaging News as describing stacked meat and sushi packages and as describing the sausage package having a tray and lid design, which she identified as not having flow-wrap surround the frame in a conventional way. A897-98. She further testified that because the photograph shows no flow-wrap around the sides of the package and the package is described as "not involv[ing] the expense of plastic profile," the article includes no errors. A6381(682:12-19).

This evidence that Packaging News means what it says, not its opposite, amply creates a genuine dispute regarding the scope and content of Packaging News, and should have precluded summary judgment. Instead of leaving this factual issue to the jury, the court improperly resolved it in a manner adverse to Kraft.

The district court purported to state in the alternative that no deference was due "[r]egardless of whether the *Packaging News* article contains a misprint" since the Board based its decision of patentability "primarily" on a wrapperless version of Re-Seal It. A9. But the court's finding that the Board "primarily" affirmed patentability based on a wrapperless version of Re-Seal It is simply incorrect. A9.

The Board weighed all obviousness factors together—as a factfinder here should have done—and found there was no evidence of any motivation to combine the prior art packages, criticized the Examiner's failure to rely equally on objective indicia of nonobviousness, and found the Examiner's rejection to be based on impermissible hindsight. A1910-16. Accordingly, the court's refusal to give deference to the Board's issuance of the claims over the same prior art the Board considered was error, and at the very least should have been left for the jury.

V. THE COURT ERRED IN RECONSTRUING "SEALING LAYER" IN A WAY THAT LIMITS THE CLAIMS TO THE PREFERRED EMBODIMENT AND IN FINDING NO LITERAL INFRINGEMENT

The district court separately erred in requiring that the "sealing layer," which covers the access opening and seals against the container's top to close the access opening, must be a "separate piece of material" from the top. A32. The claims nowhere limit the "sealing layer" in that manner, and the court's addition of that limitation improperly confined the claims to the preferred embodiment. Once the construction of "sealing layer" is corrected, the court's grant of summary judgment of no literal infringement cannot stand.

Notably, the court's *Markman* order construed the claimed sealing layer as a distinct layer that seals to the top of the container, but expressly stated that the sealing layer did ***not*** need to be "physically separated from the top of the container or, more specifically, from the wrapper that forms the top of the container." A45.

"In other words, 'distinct' and 'separate' have different meanings in this context." *Id.* At summary judgment, however, the court changed its construction to require that the sealing layer be a "separate piece of material" from the top of the container. A32. That construction was wrong; nothing in the claims requires that the sealing layer be a separate piece of material from the container top that surrounds the opening. Rather, the claims' description of the sealing layer requires only that it seal against the top to close the access opening, include a starter portion near a side of the top which can be grasped by a user, be releasable when the starter portion is pulled, provide hand access to the top access opening, and be reclosable against the top of the container to seal the opening. A83(Abstract); A94(5:42-51). The claims do not require that the sealing layer be made of any particular material or in any particular way, nor do they exclude the possibility that the sealing layer be cut out of the wrapper, as long as it seals the access opening shut when it is sealed to the container's top.

Kraft accordingly proposed that no further construction of "sealing layer" was needed, but that the court could alternatively define the directional location of the sealing layer – that the sealing layer must seal an access opening found only in the package's upper, top surface, not a side/end surface. A3254-55. This limitation arose during prosecution, when Kraft amended the claims to distinguish over prior art having a sealing layer that sealed an access opening at the side of the

container. A410-12. The district court's original construction—that the sealing layer is a distinct, but not separate, layer that seals to the top (A45)—is also acceptable, as "distinct" means "readily distinguishable," "recognizable," and "clearly defined." A4985. The sealing layer of the preferred embodiment (Figure 2), the Oreos embodiment, and Kellogg's products are all easily identifiable and discernable as compared to each container's top, which ends at and delineates the access opening. A5944; A5875; A3478; A5944; A5408; 5493-94; *see supra* pp. 12, 17 (illustrations).

The court's revised construction, however, improperly limited the claims to only the preferred embodiment, by adding the requirement that the sealing layer be "a separate piece of material" from the package top. A32. The claims do not limit how the sealing layer is made or connected to the container. *See Amgen, Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1329 (Fed. Cir. 2003) (affirming trial court finding that product claims were "directed to a structural entity that is not defined or limited by how it is made"). To the extent the court believed that a sealing layer that is made of the same material as the top cannot also "seal[] to said top" (A94(5:42)), that was error: a sealing layer that is larger than the access opening can seal against the top. The claims do not require that the sealing layer be completely removable from the top or separately formed from the top. A94(5:42-51). The claims require only that the sealing layer open to provide

sufficient access to the cookies, reclose over the access opening, and to seal to the container's top when it does so. *Id*. That can occur even if the sealing layer and the top are formed from the same piece of material – as long as the sealing layer is larger than the access opening so that it can overlap with the wrapper at the top to seal the opening.

This Court "has expressly rejected the contention that if a patent describes only a single embodiment, the claims of the patent must be construed as being limited to that embodiment." *Sealant Sys.*, 616 F. App'x at 992 (citing *Liebel–Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 906 (Fed. Cir. 2004)); *Epos Techs. Ltd. v. Pegasus Techs. Ltd.*, 766 F.3d 1338, 1341 (Fed. Cir. 2014); *see also Akamai Techs. Inc. v. Limelight Networks, Inc*., 805 F.3d 1368, 1376 (Fed. Cir. 2015) ("[E]ven where a patent describes only a single embodiment, claims will not be read restrictively unless the patentee has demonstrated a ***clear intention to limit*** the claim scope using words or expressions of manifest exclusion or restriction." (emphasis added) (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Sys.*, 381 F.3d 1111, 1117 (Fed. Cir. 2004)).

Kraft certainly did not demonstrate a "clear intention" to limit the claims to the preferred embodiment in which the sealing layer is a separate piece of material from the container top. In fact, Kraft did the opposite: it identified Oreos as a "commercial embodiment" of the patent and demonstrated it for the Examiner and

Board. A2924; *see also* A731-32; A875-81. Oreos were never made using separate material for the sealing layer. A5382. Instead, the overlapping sealing layer and access opening are made using laser cuts through the laminated layers of the wrapper. A5382. Kraft's expert charted the Oreos packaging against the claims. A5867-80; A5901-03; A5912-28. And the specification itself states that the "invention is capable of numerous modifications and variations within the scope and spirit of the invention." A94(5:23-26); A94(5:28-51); A85(Fig. 2). Kraft plainly intended Oreos to be covered by the claims and told the PTO so; it thus did the ***opposite*** of limiting its claims to the preferred embodiment. *See Akamai*, 805 F.3d at 1376 (describing how intrinsic record did not demonstrate intent to limit claim term to preferred embodiment).

Furthermore, claim 2 would be rendered meaningless under the court's revised construction, since it specifically claims the preferred embodiment in which the sealing layer is a separate piece of material affixed to a flap of the wrapper. In claim 2, the top of the container has a flap that is the "substantially the same dimension" as the access opening and that is "affixed to said sealing layer." A94(5:52-55). Since the flap is substantially the same size as the access opening, the flap cannot seal around the access opening itself, such that additional material is needed to form a sealing layer that overlaps with the container top and seals the opening. But if the sealing layer in claim 1 already required a separate piece of

material, as the court held on summary judgment, then claim 2's added limitation would be meaningless. Such an interpretation is disfavored and, here, completely unnecessary. *See Liebel-Flarsheim Co.*, 358 F.3d at 910 (stating "the presence of a dependent claim that adds a particular limitation raises a presumption that the limitation in question is not found in the independent claim").

Accordingly, the court's claim construction on summary judgment was improperly narrow. Once corrected, the summary judgment of no literal infringement cannot stand; there is at least a jury issue as to whether Kellogg's products feature a sealing layer that seals to the container's top—specifically, to the "adhesive collar" that the district court found is part of the top of the container (A33-34) and adjoins the access opening. *See supra* pp. 16-17, 34.

By limiting the construction of "sealing layer" to a distinct, separate piece of material than the top of the container, the court erred. Once the claim construction is fixed, there is at least a jury issue on the factual determination of literal infringement.

CONCLUSION

The district court's summary judgment of invalidity and no literal infringement should be reversed and the case remanded.

Respectfully submitted,

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December 30, 2015

Nos. 2015-2082, -2084

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

INTERCONTINENTAL GREAT BRANDS LLC,

Plaintiff-Appellant,

v.

KEEBLER COMPANY, KEEBLER FOODS COMPANY, KELLOGG NORTH AMERICA COMPANY, KELLOGG SALES COMPANY, KELLOGG USA, INC.,

Defendants-Cross-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, No. 1:13-cv-00321, Judge Matthew F. Kennelly

APPELLANT'S ADDENDUM

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December 30, 2015

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IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

INTERCONTINENTAL GREAT BRANDS LLC,

Plaintiff(s),

v.

KELLOGG NORTH AMERICA COMPANY, ET AL.,

Defendant(s).

Case No. 13 C 321
Judge

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of defendant(s)
and against plaintiff(s)
.

Defendant(s) shall recover costs from plaintiff(s).

☒ other: In favor of defendants Kellogg North America Co., Kellogg USA Inc., Keebler Co., Keebler Foods Co. and Kellogg Sales Co. and against plaintiff Intercontinental Great Brands LLC on the single count of plaintiff's complaint and counts one and two of defendants' counterclaim, finding no literal infringement by defendants as to claims 1, 3, 4, 6, 26, 32, 33, 34, 35, 36, 37, 39, and 42 of U.S. Patent No. 6,918,532 B2, and finding those claims invalid based on obviousness; and in favor of plaintiffs and against defendant on counts three and four of defendants' counterclaim, finding no inequitable conduct by plaintiff.

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Matthew F. Kennelly on a motion for summary judgment.

Date: 8/25/2015

Thomas G. Bruton, Clerk of Court

Pamela J. Geringer, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INTERCONTINENTAL GREAT BRANDS LLC,	)	
Plaintiff,	)	
vs.	)	**No. 13 C 321**
KELLOGG NORTH AMERICA COMPANY, KELLOGG USA INC., KEEBLER COMPANY, KEEBLER FOODS COMPANY, and KELLOGG SALES COMPANY,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Intercontinental Great Brands LLC (IGB, formerly Kraft Foods Global Brands LLC) sued Kellogg North America Company, Keebler Foods Company, and affiliates (collectively referred to as Kellogg), alleging that Kellogg manufactures products that infringe U.S. patent number 6,918,532 B2 (the '532 patent). Kellogg has moved for summary judgment of non-infringement and invalidity of the '532 patent. IGB has moved for summary judgment on Kellogg's defense of unenforceability and various validity-related points. For the reasons stated below, the Court grants IGB's motion in part, denies Kellogg's motion claiming non-infringement, but grants summary judgment of invalidity in favor of Kellogg, finding the '532 patent obvious under 35 U.S.C. § 103.

Background

Both parties market cookies in resealable containers. IGB sells Oreos and Chips

Ahoy, among other cookies, in its resealable container (referred to as the Snack 'n Seal), and Kellogg sells Sandies and Simply Made, among others. IGB owns a patent for its package, titled "Resealable Food Container," which was issued July 19, 2005.[1] The patent lists Kraft Foods Holdings, Inc., as the patent's exclusive licensee.

In October 2007, Regath HB, a patent holding company for Macfarlane Group Sweden, a company that produces resealable packages, requested an ex parte reexamination of the '532 patent. The U.S. Patent and Trademark Office (PTO) granted the request. In April 2010, the PTO issued a rejection of the '532 patent claims. IGB (then Kraft Foods Global Brands LLC) appealed the decision to the Board of Patent Appeals and Interferences. The Board reversed, finding that the claims were patentable. On October 25, 2011, the PTO issued a reexamination certificate that left the original claims in the '532 patent intact and added claims 26 through 67.

Kellogg developed its resealable container in 2010. Its package was designed to "circumvent[] the Kraft patent while maintaining similar properties." Pl.'s Ex. 19 at KELLOGG010055. IGB sued Kellogg on June 16, 2013, alleging that its cookie container infringes multiple claims of the '532 patent, including independent claims 1 and 34, dependent claims 3, 4, 6, 26, 32, 33, and 42 (which depend from claim 1), and dependent claims 35, 36, 37, and 39 (which depend from claim 34).

Independent claim 1 of the '532 patent reads:

1. A polygonal shaped food container comprising:

[1] Although there is some dispute about whether the '532 patent actually covers the Oreos and Chips Ahoy packages that are currently used by IGB, the Court need not weigh in on this question for purposes of the summary judgment motions.

a frame defining the polygonal shape of the container, said container having a top, a bottom and sides connecting the top and bottom, the frame containing a food product comprised of discrete food articles;

a wrapper surrounding said frame, said wrapper forming the top sides and bottom of the container;

said top having an access opening sufficiently large to provide hand access to substantially all of the discrete food articles contained within the frame, such that substantially any one of the discrete food articles can be accessed and removed individually through said access opening; and

a sealing layer, adhesively sealed to said top around said opening, said sealing layer including a starter portion located near a side of the top which can be grasped by a user, said sealing layer being releasable when said starter portion is pulled in a direction away from said side to in turn pull and thereby release at least a portion of said sealing layer to provide the hand access to said top access opening and reclosable against said top to seal said opening when said sealing layer is moved back against the said top.

'532 Patent, col. 5:29–51. Claim 34 reads:

34. A polygonal shaped food container comprising:

a frame defining the polygonal shape of the container, the frame having a bottom, sides and an upper periphery portion, the frame containing a food product comprised of discrete food product articles;

an overwrap encasing the frame, the overwrap forming an overwrap top, overwrap bottom and overwrap sides of the container over the frame and defining the top, bottom and sides of the container, the overwrap top having at least a pair of facing overwrap perimeter portions inward of the periphery portion of the frame;

the overwrap top having a reclosable access opening defined at least in part by the perimeter portions, the opening sufficiently large to provide hand access to substantially all of the discrete food articles contained within the frame such that substantially any one of the discrete food articles can be accessed and removed individually through the reclosable access opening, the upper periphery portion of the frame supporting the overwrap perimeter so that the overwrap perimeter portions are in a plane generally parallel to the bottom of the frame, the overwrap perimeter portions capturing the frame in the encasing overwrap to guard against unintentional removal of the frame through the opening from the encasing overwrap; and

> a sealing layer adhesively sealed to the overwrap top around the recloseable access opening, the sealing layer including a starter portion located near a side of the overwrap top which can be grasped by a user, the sealing layer being releasable when the starter portion is pulled in a direction away from the side to in turn pull and thereby release at least a portion of the sealing layer to provide hand access to the recloseable access opening and recloseable against the overwrap top to seal the access opening when the sealing layer is moved back against the overwrap top.

Ex Parte Reexam. Certif., col. 1:57–2:24.

On September 22, 2014, the Court entered an order construing certain disputed claim terms. The parties then cross-moved for summary judgment. The Court heard argument on the parties' summary judgment motions on June 26, 2015.

Discussion

A party is entitled to summary judgment if it shows that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). On a motion for summary judgment, the Court views the record in a light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. at 248. On cross-motions for summary judgment, the Court assesses whether each movant has satisfied the requirements of Rule 56. *See Cont'l Cas. Co. v. Nw. Nat'l Ins. Co.*, 427 F.3d 1038, 1041 (7th Cir. 2005). "As with any summary judgment motion, we review cross-motions for summary judgment construing all facts, and drawing all reasonable inferences from those facts, in favor of the non-moving party." *Laskin v. Siegel*, 728 F.3d 731, 734 (7th Cir. 2013) (internal quotation marks omitted).

A. Obviousness

Kellogg has moved for summary judgment of invalidity on the grounds that the patent is anticipated under 35 U.S.C. § 102 and is obvious under 35 U.S.C. § 103. IGB has moved for summary judgment on, among other things, Kellogg's defense that the claims do not contain a sufficient written description under 35 U.S.C. § 112. Because the Court concludes that the asserted claims are obvious, the Court will not discuss anticipation or written description.[2]

Patent claims are invalid as obvious under 35 U.S.C. § 103(a) when the differences between the subject matter sought to be patented and the prior art are such that the invention would have been obvious to a person having ordinary skill in the art at the time the invention was made. 35 U.S.C. § 103(a) (2006). The Court must consider four factors to determine whether claims are invalid as obvious: (1) the "scope and content of the prior art;" (2) "differences between the prior art and the claims at issue;" (3) "the level of ordinary skill in the pertinent art;" and (4) "[s]uch secondary considerations as commercial success, long felt but unsolved needs, failure of others." *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 17–18 (1966). A prima facie case of obviousness is established if the prior art references "[i]n combination . . . teach all of the limitations of the claims" and a person of ordinary skill in the art would combine the elements to create the invention. *Transocean Offshore Deepwater Drilling, Inc. v. Maersk Contractors USA, Inc.*, 617 F.3d 1296, 1303–04 (Fed. Cir. 2010). Even if the prior art combines to support a prima face case of obviousness, the Court must also

[2] Because the application for the '532 patent was filed prior to the effective date of the America Invents Act, the earlier, pre-Act version of section 103 applies. *See* Leahy–Smith America Invents Act, Pub. L. No. 112–29 (2011); *Insite Vision Inc. v. Sandoz, Inc.*, 783 F.3d 853, 857 n.1 (Fed. Cir. 2015).

consider objective evidence of non-obviousness—"secondary considerations," as they are called. *Id*. at 1305.

As the Supreme Court has stated, "when a patent claims a structure already known in the prior art that is altered by the mere substitution of one element for another known in the field, the combination must do more than yield a predictable result." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007). A patent is invalid if a person of ordinary skill in the art can implement a predictable variation of existing prior art or if he would recognize that a technique used to improve one product would improve similar products in the same way. *Id*. at 417. Because "[t]he ultimate judgment of obviousness is a legal determination" based on underlying fact findings, summary judgment of invalidity is appropriate when "the content of the prior art, the scope of the patent claim, and the level of ordinary skill in the art are not in material dispute, and the obviousness of the claim is apparent in light of these factors." *Id*. at 427; *see also Tokai Corp. v. Easton Enters., Inc.*, 632 F.3d 1358, 1366 (Fed. Cir. 2011).

1. Deference to the PTO

Patent claims are presumed valid, and thus "an accused infringer must prove invalidity by clear and convincing evidence." *Tokai Corp.*, 632 F.3d at 1367. In addition to the presumption of validity afforded to patented claims, "a party challenging validity shoulders an enhanced burden if the invalidity argument relies on the same prior art considered during examination by the U.S. Patent and Trademark Office." *Id*. Put differently, "[w]hen no prior art other than that which was considered by the PTO examiner is relied on by the attacker, he has the added burden of overcoming the deference that is due to a qualified government agency presumed to have properly

done its job." *PowerOasis, Inc. v. T–Mobile USA, Inc.*, 522 F.3d 1299, 1304 (Fed. Cir. 2008).

During reexamination, the patent examiner was presented with the 2002 *Machinery Update* article that is the main prior art reference that Kellogg now cites to support invalidation; indeed, the examiner wrote his initials next to that article's listing. *See* Pl.'s Ex 25 at KFGB0000419. But his decision rejecting the patent claims as obvious did not mention *Machinery Update*. *Id.* at KFGB0000743–759. This was probably because, when granting reexamination, the examiner stated that "*Machinery Update* [ ] is substantially equivalent to the disclosure of *Packaging News*," a 2001 article in a trade journal. *Id*. at KFGB0000413. But *Packaging News* and *Machinery Update* are not substantially the same. Both articles describe a resealable food package called the Re-Seal It system (also known as the Fuji Package). The *Packaging News* article says that the Re-Seal It system "operates *without* conventional wrapping film," whereas the *Machinery Update* article says that "[t]he Re-Seal It system operates *with* conventional wrapping film." *Compare* Defs.' Ex. 34 at KELLOGG000518, *with* Defs.' Ex. 13 at 60 (emphasis added). According to Kellogg, the statement in *Packaging News* was a misprint. Although IGB claims that "[t]here is no evidence of any misprint in *Packaging News*," the record contradicts this. Pl.'s Mem. in Supp. of Cross Mot. for Summ. J. and in Opp'n to Defs.' Mot. for Summ. J. at 43. The *Packaging News* article includes an image that appears to show wrapping film, and the text states that the technology "allows flow-wraps of bacon, sliced cooked meat, cheese and similar food products." Defs.' Ex. 34 at KELLOGG000518. This suggests, contrary to IGB's assertion, that the article's statement that the system operates "without"

conventional wrapping film is a misprint.

Regardless of whether the *Packaging* News article contains a misprint, it is undisputed that the Board, in its opinion reversing the examiner's finding of obviousness, did not consider *Machinery Update*. Pl.'s Ex. 25 at KFGB0001645–1647 (listing the "prior art relied upon by the Examiner in rejecting the claim" and the issues presented for review). Instead, the Board considered *Packaging News*. Based on the statement in *Packaging News* that the Re-Seal It package did not have conventional wrapping film, the Board concluded that the article teaches *away* from using a wrapper surrounding a frame. *Id*. at KFGB0001652–1655 ("This teaching by *Packaging News* which specifically 'operates without conventional wrapping film' (FF 2B) would lead a person of ordinary skill in the art away from using a wrapper surrounding a frame"; "[T]he Examiner's articulated rationale [for rejecting the claims as obvious] does not appear to account for the fact that *Packaging News* teaches to not utilize conventional wrapping film (FF 2B) and that its mere use of a tray in conjunction with flap/label would lead a person of ordinary skill in the art away from using a wrapper surrounding a frame, and in a divergent direction than that taken by the applicant of the '532 patent."). Based primarily on the conclusion that a wrapperless version of the Re-Seal It package taught away from combining the elements, the Board declared the patent valid as non-obvious. *Id.* at KFGB001652–56.

Because the Board of Patent Appeals and Interferences did not consider *Machinery Update*, there is no enhanced presumption in this case. "An added burden of deference to the PTO is not required [ ] with respect to invalidity arguments based on evidence that the PTO did not consider." *Tokai Corp.*, 632 F.3d at 1167.

2. The level of ordinary skill in the pertinent art

The parties do not dispute the level of ordinary skill in the pertinent art. Kellogg's expert characterizes a person of ordinary skill in the art as someone with "at least a bachelor's degree in mechanical engineering or packaging design and several years of practical experience designing packages," or someone with "a degree in a related field such as chemistry or chemical engineering and significant practical experience designing packages." Defs.' Mem. in Supp. of Mot. for Summ. J. at 43. IGB's expert stated that defendants' description was not "substantially different from my own opinion regarding a person of ordinary skill in the art." Pl.'s Ex. 27 at 16–17.

3. Content of the prior art and comparison with claims 1 and 34

IGB claims April 16, 2003, the day the patent application was filed, as the date of invention, so the Court considers the state of the prior art at that date. IGB does not dispute that resealable packaging and trays surrounded by a flow-wrapped wrapper or overwrap were available before the priority date. Pl.'s Resp. to Defs.' LR 56.1(a) Stmt. ¶¶ 28, 30. Although Kellogg highlights five items of prior art, the Court focuses on two articles published in *Machinery Update*, a trade journal—one published in September/October 2001 and the other published in March/April 2002.[3] Defs.' Ex. 13, 33. The articles describe and depict variations of the Re-Seal It system. IGB concedes that "*Machinery Update* is legal prior art and may be considered by the jury for

[3] The Court does not consider the other four prior art references cited by Kellogg. The parties dispute whether one reference, the sample of the Re-Seal It technology (also referred to as the Fuji Package), can constitute prior art. The Court does not address this question. As for the others, Fuji Seal and Kao are foreign patent applications for wet wipes containers. There is a triable dispute regarding whether a person skilled in food packaging would look to features of wet wipes packaging. Unitka is a Japanese patent application that teaches a package for microwaving foods. There is a triable dispute regarding whether this container includes a resealable function.

anticipation and obviousness." Pl.'s Mem. in Supp. of Cross Mot. for Summ. J. and in Opp'n to Defs.' Mot. for Summ. J. at 16.

The Court primarily considers the 2002 article. The 2002 article describes the Re-Seal It system, which "allows flow-wraps of bacon, sliced cooked meat, cheese and similar food products that are consumed over a period of time to be opened, then reclosed to avoid drying out in the refrigerator." Defs.' Ex. 13 at 60. The system can also "be used for trays of high value prepared food such as sushi or canapés." *Id.* The Re-Seal It system operates "with conventional wrapping film," which is cut "to produce a flap." *Id.* "A filmic label with peelable adhesive is then applied over the flap." *Id.* "A small non-adhesive area at one end of the label provides a pull point," which consumers pull to open the container. *Id.* "To reclose the pack, the label is wiped back into place, held by the peelable adhesive which . . . has been specially formulated to grip through fat and product residues." *Id.* The 2002 article includes an image of the package containing sliced meat. *Id.* at 59. The 2001 article shows a photograph of the container holding sushi. Defs.' Ex. 33 at 46.

There is no genuine dispute that the *Machinery Update* articles disclose all of the limitations recited in claims 1 and 34, with the exception of the "frame" limitation. With respect to claim 1, the *Machinery Update* articles describe the following limitations: a polygon container, covered in overwrap, a sealing layer sealed to the top, that can be opened using a starter portion and reclosed after use, with a large enough opening for hand access to discrete food articles. Defs.' Ex. 13 at 59–60. IGB argues that the 2002 article does not disclose a top with "an access opening sufficiently large to provide hand access to substantially all of the discrete food articles contained within the frame,"

because the container depicted holds sliced meat that is stacked and accessed individually from a small opening. But the article also states that the package can be used for sushi or canapés, which are unquestionably discrete food articles. As to the size of the opening, the 2001 article depicts sushi packaged in a Re-Seal It container with an access opening on the top that is clearly large enough for hand access to all of the sushi pieces. IGB argues that when used with sushi, the access opening is not just on the top—rather it wraps around the side of the package. The 2002 article states that "the aperture can extend around the edge of the pack itself, allowing trays of product to be easily removed for serving and then returned to the pouch for storage." Defs.' Ex. 13 at 60. Thus, although the aperture "can" extend around the side, it does not necessarily extend around the side. In fact, the image of the package containing sliced meat has an opening only on the top. All of the required elements of claim 1 are therefore depicted or described in the *Machinery Update* articles, with the exception of the "frame" requirement.

The Court construed the term "frame" to mean "a tray with a bottom and sides." 9/22/2014 Order at 9. The article says that the Re-Seal It can be used on "trays of high value prepared food such as sushi or canapés," but it is not clear that the tray has sides. Defs.' Ex. 13 at 60.[4] Thus, there is a genuine dispute regarding whether *Machinery*

[4] There is some dispute about how "frame" should be construed if the Court were to conclude that the frame in one of the prior art references has sides. Although the Court assumes that the tray in *Machinery Update* does not have sides, the specification and claims suggest that a tray with very shallow sides cannot be considered a "frame." Under those claims, the frame must "defin[e] the polygonal shape of the container." '532 Patent, col. 5:39; Ex Parte Reexam. Certif., col. 1:58. Additionally, "[t]he purpose of the present invention is to provide a new and improved container for food products such as rigid food articles . . . , which container provides adequate protection for the contents thereof . . . ." '532 Patent, col. 1:39–44. The specification also says that the

Update discloses a frame.

Claim 34 recites essentially the same structure as claim 1, with a few additional limitations. Specifically, the frame under claim 34 must have "a bottom, sides and an upper periphery portion," and "the upper periphery portion of the frame [must] support[] the overwrap perimeter so that the overwrap perimeter portions are in a plane generally parallel to the bottom of the frame, the overwrap perimeter portions capturing the frame in the encasing overwrap to guard against unintentional removal of the frame through the opening from the encasing overwrap." Ex Parte Reexam. Certif., col. 1:59–60, 2:7–13. Additionally, the container must have "an overwrap encasing the frame . . . defining the top, bottom and sides of the container, the overwrap top having at least a pair of facing overwrap perimeter portions inward of the periphery portion of the frame."[5] *Id.*, col. 1:62–67. Additionally, the reclosable access opening on the top must be "defined at least in part by the perimeter portions." *Id.*, col. 2:1–2.

Machinery Update does not disclose a frame, so it obviously cannot disclose an upper periphery portion of the frame that supports the overwrap or defines the polygonal shape of the container. During argument, IGB's counsel explained that the "facing overwrap perimeter portions" are the part of the top that extends over the frame that holds the frame in place. 6/26/2015 Tr. at 31–32; *see also* Pl.'s Ex. 35 at KFGB0000624 (diagramming, in a submission to the PTO depicted below, the perimeter portions (either B or C) and the upper periphery portion (A)).

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invention "provid[es] a suitable container for such food products." *Id.*, col. 1:45–46. This indicates that the sides must be deep enough to completely cover and protect the food inside.

[5] The Court ruled that the term "overwrap" in claim 34 is essentially a synonym for "wrapper" as used in other claims in the patent. 9/22/2014 Order at 10–11.

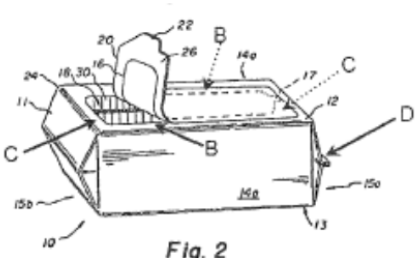


Fig. 2



Fig. 3

Pl.'s Ex. 35 at KFGB0000624.

In the images from *Machinery Update* that were provided to the Court—the images of the container holding sliced meat and sushi—both packages include facing perimeter portions that are parallel to the bottom. The image of the package containing meat, shown below, clearly depicts facing perimeter portions. Although the image of the sushi package is not clear, that package must have parallel perimeter portions on the top, because otherwise the sealing layer would have nothing to stick to.

IGB again contends that the opening wraps all the way around the side for discrete food items like sushi. Thus, IGB says, even if there are facing perimeter portions on the top, the tray can be unintentionally removed in that embodiment, which means the perimeter portions do not "captur[e] the frame in the encasing overwrap to guard against unintentional removal of the frame." As the Court has discussed, the 2002 article simply states that "the aperture *can* extend around the edge of the pack itself, allowing trays of product to be easily removed for serving." Defs.' Ex. 13 at 60 (emphasis added). The Re-Seal It system does not require an opening that extends around the side of the container. In fact, the image of the Re-Seal It packaging

containing stacked meat only includes a top opening. *Id.* at 59. If a frame were included in that package, it would be impossible to unintentionally remove it through the top opening. Accordingly, it is not genuinely disputed that the two *Machinery Update* articles disclose every limitation of claims 1 and 34, with the exception of the frame.

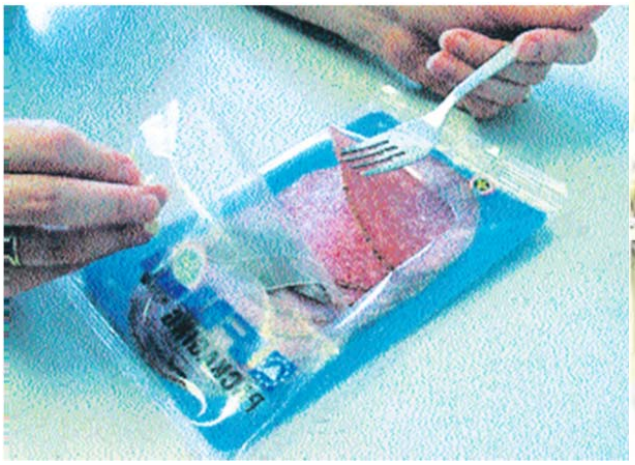


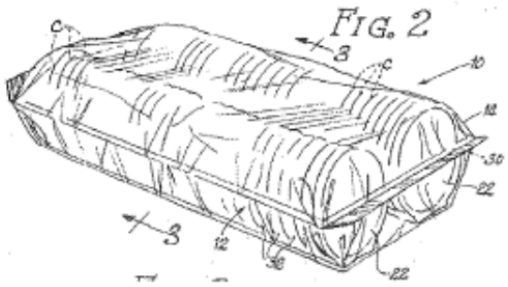
Image from *Machinery Update* (2002)
Defs.' Ex. 13 at 59.



Image from *Machinery Update* (2001)
Defs.' Ex. 33 at 46.

Frames for discrete food items like cookies unquestionably existed in the prior art. For instance, the Graham stackable cookie package and tray, which was presented to the PTO during reexamination, discloses "a cookie package 'including an open-topped cookie tray . . . [which] provides support ribs effectively for contacting cookies at spaced points[,] for so spacing the cookies, and for resiliently cushioning the cookies against shock and stacking loads.'" Pl.'s Ex. 25 at KFGB0001053 (quoting Graham, col. l, ll. 11–12, 18–21; Third Cornell Decl., ¶ 15).[6]

[6] The Graham package was one of the prior art references cited by the examiner when he invalidated claims 25 through 46 as obvious during reexamination. Pl.'s Ex. 25 at KFGB0001646. Graham was also considered by the Board of Patent Appeals and Interferences, although the Board concluded that it would not have been obvious to



Pl.'s Ex. 25 at KFGB0001649 (reproduction of Figure 2 of the Graham patent). Additionally, in its submissions to the PTO, IGB included images of the previous Oreos package, which was described by one consumer as "inspiration for how to NOT handle usability . . ." *Id.* at KFGB000552. Those images show a frame that extends to support the overwrap and protect the cookies, which also forms the shape of the polygonal container. All of the independent claim limitations existed in the prior art at the time of invention; traditional cookie trays meet the "frame" limitation and *Machinery Update* discloses the other claim limitations.

4. Motivation to combine

The parties primarily dispute whether one skilled in the art would be motivated to combine the prior art elements. The Supreme Court and Federal Circuit have articulated a flexible approach to determining whether there was a motivation to combine the prior art at the time of invention. *See KSR*, 550 U.S. at 415–16; *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1239 (Fed. Cir. 2010). When a technology is simple,

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combine Graham with *Packaging News* because *Packaging News* teaches away from the use of conventional wrapping film. *Id*. at KFGB0001655.

the Court's obviousness analysis "may include recourse to logic, judgment, and common sense available to the person of ordinary skill that do not necessarily require explication in any reference or expert opinion." *See Perfect Web Techs., Inc. v. InfoUSA, Inc.*, 587 F.3d 1324, 1329 (Fed. Cir. 2009).

In assessing obviousness, the Court can combine the different features of the Re-Seal It system as they are depicted and described in *Machinery Update*, if someone skilled in the art reading the articles would think to combine them. *See, e.g., Cross Med. Prods., Inc. v. Medtronic Sofamor Danek, Inc.*, 424 F.3d 1293, 1321 (Fed. Cir. 2005). The container for stacked meats was described *on the same page* as the container for sushi and canapés. Defs.' Ex. 13 at 60. The purpose of the article, which was published in a packaging journal, was to introduce food packaging experts to the Re-Seal It system and its varied potential uses. Based on this undisputed evidence, no reasonable jury could conclude that a person skilled in the art would not think to combine the features of the Re-Seal It food package that were disclosed in the article—including the top opening of the meat container and the tray of the sushi container.

IGB argues that a person of skill in the art would not be motivated to combine a cookie tray with a resealable package like the container described in *Machinery Update*. The Federal Circuit has held that "where all of the limitations of the patent were present in the prior art references, and the invention was addressed to a known problem, *KSR* . . . compels the grant of summary judgment of obviousness." *Wyers*, 616 F.3d at 1240 (internal quotation marks and citations omitted). Here, all of the limitations were present in the prior art, and the problem that the invention was designed to solve was known to those skilled in the art. The invention was created to remedy a problem with existing

cookie containers, namely that they did not "provide a convenient opening and reclosing arrangement." '532 Patent col. 1:19–20. Kraft's submissions to the PTO also show that the lack of a resealing function on cookie packages was a known problem. Kraft wrote:

> With current overwrapped trays, consumers struggle to gain access to the product as the end seals are hard to open, and the tray is very hard to get in and out of the flow wrap, resulting in film tearing. This doesn't allow the package to be effectively reclosed, resulting in its contents losing freshness, and consumers then often resorting to repackaging the product. Snack 'n Seal eliminates this hassle, as the package is easy to use and keeps cookies fresh longer, eliminating the need to repackage.

Pl.'s Ex. 25 at KFGB0000477. Additionally, IGB presented consumer complaints about Oreos' previous packaging. *See id.* at KFGB0000552; Pl.'s Ex. 22 at KFGB0003854 (summary of the results of a June 2003 Kraft study, which revealed "that consumers are somewhat dissatisfied with current snack food packaging," because "bags tear during initial opening and are hard to reseal, [i]t is difficult to place cookie/cracker trays back in the bag, [and s]nacks do not stay fresh"). Moreover, Kellogg had also recognized the problems associated with traditional cookie packages "[i]n the early 2000's." Pl.'s Claim Const. Br. at 3; *see also* Pl.'s Ex. 30 at 324 (Kellogg's 30(b)(6) witness, stating that Kellogg had interest in a resealable container for cookies prior to 2004).

In sum, there was a known problem in the cookie packaging industry, and all of the elements of the invention existed in the prior art. A packaging expert, with knowledge of existing food packaging technology, would have thought to combine a resealable container and a frame big enough to contain cookies. This combination "would have been entirely predictable and grounded in common sense." *Ball Aerosol & Specialty Container, Inc. v. Ltd. Brands, Inc.*, 555 F.3d 984, 992–93 (Fed. Cir. 2009); *see also Perfect Web Techs.,* 587 F.3d at 1330–31 (affirming district court's grant of

summary judgment of obviousness). No reasonable jury could conclude that a person skilled in packaging design would not be motivated to combine these features.

According to IGB, it would have been counterintuitive to a person of ordinary skill to cut a hole in the top of a cookie container. IGB claims that consumers and competitors were skeptical of the Snack 'n Seal technology when it was first released, which it says shows that the invention was counterintuitive. But the evidence that IGB cites does not actually support that point. A June 2003 presentation prepared by Kraft discussing the results of a consumer survey stated that only three percent of survey respondents found the resealable pull back lid to be "not at all believable." Pl.'s Ex. 22 at KFGB0003889. In fact, another part of the same report said: "consumers like this idea [of a resealable pull-back lid] and are familiar with the concept as it is available in the cleaning and personal care categories (i.e., wipes)." Pl.'s Ex. 22 at KFGB0003862. Far from suggesting that consumers received the idea of a resealable cookie container with skepticism, it appears that they embraced it as a solution to an existing problem. IGB also cites a February 2003 e-mail attachment listing consumer comments, including the following: "Resealable Newtons: good idea, needs to seal well, opening needs to be bigger." Pl.'s Ex. 23 at KFGB0003958. Again, this comment suggests positive initial reaction and contradicts IGB's argument that it would be counterintuitive "to cut a giant hole in the top of the cookie container." 6/26/2015 Tr. at 30. IGB points to one piece of evidence suggesting consumer skepticism. Kellogg's Rule 30(b)(6) witness commented during his deposition, "As we tested the Snack 'N Seal, it went from very much skepticism on the part of consumers, and as it was in the marketplace for a longer period of time, became more familiar with the consumers, it became the package that

was acceptable to them." Pl.'s Ex. 30 at 323. The witness did not elaborate on this point, although his earlier statement that Kellogg had been interested in a resealable cookie package for years contradicts the notion that consumers were skeptical about resealable containers. *Id.* at 312–313, 324. Although IGB cites evidence that supports the inference that its competitors were skeptical that packaging could drive consumption, there is no evidence from which a reasonable jury could conclude that it would be counterintuitive to combine a resealable container with an opening on the top and a cookie tray.

Although IGB's expert has offered a report in which he concludes that the claims are not obvious in light of *Machinery Update*, the report does not create a genuine issue of material fact. First, IGB's expert states that "there is no common theme running from one part of *Machinery Update* to another" that would explain why "features from one package would have been combined with those of another package." Pl.'s Ex. 27 at 51. (IGB's expert focused exclusively on the 2002 *Machinery* Update article.) But the article itself clearly suggests that the features of Re-Seal It packages can be combined, by stating that the same package shown with stacked meats can also "be used for trays of high value prepared food such as sushi or canapés." Defs.' Ex. 13 at 60. No reasonable jury would believe that a food packaging expert reading that article would not think to combine the versions of the Re-Seal It system described. Second, IGB's expert points out that the patent applicants "distinguished prior art packages for storing sliced food items" from their invention designed for discrete food items. According to IGB's expert, "applicants made clear during prosecution that their invention was distinct from prior art package for food, such as those disclosed in *Machinery Update.*" Pl.'s Ex.

27 at 51–52. But the obviousness analysis does not focus on what the inventor said or did, but what a person skilled in the art would have known. *Machinery Update* states that the Re-Seal It system is not limited to sliced food items but can also be used for discrete food items. Thus, the representations to the PTO do not create a triable issue.

Additionally, IGB's expert states that *Machinery Update* "contains teachings that teach away from the combinations" in the invention. *Id.* at 52. He says that bacon, sliced meat, and cheese are all products "intended to be consumed over a period of time," but that the article "in no way suggests that sushi is a type of food that . . . should be consumed 'over a period of time.'" *Id*. The implication is that a person skilled in the art would not see the sushi tray and think to use the same type of package with food items consumed over a period of time, like cookies. This, however, contradicts the Supreme Court's direction that "[a] person of ordinary skill is also a person of ordinary creativity, not an automaton." *KSR*, 550 U.S. at 421. If a person skilled in the art were to read the 2002 *Machinery Update* article, it would require only a minimal amount of creativity for that person to think to mix and match the features described, as the Court has discussed.

Finally, IGB's expert says *Machinery Update* teaches away from an overwrap tray that prevents unintentional removal, because the article describes an opening that extends around the side of the package. Again, the article suggests the various features of the Re-Seal It package can be combined, and thus does the opposite of teaching away from a combination. *Cf. In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994) ("A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or

would be led in a direction divergent from the path that was taken by the applicant."). Far from "suggest[ing] that the line of development flowing from the reference's disclosure is unlikely to be productive of the result sought by the applicant," *id.*, the article encourages the use of the Re-Seal It system for different types of foods.

The Court concludes that IGB's expert's report does not create a genuine issue of fact regarding the motivation to combine the features highlighted in *Machinery Update* with existing cookie packages. As the Court has noted, when a technology is simple, the obviousness analysis "may include recourse to logic, judgment, and common sense available to the person of ordinary skill that do not necessarily require explication in any reference or expert opinion." *Perfect Web Techs.*, 587 F.3d at 1329. In *KSR*, the patent owner presented expert affidavits stating that the invention was non-obvious. The Supreme Court nonetheless concluded:

> In considering summary judgment . . . the district court can and should take into account expert testimony, which may resolve or keep open certain questions of fact. That is not the end of the issue, however. The ultimate judgment of obviousness is a legal determination. Where, as here, the content of the prior art, the scope of the patent claim, and the level of ordinary skill in the art are not in material dispute, and the obviousness of the claim is apparent in light of these factors, summary judgment is appropriate. Nothing in the declarations proffered by Teleflex prevented the District Court from reaching the careful conclusions underlying its order for summary judgment in this case.

KSR, 550 U.S. at 427 (internal citation omitted). Conclusory expert statements do not preclude a determination of obviousness where, as here, the underlying factual issues are not genuinely disputed. *See Stone Strong, LLC v. Del Zotto Prods. of Fla., Inc.*, 455 F. App'x 964, 969 (Fed. Cir. 2011). Because there is no genuine dispute that all elements of claims 1 and 34 are disclosed in the prior art and it would have been predictable for a person of skill in the art to combine those elements, Kellogg has made

a strong prima facie showing of obviousness as to independent claims 1 and 34.

5. Content of the prior art and comparison with dependent claims 3, 4, 6, 26, 32, 33, 35, 36, 37, 39, and 42

The Court must also consider whether any of the narrower dependent claims stemming from independent claims 1 and 34 are non-obvious. *See Sandt Tech., Ltd. v. Resco Metal & Plastics Corp.*, 264 F.3d 1344, 1356 (Fed. Cir. 2001) ("Because dependent claims contain additional limitations, they cannot be presumed to be invalid as obvious just because the independent claims from which they depend have properly been so found."). IGB accuses Kellogg of infringing dependent claims 3, 4, 6, 26, 32, 33, and 42 (which depend from claim 1) and dependent claims 35, 36, 37, and 39 (which depend from claim 34). For the reasons stated below, Kellogg has made a strong prima facie showing that each of the dependent claims are obvious in light of *Machinery Update* and existing cookie packages.

A number of the dependent claims are essentially duplicative of one or both of the independent claims. For instance, claim 26 states:

> 26. The polygonal shaped food container of claim 1 wherein the frame has an upper periphery and the top has a pair of facing perimeter portions adjacent the access opening, the pair of facing perimeter portions extending inward beyond at least a portion of the upper periphery portion to capture the frame in the wrapper against unintentional removal through the access opening.

Ex Parte Reexam. Certif., col. 1:21– 27. This claim has substantially the same elements as Claim 34, which the Court has already discussed. Additionally, claim 39 states:

> 39. The polygonal shaped food container of claim 35, wherein the sealing layer covers substantially the entire top.

Ex Parte Reexam. Certif., col. 2:50–51. Claim 39 is essentially duplicative of the

requirement in claim 34 that the opening be "sufficiently large to provide hand access to substantially all of the discrete food articles contained within the frame . . ." By definition, if the opening provides hand access to most of the discrete food items, the sealing later that covers the opening and attaches to the top would cover substantially the entire top. The difference, it would seem, is one of degree, as evidenced by use of the word "entire" in claim 39. In claim 39, the sealing layer must cover nearly all of the top of the wrapper. This difference is a minor one. The image of the Re-Seal It package containing sushi clearly shows an access opening covering substantially the entire top. Defs.' Ex. 33 at 46.

Claim 35 states:

> 35. The polygonal shaped food container of claim 34 wherein the facing perimeter portions extend to additional perimeter portions extending inward of the periphery portion of the frame, the facing perimeter portions and additional perimeter portions combined to surround the reclosable access opening, and the perimeter portions all extend inward beyond the periphery portion of the frame to capture the frame in the overwrap against unintentional removal through the reclosable access opening, the upper periphery portion of the frame supporting all of the overwrap perimeter portions so that the overwrap perimeter portions are in a plane generally parallel to the bottom of the frame after the reclosable access opening is opened to expose the food product articles.

Ex Parte Reexam. Certif., col. 2:25–38. Claim 35 recites essentially the same structure as claim 34, except that it requires, in addition to the "pair of facing perimeter portions" recited in claim 34, "additional perimeter portions extending inward of the periphery portion of the frame." Those perimeter portions "combine[] to surround the recloseable access opening." The meat package depicted in *Machinery Update* does not include a tray, but it does include two sets of facing perimeter portions that surround the recloseable access opening. If a tray was added, then the tray could not be

unintentionally removed. Claim 35 also requires the "upper periphery portion of the frame [to] support[] all of the overwrap perimeter portions," which is essentially duplicative of the requirements for frames stated in claim 34 that "the upper periphery portion of the frame [must] support[] the overwrap perimeter." Ex Parte Reexam. Certif., col. 2:7–8.

Claim 42 states:

> 42. The polygonal shaped food container of claim 1 wherein the frame is the only support for elevating the wrapper at the top of the container.

Ex Parte Reexam. Certif., col. 2:60–62. This claim is largely duplicative of the requirement in claims 1 and 34 that the frame "defin[e] the polygonal shape of the container" and "support[] the overwrap perimeter." '532 Patent, col. 5:39; Ex Parte Reexam. Certif., col. 1:58, 2:7–8. With respect to this claim, the frame must be the "only support" for the wrapper, which means that the frame must extend above the food items and form the structure of the wrapper that surrounds the container. As the Court has stated, *Machinery Update* does not disclose a frame, but a deep frame surrounded by a wrapper already existed in cookie packaging. Thus, Kellogg has made a strong prima facie showing that claim 42 is obvious in light of the prior art.

Claim 3 states:

> 3. The polygonal food container of claim 1, wherein said starter portion comprises a tab which projects past an edge of said top at one side of the container, said tab being accessible beyond the edge to be grasped.

'532 Patent, col. 5:56–59. *Machinery Update* discloses a starter portion tab on the top that can be grasped. Defs.' Ex. 13 at 60 ("A small non-adhesive area at one end of the label provides a pull point.").

Claim 4 states:

> 4. The polygonal shaped food container of claim 1, wherein said top of the container includes graphics around said opening, and said sealing layer includes graphics which match the graphics on said top.

'532 Patent, col. 5:60–63. The image in *Machinery Update* clearly shows a sealing layer and top layer with matching graphics. Defs.' Ex. 13 at 59.

Claim 6 states:

> 6. The polygonal shaped food container of claim 1, further comprising a tamper-evident structure.

'532 Patent, col. 5:66–67. The patent describes a "tamper-evident structure" as follows: "[T]amper-evident structure are [sic] provided in an effort to indicate whether the container [ ] has been previously opened or in some manner been tampered with." '532 patent, col. 3:57–60. The stacked meat container depicted in *Machinery Update* appears to include a white, black, and yellow sticker on the top at the place where the sealing layer meets the overwrap top. The sticker appears to have been torn in half when the package was opened, and the Court can make out the other half of the sticker on the sealing layer underneath the fingers. Defs.' Ex. 13 at 59. Although the image is grainy, this appears to be the tamper-evident structure recited in claim 6.

Two of the dependent claims relate to dividers in the frame. Claim 32 states:

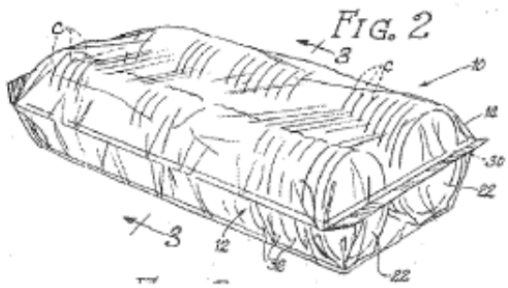
> 32. The polygonal shaped food container of claim 26 wherein the frame has at least one divider to separate discrete food articles.

Ex Parte Reexam. Certif., col. 1:50–52. Claim 36 states:

> 36. The polygonal shaped food container of claim 35 wherein the frame has a plurality of dividers extending transversely across the frame.

Ex Parte Reexam. Certif., col. 2:39– 41. Claim 36 differs from claim 32 in that it requires more than one divider that extends from one end of the frame to another. The

Machinery Update articles do not disclose dividers. But trays with dividers were used for packaging cookies prior to the invention. For instance, the Graham patent discloses "a cookie package . . . [which] provides support ribs effectively for contacting cookies at spaced points for so spacing the cookies, and for resiliently cushioning the cookies against shock and stacking loads.'" Pl.'s Ex. 25 at KFGB0001053 (quoting Graham, col. l, ll. 11–12, 18–21; Third Cornell Decl. ¶ 15). The image of the Graham cookie tray clearly shows dividers, including dividers that traverse the frame. *Id.* at KFGB0001649.



Pl.'s Ex. 25 at KFGB0001649 (reproduction of Figure 2 of the Graham patent)

For the reasons the Court has stated, it would have been predictable for a packaging expert to combine a cookie tray, like that used in the Graham package, with the resealing technology in *Machinery Update.*

Two of the dependent claims require the package to contain cookies and the package and overwrap to protect the cookies from damage. Claim 33 states:

> 33. The polygonal shaped food container of claim 26 wherein the discrete food articles are cookies susceptible to damage and the frame and the wrapper cooperate to protect the cookies from damage.

Ex Parte Reexam. Certif., col. 1:53–2:24. Claim 37 states:

> 37. The polygonal shaped food container of claim 36 wherein the discrete food articles are cookies susceptible to damage and the frame and the overwrap cooperate to protect the cookies from damage.

Ex Parte Reexam. Certif., col. 2:42– 45. The *Machinery Update* articles do not disclose this claim. They do not describe or depict a frame that would protect cookies from damage. But as the Court has stated, cookie trays designed to protect cookies (like the Graham package) existed in the prior art, and it would have been predictable for one skilled in the art to combine existing cookie trays with resealable packaging technology described in *Machinery Update.* Thus, Kellogg has made a strong prima facie showing that these claims are obvious.

In sum, Kellogg has made a strong showing that the additional structural limitations recited by the dependent claims are obvious. They simply recite features that were common in previous cookie packages or disclosed in *Machinery Update*. As the Court has explained, it is not genuinely disputed that it would have been predictable for one skilled in the art to combine these features.

6. Secondary considerations

Although Kellogg has made a strong prima facie showing of obviousness based on the primary considerations, the Court must also analyze secondary considerations of non-obviousness, such as commercial success, long felt but unsolved needs, failure of others, copying, and unexpected results. *KSR*, 550 U.S. at 406; *Wyers*, 616 F.3d at 1245. IGB has presented substantial evidence of secondary considerations of non-obviousness.

With respect to commercial success, a Kraft study concluded that the company's sales volume increased four percent due to the Snack 'n Seal packaging. Pl.'s Ex. 25 at

KFGB0000484. IGB also presented evidence of positive consumer feedback related to the packaging. Additionally, a report prepared by Kellogg concluded that IGB's Snack 'n Seal "was a clear favorite for nearly all" of 42 respondents interviewed. Pl.'s Ex. 49 at KELLOGG009409. The report stated: "It is evident that Nabisco's launch of its Snack 'n Seal packaging has had an impact on expectations. . . . [S]ome [respondents] said they look for cookie products in that packaging because it is effective at maintaining freshness and easy to use." Pl.'s Ex. 14 at KELLOGG009415. Another report stated: "Kellogg's Snacks division has identified packaging innovations as a potentially important way to increase sales and consumption of existing snack food items, deliver improved margins/ROI, and differentiate both existing and new snack food products." Pl.'s Ex. 13 at KELLOGG009039. IGB has offered substantial evidence from which a jury could find that its invention has been commercially successful.

IGB has also presented evidence of long felt but unsolved need. Kraft won many awards for its Snack 'n Seal packaging, including a DuPont Award, "one of the highest industry awards innovative packaging technology can receive." Pl.'s Ex. 25 at KFGB000475. Additionally, many industry publications have lauded the Snack 'n Seal package, including one article that said, "The tray pack for Oreo cookies long cried for improvement." *Id.* at KFGB0000477–0000479.

Additionally, IGB has presented compelling evidence of copying. A document produced by Kellogg states that the company "develop[ed] technology that circumvents the Kraft patent while maintaining similar properties." Pl.'s Ex. 19 at KELLOGG010055. This evidence shows that Kellogg intentionally copied IGB's packaging.

Even assuming these facts to be true and drawing all reasonable inferences in

IGB's favor, this is a case in which the secondary considerations do not overcome Kellogg's extremely strong prima facie showing that the invention was obvious in light of *Machinery Update*. "[S]econdary considerations of nonobviousness . . . simply cannot overcome a strong prima facie case of obviousness." *Wyers*, 616 F.3d at 1246; *see also Perfect Web Techs.,* 587 F.3d at 1333 ("[E]vidence of secondary considerations does not always overcome a strong prima facie showing of obviousness."); *Ball Aerosol*, 555 F.3d at 994 (concluding that "minimal indications of commercial success . . . do not outweigh the clear indication of obviousness apparent from the prior art"); *Tokai Corp.*, 632 F.3d at 1370. In this case, the prior art references teach all of the claim limitations—all of the elements could be found in existing food packaging technology. In fact, nearly all of the elements were found in one *Machinery Update* article, and the rest already existed in cookie packages. Additionally, the technology is relatively simple. Based on these considerations, a person skilled in the art would have a reason to combine the elements to create the invention. In sum, the primary considerations lead to a conclusion that the invention was obvious in light of the prior art, and IGB's strong showing of secondary considerations does not outweigh this determination.

In sum, based on the undisputed facts, all of the asserted claims are invalid as obvious in light of *Machinery Update* when combined with existing cookie packages. Because the asserted claims are obvious, the Court need not consider Kellogg's anticipation or written description arguments or whether the sample of the Re-Seal It technology, also referred to as the Fuji Package, constitutes prior art under 35 U.S.C. § 102(a).[7]

[7] Both parties moved for summary judgment on whether the Fuji Package can constitute

B. Non-infringement

Although judgment in favor of defendants is appropriate because the asserted claims are invalid, the Court nonetheless considers the parties' infringement arguments. "Patent infringement is a two step inquiry. First, the court must construe the asserted claim. Second, the court must determine whether the accused product or process contains each limitation of the properly construed claims, either literally or by a substantial equivalent." *Freedman Seating Co. v. Am. Seating Co.*, 420 F.3d 1350, 1356–57 (Fed. Cir. 2005) (internal citation omitted). "The first step is a question of law; the second step is a question of fact." *Id.* at 1357. "Summary judgment of noninfringement may only be granted if, after viewing the alleged facts in the light most favorable to the nonmovant and drawing all justifiable inferences in the nonmovant's favor, there is no genuine issue whether the accused device is encompassed by the patent claims." *Novartis Corp. v. Ben Venue Labs., Inc.*, 271 F.3d 1043, 1046 (Fed. Cir. 2001).

Defendants are entitled to summary judgment of non-infringement as to literal infringement based on the Court's construction of the claim term, "sealing layer." The Court concluded that the "sealing layer" as used in claims 1 and 34 must be a distinct layer from the top of the container, because "the patent specification differentiates the sealing layer from the component(s) of the container that form its top." 9/22/2014 Order

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prior art. It is undisputed that a sample of the package was given to a Kellogg employee at a European trade show and was shown to Kellogg employees in the United States. The parties dispute whether the sample was "known or used by others in this country" before the date of invention under section 102(a). 35 U.S.C. § 102(a) (2006); *see also Ormco Corp. v. Align Tech., Inc.*, 463 F.3d 1299, 1305–06 (Fed. Cir. 2006); *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340, 1350 (2008) (discussing the standard under section 102(a)). The Court does not address this issue.

at 6–7. Kellogg argues that the accused products do not have a sealing layer that is distinct from the top of the container. IGB does not dispute that the accused products' purported "sealing layer" is part of the same piece of material as the top of the packaging; it is created by cutting a flap from the top of the wrapper. Instead, IGB argues that "[b]y limiting the scope of the Court's Order on Sealing Layer to a discrete layer—meaning separately manufactured material—Defendants improperly limit the claims to the preferred embodiment." Pl.'s Mem. in Supp. of Cross Mot. for Summ. J. and in Opp'n to Defs.' Mot. for Summ. J. at 6. As the Court stated in the claim construction ruling, the "sealing layer" must be a distinct layer from the wrapper top. *See* 9/22/2014 Order at 5–7 ("Kellogg says that sealing layer means 'a layer of material distinct from the top of the wrapper having adhesive thereon for sealing to the upper surface of the top of the wrapper.' . . . The Court agrees with Kellogg that the claim language requires the sealing layer to be a distinct layer from the top of the container."). In other words, the sealing layer must be a separate piece of material, although it can be made of the same type of material as the rest of the top. Because the top and the cut-out flap are not "distinct layers" in the accused products—rather, they are part of the same layer—Kellogg does not literally infringe the sealing layer limitation. Kellogg is therefore entitled to summary judgment of no literal infringement because, based on the undisputed facts, the accused products do not contain every limitation of the independent claims.

The Court addresses another claim construction issue raised by Kellogg, looking first and primarily to "the claims themselves, the specification, and the prosecution history of the patent." *Sunovion Pharms., Inc. v. Teva Pharms. USA, Inc.*, 731 F.3d

1271, 1276 (Fed. Cir. 2013). Kellogg argues that it is entitled to summary judgment of non-infringement because the flap on the accused product—even if it is considered a "sealing layer"—does not adhere directly to the top of the wrapper as required under both claims. Instead, the flap adheres to an adhesive collar, which is a separate material that is affixed to the top. IGB argues that the adhesive collar should be considered part of the top of the container. The parties do not dispute the structure of the accused products but rather ask the Court to determine whether a material affixed to the top of the wrapper can be considered part of the top.

Under claim 1, the sealing layer must be "adhesively sealed to said top around said opening" and must be "reclosable against said top to seal said opening when said sealing layer is moved back against the said top." '532 Patent, col. 5:42–51. Similarly, under claim 34 the sealing layer must be "adhesively sealed to the overwrap top around the recloseable access opening" and must be "recloseable against the overwrap top." Ex Parte Reexam. Certif., col. 2:14– 24. Nothing in the claims or specification suggests that a material affixed to the top cannot be considered part of the top. Kellogg points to the claim language requiring that the wrapper "surround[] said frame" and "encas[e] the frame." '532 Patent, col. 5:34–35; Ex Parte Reexam. Certif., col. 2:62. Even though the wrapper forms the top and must surround the frame, this does not mean that the top cannot have additional material affixed to it. The top limitation is not like the "sealing layer" term. There, the word "layer" and the surrounding language in the claim and specification indicated that the top and the sealing layer must be separate pieces of material. Here, no language limits "top" to exclude materials affixed directly to the top of the wrapper. Accordingly, the Court concludes that the "top" can include materials

directly affixed to the top, such as the adhesive collar. Based on the undisputed facts, the accused product contains that limitation.

Even though Kellogg does not literally infringe because the accused product does not have a "sealing layer," Kellogg is not entitled to summary judgment of non-infringement because a reasonable jury could find that the accused product infringes under the doctrine of equivalents. The doctrine of equivalents applies when the accused product does not contain every claim limitation but nonetheless provides the same function in the same way with the same results. *See Sage Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1424 (Fed. Cir. 1997). The Court "must consider the totality of the circumstances" to "determine whether the alleged equivalent can be fairly characterized as an insubstantial change from the claimed subject matter without rendering the pertinent limitation meaningless." *Freedman Seating Co.*, 420 F.3d at 1358. Apart from the one material difference between the '532 patent and the accused product that Kellogg highlights—namely the different sealing layer structure—there is ample evidence from which a reasonable jury could find that the accused product is identical in structure to the patented invention. A reasonable jury could find that the accused product performs the same function as the patented invention in the same way. In fact, a document produced by Kellogg states that the company "develop[ed] technology that circumvents the Kraft patent while maintaining similar properties." Pl.'s Ex. 19 at KELLOGG010055. This undisputed evidence suggests that Kellogg intentionally altered its packaging slightly to avoid literally infringing the '532 patent. This is precisely what the doctrine of equivalents aims to prevent.

C. Inequitable conduct

The Court grants IGB's motion for summary judgment on defendants' inequitable conduct defense. To prevail on a defense of inequitable conduct of the type asserted here, "the accused infringer must prove by clear and convincing evidence that the applicant knew of [a prior art] reference, knew that it was material, and made a deliberate decision to withhold it." *Therasense, Inc. v. Becton, Dickinson & Co*., 649 F.3d 1276, 1290 (Fed. Cir. 2011) (en banc). The intent requirement is exacting; "the evidence must be sufficient to require a finding of deceitful intent in the light of all the circumstances. Hence, when there are multiple reasonable inferences that may be drawn, intent to deceive cannot be found." *Id*. at 1290–91 (internal quotation marks and citation omitted). As far as materiality, absent "affirmative egregious misconduct," the failure to disclose must be but-for material, meaning "the PTO would not have allowed a claim had it been aware of the undisclosed prior art." *Id*. at 1291.

Defendants claim that IGB engaged in affirmative egregious misconduct by failing to point out the misprint in the *Packaging News* article. As the Court has discussed, the article stated that the Re-Seal It technology did not include conventional wrapping film, which was almost certainly a misprint. Not realizing this, the Board of Patent Appeals and Interferences considered that article and concluded that the article teaches away from combining the package with overwrap. The Board did not consider the *Machinery Update* articles that described the Re-Seal It package as including overwrap. This allegation cannot form the basis of an inequitable conduct claim, however. It is undisputed that *Machinery Update* and *Packaging News* were presented during reexamination, and "[a]n applicant can not be guilty of inequitable conduct if the

reference was cited to the examiner, whether or not it was a ground of rejection by the examiner." *Fiskars, Inc. v. Hunt Mfg. Co.*, 221 F.3d 1318, 1327 (Fed. Cir. 2000).

Even though Kellogg does not dispute that all of the relevant articles were submitted during reexamination, Kellogg nonetheless argues that IGB's counsel committed egregious misconduct by knowingly making false statements about the *Packaging News* article during oral argument before the Board. Kellogg points to the portion of the hearing in which one judge asked, "In looking at this photograph that's reproduced in this 'Packaging News' document, it appears that there is something on the—below the tray, meaning a wrap of some sort, that goes underneath the tray. Is that a correct characterization?" IGB's counsel responded: "No, Your Honor. There's no evidence that there is any sort of surrounding wrapper." Pl.'s Ex. 25 at KFGB0002668. Another judge pointed to the text of *Packaging News* and asked, "What is that talking about there? They're talking about flow wraps." IGB's attorney responded that "they're talking about the types of foods that would have normally been flow wrapped; now they're using this new technology." *Id.* at KFGB0002673. Although IGB's attorney during the reexamination proceedings should have notified the Board that the *Machinery Article* described the same packaging as including conventional wrapping, he merely restated the contents of the misprinted article. There is no evidence that the attorney knowingly failed to identify the inconsistency between the two articles. Absent evidence of specific intent to deceive, the Court may not find the '532 patent unenforceable due to inequitable conduct. Kellogg has pointed to no such evidence.

Defendants also claim that IGB withheld information about the Fuji Package

when it filed its patent application. IGB offered evidence that a Kraft employee in Germany obtained the Fuji Package at a 2001 trade show in Europe and sent an e-mail about the package to another German Kraft employee named Ron Exner shortly thereafter. The inventor of the '532 patent contacted Exner to ask about prior art before applying for the patent in 2003. Kellogg contends that Exner had a duty to share his knowledge of the Fuji Package with the inventor. But in the e-mails provided to the Court, Exner is merely copied and does not acknowledge receipt. There is no suggestion that Exner intended the inventor to withhold relevant prior art from the PTO. As the Court has noted, when there are multiple reasonable inferences that may be drawn, intent to deceive cannot be found. *See Therasense, Inc.*, 649 F.3d at 1290–91. Here, there are many alternative reasonable inferences that can be drawn—that Exner did not see the e-mail, that he forgot about the e-mail, or that he did not recognize the technology as the Fuji Package because it was described by another name, "Antonson," in the e-mail. Defs.' Reply in Supp. of Mot. for Summ. J. and Opp'n to Pl.'s Cross Mot. for Summ. J., Ex. 49 at RDINCO291215. Moreover, the German employee's knowledge cannot form the basis for a claim of inequitable conduct because he did not have a duty to disclose information to the PTO. *See* MPEP § 2001.01; 37 C.F.R. § 1.56 (listing those with a duty to disclose information to the PTO to include named inventors, the prosecuting attorney or agent, and others who are substantively involved in the preparation or prosecution of the application).

Conclusion

For the foregoing reasons, the Court grants summary judgment of invalidity in favor of defendants on the basis of obviousness [dkt. no. 131] and grants plaintiff's

cross-motion for summary judgment in part [dkt. no. 143]. The Court directs the parties to promptly confer regarding the appropriate language for a judgment consistent with the Court's ruling. The parties are to submit a proposed form judgment or alternative proposals are to be submitted by no later than August 6, 2015.

MATTHEW F. KENNELLY
United States District Judge

Date: August 3, 2015.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INTERCONTINENTAL GREAT BRANDS LLC,	)	
Plaintiff,	)	
vs.	)	**No. 13 C 321**
KELLOGG NORTH AMERICA COMPANY, KELLOGG USA, INC., KEEBLER COMPANY, KEEBLER FOODS COMPANY, and KELLOGG SALES COMPANY,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Intercontinental Great Brands LLC (IGB) has sued defendants Kellogg North America and related entities (collectively Kellogg) for patent infringement. IGB contends that Kellogg manufactures products that infringe U.S. patent number 6,918,532 B2 (the '532 patent), in particular Claims 1, 3, 4, 6, 12, 13, 15-17, 23, 24, 26-37, 39-45 of that patent. The parties have submitted briefs regarding the construction of certain terms in the claims. The Court held a claim construction hearing, followed by supplemental briefing. The Court rules on the construction of disputed terms as set forth below.[1]

Background

The '532 patent covers a "Resealable Food Container." It was issued on July 19,

[1] The Court apologizes for the inordinately long period that it took to issue this decision following completion of the supplementary briefing.

2005. The listed inventors are five individuals from New Jersey, who first filed the application for the patent in April 2003. The patent lists IGB's parent company Kraft Foods Holdings, Inc. as the patent's exclusive licensee.

The Macfarlane Group Sweden, also known as Reseal-It, works with Fuji Packaging GmbH to produce re-sealable packages. In October 2007, Regath HB, a patent holding company for Macfarlane, requested an *ex parte* reexamination of the '532 patent. The United States Patent and Trademark Office (PTO) granted the request. In April 2010, the PTO issued a rejection of the '532 patent claims. IGB appealed the decision to the Board of Patent Appeals (BPA). In August 2008, the BPA reversed, finding that all claims of the '532 patent were patentable. On October 25, 2011, the PTO issued a reexamination certificate that left the original claims in the '532 patent intact and added a number of new claims.

The '532 patent describes a container that protects food products and helps keep them fresh. The container enables a consumer to select a food item from the container through a resealable panel at the top. The summary of the invention section of the '532 patent's specification states that "the purpose of the present invention is to provide a new and improved container for food products such as rigid food articles, for example cookies and the like . . . ." '532 Patent, col. 1:40-41.

The '532 patent includes sixty-seven claims, with claims 26-67 having been added after the reexamination proceedings. Three of the claims that IGB asserts in this case are independent claims, specifically, claims 1, 13, and 34. Three of the disputed terms are contained in one or more of these claims. The Court sets out claims 1 and 34 in their entirety, highlighting the disputed language:

1. A polygonal shaped food container comprising:

a frame defining the polygonal shape of the container, said container having a top, a bottom and sides connecting the top and bottom, the frame containing a food product comprised of discrete food articles;

a wrapper surrounding said frame, said wrapper **forming the top sides and bottom of the container**;

said top having an access opening sufficiently large to provide hand access to substantially all of the discrete food articles contained within the frame, such that substantially any one of the discrete food articles can be accessed and removed individually through said access opening; and

a sealing layer, adhesively sealed to said top around said opening, said sealing layer including a starter portion located near a side of the top which can be grasped by a user, said sealing layer being releasable when said starter portion is pulled in a direction away from said side to in turn pull and thereby release at least a portion of said sealing layer to provide the hand access to said top access opening and reclosable against said top to seal said opening when said sealing layer is moved back against the said top.

'532 Patent, col. 5:29-51 (emphasis added). Claim 13 is virtually identical to claim 1; it describes a rectangular food container rather than a polygonal container and makes a small number of corresponding changes. Claim 34, which is one of the claims added after the reexamination, reads as follows:

34. A polygonal shaped food container comprising:

a frame defining the polygonal shape of the container, the frame having a bottom, sides and an upper periphery portion, the frame containing a food product comprised of discrete food articles;

an overwrap encasing the frame, the overwrap forming an overwrap top, overwrap bottom and overwrap sides of the container over the frame and defining the top, bottom and sides of the container, the overwrap top having at least a pair of facing overwrap perimeter portions inward of the periphery portion of the frame;

the overwrap top having a reclosable access opening defined at least in part by the perimeter portions, the opening sufficiently large to provide hand access to substantially all of the discrete food articles contained

> within the frame such that substantially any one of the discrete food articles can be accessed and removed individually through the reclosable access opening, the upper periphery portion of the frame supporting the overwrap perimeter portions so that the overwrap perimeter portions are in a plane generally parallel to the bottom of the frame, the overwrap perimeter portions capturing the frame in the encasing overwrap to guard against unintentional removal of the frame through the opening from the encasing overwrap; and
>
> **a sealing layer** adhesively sealed to the overwrap top around the reclosable access opening, the sealing layer including a starter portion located near a side of the overwrap top which can be grasped by a user, the sealing layer being releasable when said starter portion is pulled in a direction away from the side to in turn pull and thereby release at least a portion of the sealing layer to provide the hand access to the reclosable access opening and reclosable against the overwrap top to seal the access opening when the sealing layer is moved back against the overwrap top.

Ex Parte Reexam. Certif., col. 1:57–col. 2:24 (emphasis added).

The parties presented seven claim terms to the Court for construction. They subsequently stipulated to the definition of one term found in claim 1, specifically, "forming the top sides and bottom of the container." They agree that this means, "forming the top, sides, and bottom of the container"; in other words, they essentially agreed that commas were missing. Defs.' Opening Br. at 24.

The parties have proposed competing definitions for the three terms: "sealing layer," "frame," and "overwrap." IGB has also asked the Court to construe three additional terms: "additional perimeter portions," "facing overwrap portions," and "facing perimeter portions."

"When construing claim terms, we first look to, and primarily rely on, the intrinsic evidence, including the claims themselves, the specification, and the prosecution history of the patent, which is usually dispositive." *Sunovion Pharms., Inc. v. Teva Pharms. USA, Inc.*, 731 F.3d 1271, 1276 (Fed. Cir. 2013). "'[E]xtrinsic evidence in general' is

'less reliable than the patent and its prosecution history in determining how to read claim terms.'" *SkinMedica, Inc. v. Histogen Inc.*, 727 F.3d 1187, 1195 (Fed. Cir. 2013) (quoting *Phillips v. AWH Corp.*, 415 F.3d 1303, 1318 (Fed. Cir. 2005) (en banc)).

Claim terms are generally given "their ordinary and customary meaning as understood by a person of ordinary skill in the art when read in the context of the specification and prosecution history." *Butamax(TM) Advanced Biofuels LLC v. Gevo, Inc.*, 746 F.3d 1302, 1309 (Fed. Cir. 2014) (internal quotation marks omitted). "'There are only two exceptions to this general rule: 1) when a patentee sets out a definition and acts as his own lexicographer, or 2) when the patentee disavows the full scope of a claim term either in the specification or during prosecution.'" *Starhome GmbH v. AT & T Mobility LLC*, 743 F.3d 849, 856 (Fed. Cir. 2014) (internal quotation marks omitted).

Discussion

1. Sealing layer

The term sealing layer appears in all of the asserted claims of the '532 patent. The parties propose competing definitions of this term.

Kellogg says that sealing layer means "a layer of material distinct from the top of the wrapper having adhesive thereon for sealing to the upper surface of the top of the wrapper." Defs.' Opening Br. at 9. IGB says that the sealing layer is "[p]art of the container formed in a surface of the container other than an end surface." Pl.'s Reply Br. at 9. IGB has clarified that by the phrase "other than an end surface," it means to refer to the top of the container. *Id.* at 11. Thus IGB's definition of "sealing layer" essentially is: "part of the container formed in the top of the container." (IGB has not clarified what it means for the sealing layer to be "formed in" a surface of the container.)

Hrg. Tr. at 19. The essential difference between the two sides' proposed definitions is that Kellogg contends the sealing layer must be a layer distinct from the top of the container, whereas IGB contends the sealing layer is part of the top of the container, not a distinct layer.

IGB's proposed definition of "sealing layer" makes no sense when the term is read in context. "[T]he claims themselves provide substantial guidance as to the meaning of particular claim terms," and "the context in which a term is used in the asserted claim can be highly instructive." *Phillips*, 415 F.3d at 1314.

The claim language expressly requires the sealing layer to be "*sealed to* said top." '532 Patent, col. 5:42 (emphasis added). The sealing layer cannot be *sealed to* the top of the container if it *is* part of the top. The Court agrees with Kellogg that the claim language requires the sealing layer to be a distinct layer from the top of the container.

The '532 patent's specification is consistent with this understanding of the sealing layer as distinct from the top of the container. *See Phillips*, 415 F.3d at 1313 ("[T]he person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification."). The patent's abstract describes a "wrapper [that] forms a top of the container which has an access opening" and "[a] sealing layer [that] is adhesively sealed to the top around the opening" and that "is resealable against the top layer. . . ." '532 Patent, Abstract. The summary of the invention similarly describes "[a] sealing layer [that] is adhesively sealed to the top" and that is "releasable from the top" and "reclosable against the top." *Id.*, col. 1:56-61. And

the "detailed description of the invention" describes, among other examples, a top that has a flap that may be pulled back as well as "[a] sealing layer [that] is affixed to the flap." *Id.*, col. 3:19. Thus the patent specification differentiates the sealing layer from the component(s) of the container that form its top.

IGB contends that its proposed definition is superior because it "directly quotes" the specification, namely the summary of invention. Pl.'s Reply Br. at 12. The phrase in question says that the container includes "an easily accessible opening seal formed in a surface other than an end surface, which seal can reclose the container during use." '532 Patent, col. 1:48-50. This language, however, refers to where the seal is formed; it does not describe the sealing layer itself. But even if read as IGB urges, this single reference does not trump the clear language of the claims, which as discussed earlier make it clear that the sealing layer is not part of the top; it is a distinct layer that seals to the top.

This does not mean, however, that the sealing layer must be physically separated from the top of the container or, more specifically, from the wrapper that forms the top of the container as described in claim 1. In particular, the requirement of a distinct layer does not preclude the sealing layer from being laminated to another layer or layers of the wrapper. One layer of material that is laminated to another is no less a distinct layer. In other words, "distinct" and "separate" have different meanings in this context.

The Court also disagrees with Kellogg's contention that the sealing layer must include adhesive. The claim does not require this. Though "adhesive seal[ing]" of the adhesive layer to the top of the container is required, there is nothing in the claim

language that requires there to be adhesive *on the sealing layer*, as opposed to, for example, on the top of the container where the sealing layer is intended to adhere. The Court acknowledges that the specification's description of the preferred embodiment of the invention states that "[a]dhesive 26 is applied to the surface of sealing layer 20 which is in contact with top 12." '532 Patent, col. 3:33-34. Under normal circumstances, however, it is improper to import limitations from the specification that are not part of the claims. *See, e.g., Deere & Co. v. Bush Hog, LLC*, 703 F.3d 1349, 1354 (Fed. Cir. 2012); *Phillips*, 415 F.3d at 1323. And the Federal Circuit has "expressly rejected the contention that if a patent describes only a single embodiment, the claims of the patent must be construed as being limited to that embodiment." *Dealertrack, Inc. v. Huber*, 674 F.3d 1315, 1322 (Fed. Cir. 2012) (citing *Phillips*). Because there is nothing in the claims that indicates that the adhesive is to be applied to the sealing layer, the Court declines to read the patent as requiring this.

2. Frame

The next term the Court must define is "frame," which appears in claims 1, 13, and 34. As noted earlier, the claims say that the frame "defin[es] the . . . shape of the container" and "contain[s] a food product. . . ." '532 Patent, col. 5:30-32; *see also id.*, col. 6:33-36; Reexam. Certif., col. 1:58-60. Claim 1 says that a wrapper "surround[s] said frame" and "form[s] the top[,] sides[,] and bottom of the container," and Claim 13 says that a wrapper "surround[s] said frame" and "form[s] [the] generally rectangular top of the container." '532 Patent, col. 5:34-35, col. 6:38-39. Claim 34 says that "an overwrap encase[es] the frame" and "form[s] an overwrap top, overwrap bottom and overwrap sides of the container over the frame." Reexam. Certif., col. 1:62-64.

IGB's proposed construction of frame is "a tray with a bottom and sides." Defs.' Opening Br. at 19. Kellogg's proposed construction is "a tray for holding and protecting a food product." *Id.*

The Court has a hard time seeing why it is necessary or appropriate to include in the definition of the single word frame a requirement that the frame "hold" the food product, as Kellogg urges. Other language in the claims requires the frame to "contain[s] a food product." *See, e.g.*, '532 Patent, col. 5:32. There is no need to build this concept into the definition of the single word, frame. Thus the parties' dispute boils down to whether the frame must have sides.

The claim's plain language requires the frame to be capable of "containing" a food product. The Court does not see how a frame without sides may be said to "contain" a food product. As the claim construction hearing, counsel for Kellogg made reference to the flat circular structure, typically made of cardboard, on which pizza is sometimes served or delivered. But that structure does not "contain" a food product; it "holds" a food product. Containing implies that the food product is, at least to some extent, *within* the structure that holds it.

When the Court asked Kellogg's counsel at the claim construction hearing how the frame could "contain" a food product without having sides, counsel replied that "it's cooperating with the container that's got a top and bottom sides around it." Hrg. Tr. at 78. Indeed, claim 1 describes "said container having a top, a bottom and sides . . . ." '532 Patent, col. 5:30-31. But as the Court noted at the claim construction hearing, Claim 1 does not state that the frame cooperates with the container to contain food. Hrg. Tr. at 78-79. It refers, instead, to the "*frame* containing a food product." '532

Patent, col. 5:32.

The Court concludes that the claim requires the frame to have sides and therefore adopts IGB's proposed definition.

3. "Overwrap"

The parties also dispute the meaning of the term "overwrap," which appears in claim 34, one of the claims that was added to the '532 patent following the reexamination. Claim 34 describes the overwrap as "encasing the frame" on all sides. Reexam. Certif., col. 1:62. The claim also describes the overwrap top as "having a reclosable access opening . . . sufficiently large to provide hand access to substantially all of the discrete food articles contained within the frame," a point to which the Court will return momentarily. *Id.*, col. 2:1-5.

Kellogg urges the Court to construe overwrap as used in claim 34 as "[a] tamper evidence structure which completely surrounds the wrapper." Defs.' Opening Br. at 21. By contrast, IGB contends that overwrap is essentially a synonym for the term wrapper as used in other claims in the patent.

Kellogg invokes claims 11 and 22 in support of its proposed construction. These claims, which depend from claims 1 and 13 respectively, use the term overwrap to describe a structure that surrounds the wrapper—in other words, the same way in which Kellogg says the term should be construed for purposes of claim 34. Claim 11 describes a "tamper-evident structure [that] comprises an overwrap surrounding said wrapper," and claim 22 refers to a "tamper-evident structure [that is] an overwrap surrounding said wrapper." '532 Patent, col. 6:27-29, col. 8:8-10. The "summary of the invention" section of the specification further states that "the tamper-evident structure

may include . . . an overwrap surrounding the wrapper." *Id.*, col. 1:65-66, col. 2:3-4. Kellogg argues that as used in claim 34, "overwrap" should be read consistently with its usage elsewhere in the patent.

The Court disagrees and concludes that IGB has the better of the argument. Claim 34, unlike claims 11 and 22, does not describe two separate wrappers. Rather, after describing the frame, claim 34 immediately describes the overwrap without first (or later) describing any other sort of wrapper or other structure encasing the frame. In addition, the Court agrees with IGB that Kellogg's proposed construction would render claim 34 essentially incoherent. As IGB points out, and as the Court noted earlier, claim 34 requires the "overwrap" to have an access opening in the top through which one can access the food items inside. As IGB argues, this would not be possible if the overwrap were, as Kellogg proposes, a "tamper evidence structure which completely surrounds the wrapper." Were that the case, an opening in the overwrap would led not to the food product, but only to an interior wrapper.

Kellogg's primary argument is that as a general rule, a term is considered to have the same meaning each time it is used in a claim. But that is not an iron rule; rather, it is a presumption. The Federal Circuit refers to this canon as a "presumption that the same terms appearing in different portions of the claims should be given the same meaning unless it is clear from the specification and prosecution history that the terms have different meanings at different portions of the claims." *See Fin Control Sys. Pty, Ltd. v. OAM, Inc.*, 265 F.3d 1311, 1318 (Fed. Cir. 2001). In this case, the claim language itself makes it clear that "overwrap" is used differently in claim 34—which, again, was added after the reexamination proceedings—from its usage elsewhere in the

patent. The Court is unpersuaded that the presumption upon which Kellogg relies trumps the plain meaning of the term as it is used in the context of the claim at issue.

4. "Facing perimeter portions," "Facing overwrap perimeter portions," "Additional perimeter portions"

The parties dispute whether the Court should define the terms "facing perimeter portions" (Claims 26, 27, 35, 41, and 44), "facing overwrap perimeter portions" (Claim 34), and "additional perimeter portions" (Claims 27, 35, and 41), with IGB arguing that it should and Kellogg maintaining that it is unnecessary. The Court agrees with Kellogg; there is no need for the Court to construe these terms, at least not at this time.

Conclusion

The Court rules on the disputed claim terms as set forth in the foregoing decision. The case is set for a telephone status hearing on October 6, 2014 at 8:45 a.m. to discuss a schedule for further proceedings. Counsel are to jointly initiate the call to chambers (312-435-5618). Prior to the status hearing, counsel are directed to confer to attempt to agree on a schedule.

MATTHEW F. KENNELLY
United States District Judge

Date: September 22, 2014

US006918532B2

(12) **United States Patent**
Sierra-Gomez et al.

(10) **Patent No.: US 6,918,532 B2**
(45) **Date of Patent: Jul. 19, 2005**

(54) **RESEALABLE FOOD CONTAINER**

(75) Inventors: **Gladys Odette Sierra-Gomez**, Woodbridge, NJ (US); **Eva Marie Peters**, Cedar Grove, NJ (US); **Joseph Stiener**, Warren, NJ (US); **Charles Francis Flynn, IV**, Oak Ridge, NJ (US); **James Spencer Mandle**, Woodcliff Lake, NJ (US)

(73) Assignee: **Kraft Foods Holdings, Inc.**, Northfield, IL (US)

(*) Notice: Subject to any disclaimer, the term of this patent is extended or adjusted under 35 U.S.C. 154(b) by 119 days.

(21) Appl. No.: **10/414,502**

(22) Filed: **Apr. 16, 2003**

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(52) **U.S. Cl.** **229/87.08**; 206/459.1; 229/87.05; 383/203; 383/205; 426/119

(58) **Field of Search** 206/459.1, 807; 383/210–211, 203–206; 426/124, 122–123, 106, 119; 428/40.1, 41.7–41.8, 42.1; 229/87.05, 87.08

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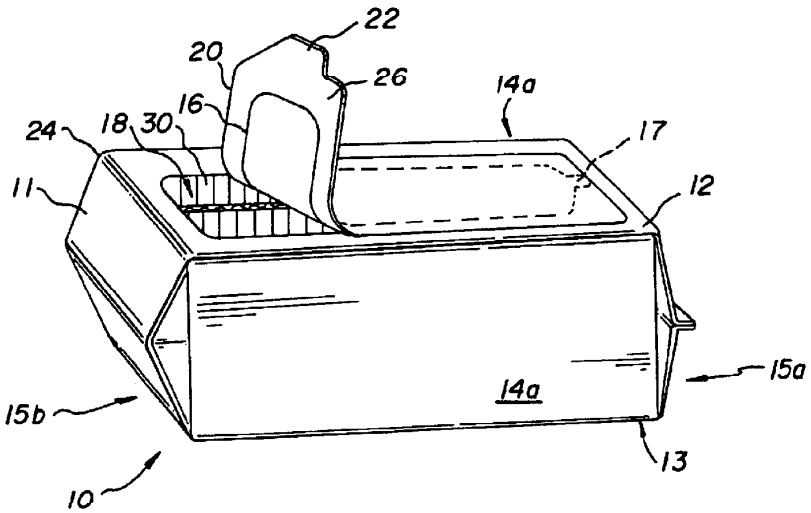
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(57) **ABSTRACT**

A container for a food product includes a wrapper which surrounds a frame. The container can be any polygonal shape which is defined by the shape of the frame. The wrapper forms a top of the container which has an access opening. A sealing layer is adhesively sealed to the top around the opening. The sealing layer is resealable when a tab of the sealing layer is pulled back. The sealing layer is resealable against the top layer to seal the opening when the sealing layer is moved back to a flat position on the top. Various tamper-evident structures are provided to indicate when the container has been initially opened or tampered with.

25 Claims, 7 Drawing Sheets



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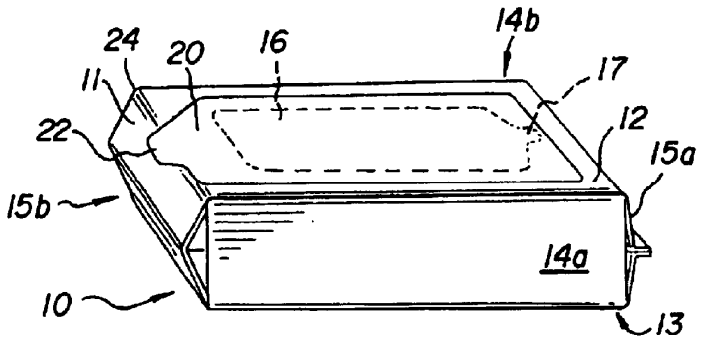


Fig. 1

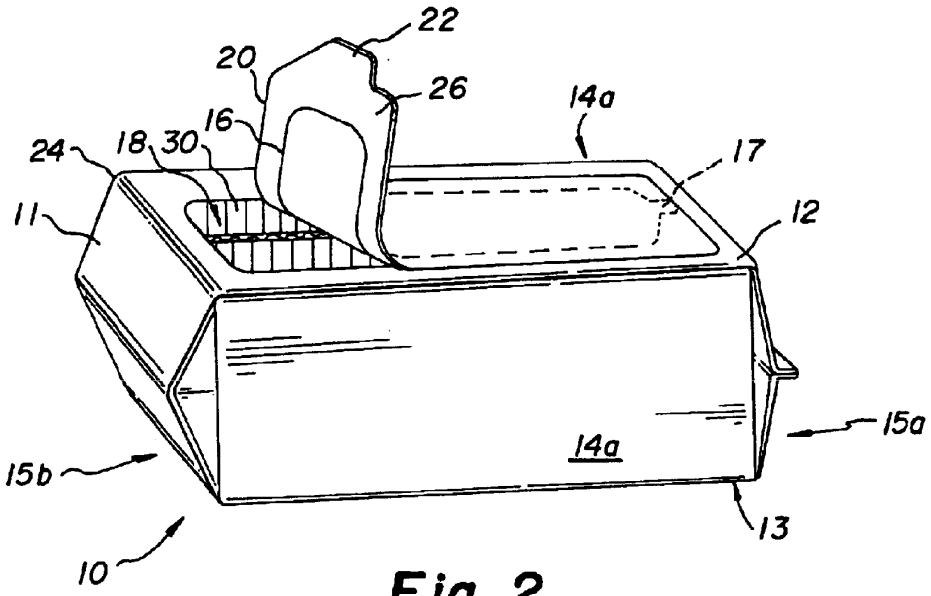


Fig. 2

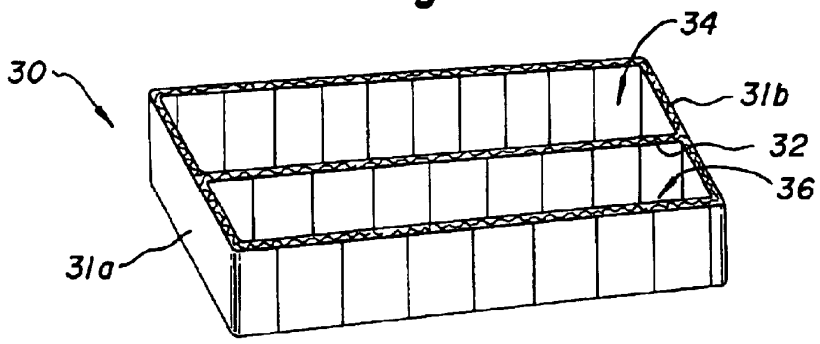


Fig. 3

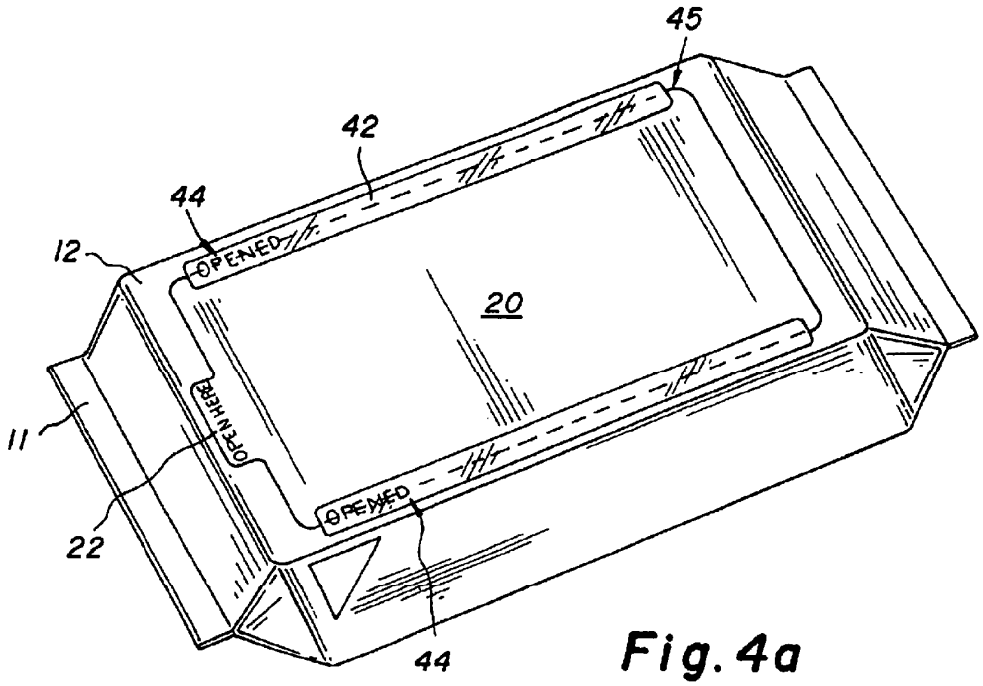

45
42
44
12
OPENED
20
OPEN HERE
11
22
OPENED
44

Fig. 4a

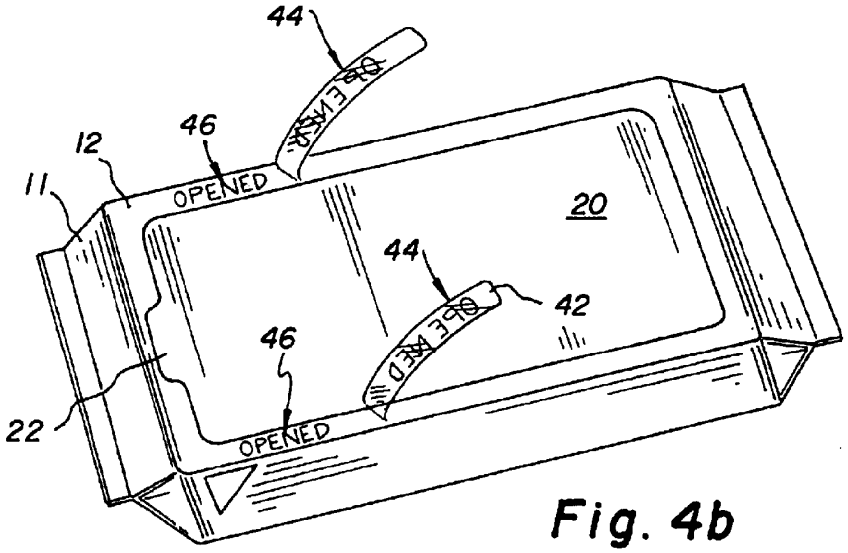

44
OPENED
46
12
11
OPENED
20
44
42
OPENED
46
22
OPENED

Fig. 4b

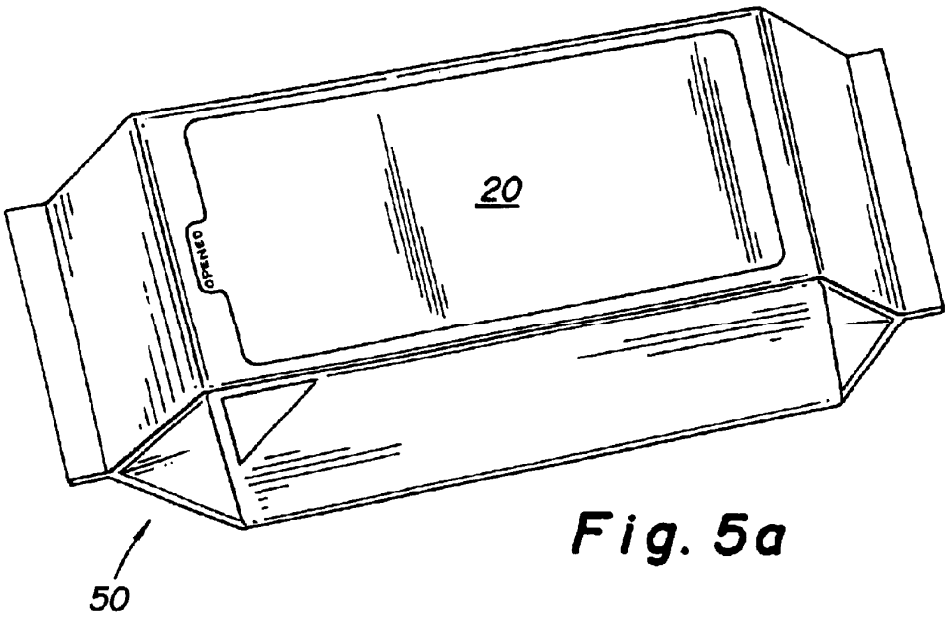


Fig. 5a

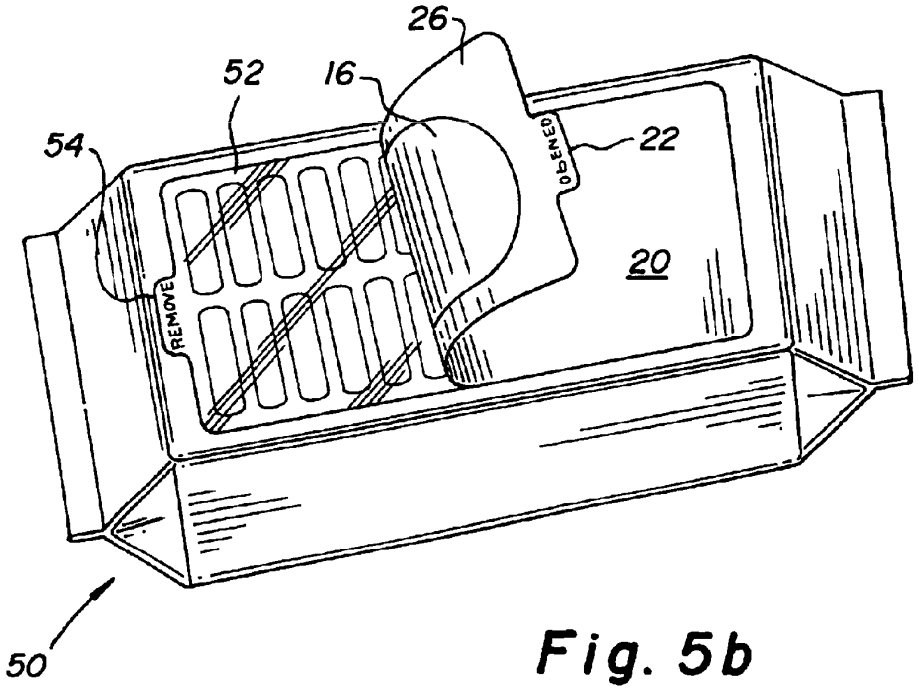


Fig. 5b

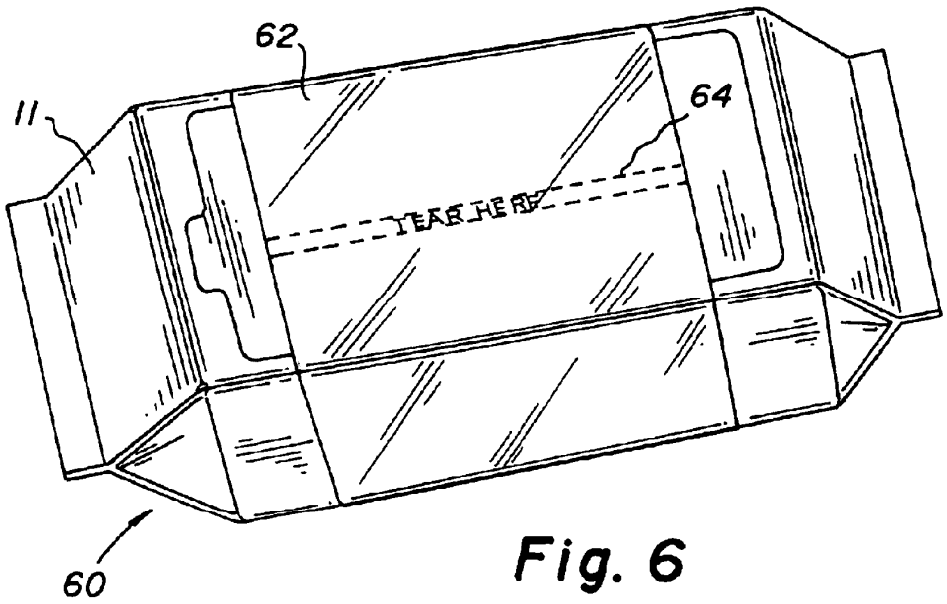


Fig. 6

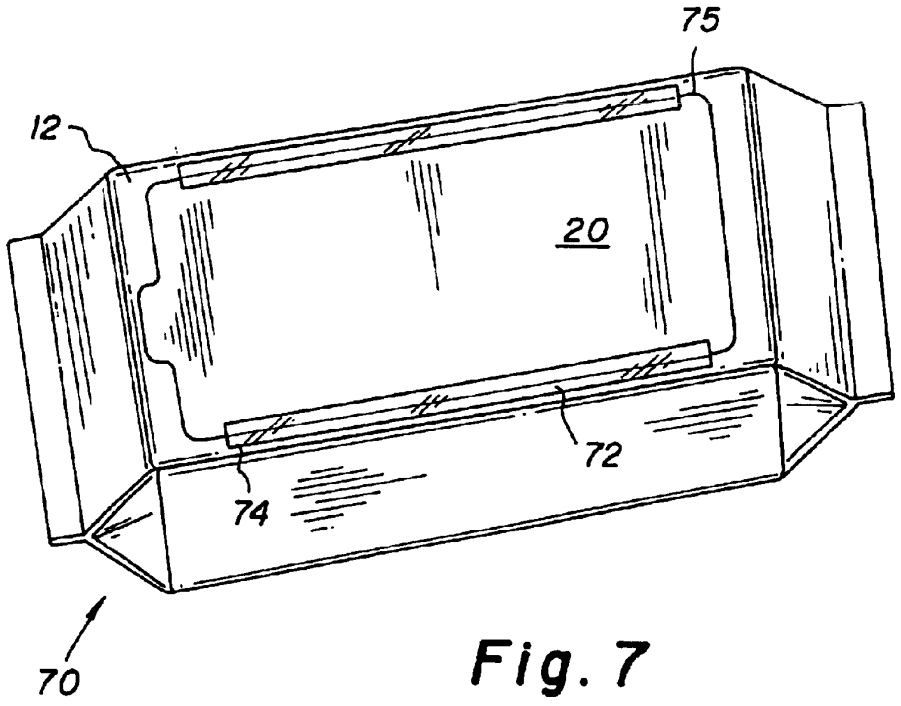


Fig. 7

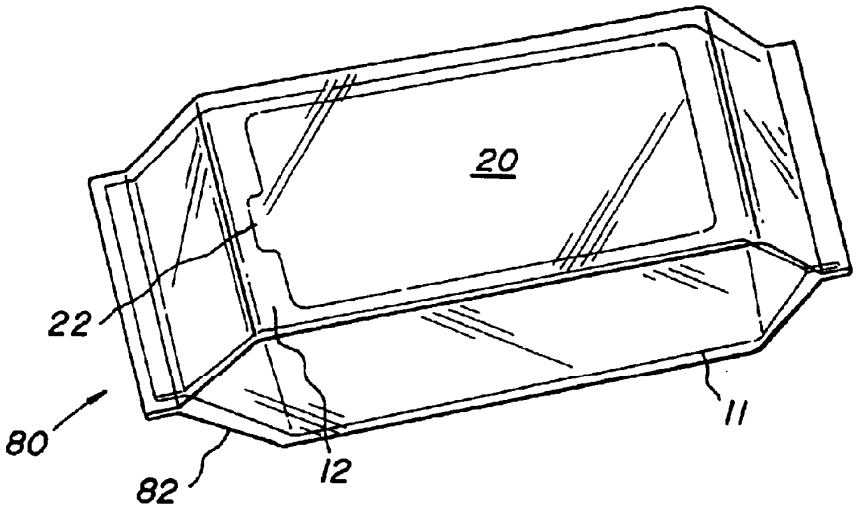


Fig. 8

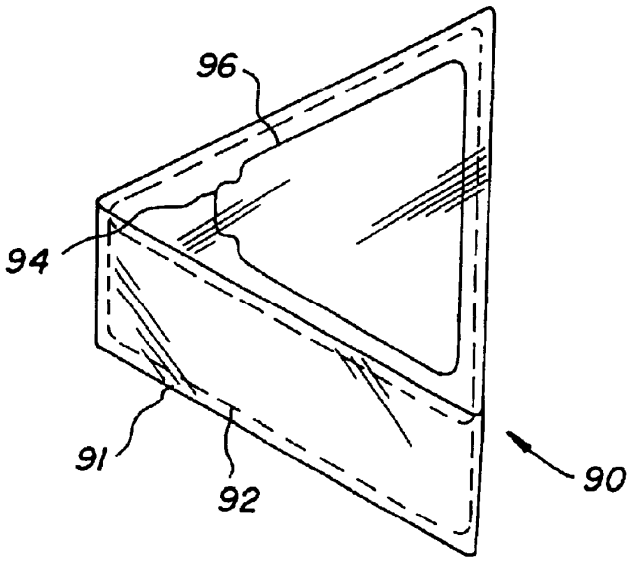


Fig. 9

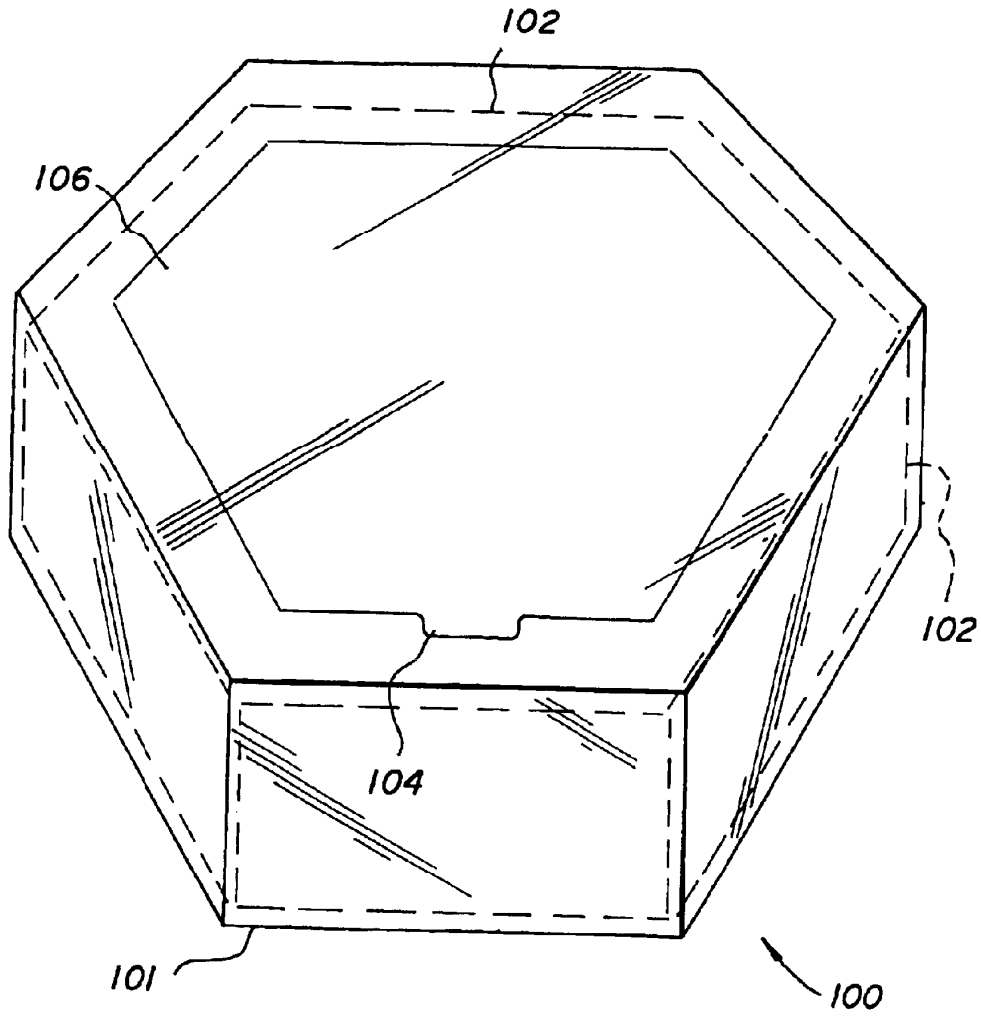


Fig. 10

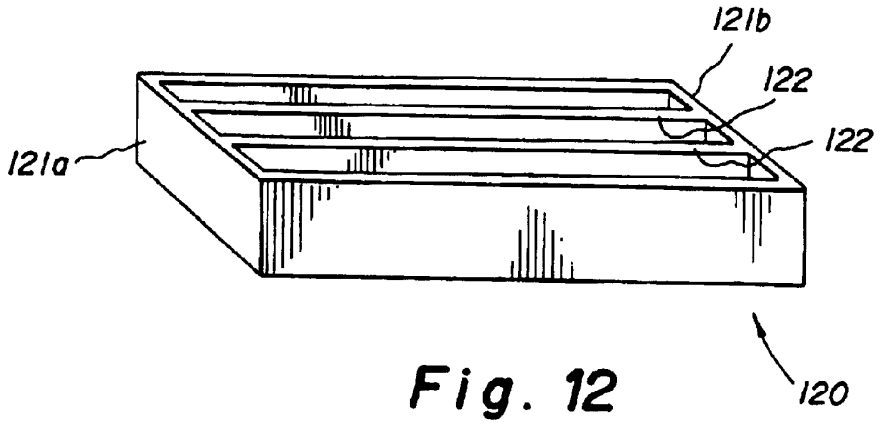


Fig. 12

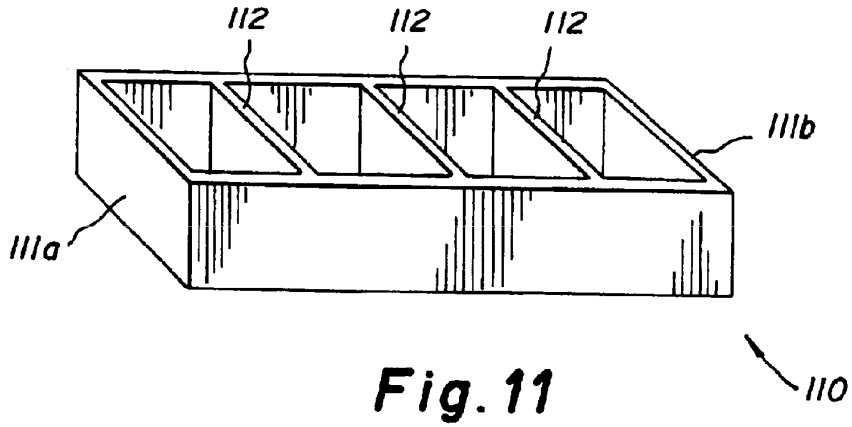


Fig. 11



Fig. 13

RESEALABLE FOOD CONTAINER

FIELD OF THE INVENTION

The present invention relates to a resealable container, and in particular, a new and improved resealable container having a reclosable sealing layer which can be pulled back and reclosed against a top portion of the container.

BACKGROUND OF THE INVENTION

Containers for food products such as cookies and other snacks typically include a frame surrounded by an outer wrapper. The frame acts as a tray to hold the food product and to protect the food product from damage. One normally gains access to the contents of the container by opening one end of the wrapper, withdrawing the tray from the inside thereof, and then removing the food product from the tray. However, these containers generally do not provide a convenient opening and reclosing arrangement. For example, reclosing of the wrapper, once opened, generally includes simply folding or rolling the end down and clipping the end to keep the wrapper closed.

Reclosable seals have been used for dispensing bags for wet tissue or disposable cleaning wipes. The label on these bags can be pulled back thereby exposing an opening, allowing access to the wet tissues or wipes inside. Typically, these dispensing bags are completely flexible, formed exclusively of a plastic or other suitable flexible material which closely surrounds the pack of wet tissues or wipes. Examples of these dispensing bags include U.S. Pat. Nos. 4,840,270 and 6,026,953, U.S. Design Pat. No. D 447,054 and U.S. Patent Application Publication No. 2002/0182359. However, such known dispensing bags are not well suited for containing food products as these containers fail to provide adequate protection for storing food products.

SUMMARY OF THE INVENTION

The purpose of the present invention is to provide a new and improved container for food products such as rigid food articles, for example cookies and the like, which container provides adequate protection for the contents thereof, while concurrently facilitating opening of the container wrapper and resealing the seal to protect the contents thereof until the contents are fully consumed.

This purpose is achieved by providing a suitable container for such food products, in combination with an easily accessible opening seal formed in a surface other than an end surface, which seal can reclose the container during use.

In accordance with one embodiment, the present invention comprises a polygonal shaped food container having a frame defining the polygonal shape of the container which contains the food product. A wrapper surrounds the frame and forms a top of the container. The top has an access opening so as to provide hand access to food contents of the container. A sealing layer is adhesively sealed to the top around the opening. The sealing layer is releasable from the top when a starter portion, for example, a tab of the sealing layer is pulled back and is reclosable against the top to seal the opening when the sealing layer is moved back to a flat position on the top.

In accordance with a further form of the present invention, the food container includes a tamper-evident structure. In various different alternate embodiments, the tamper-evident structure may include tamper-evident tape or scored seal tape extending along at least a portion of a perimeter where the scoring tape contacts the top, a removable film disposed under the sealing layer, a membrane sleeve encircling the wrapper over the sealing layer, or an overwrap surrounding the wrapper.

In accordance with another aspect of the present invention, a rectangular food container includes a frame defining the rectangular shape of the container which contains the food product. A wrapper surrounds the frame and forms a top of the container. The top has an access opening so as to provide hand access to food contents of the container. A sealing layer is adhesively sealed to the top around the opening. The sealing layer is releasable from the top when a tab of the sealing layer is pulled back and reclosable against the top to seal the opening when the sealing layer is moved back to a flat position on the top.

In accordance with another aspect of the present invention, a polygonal shaped food container comprises a frame defining the polygonal shape of the container which contains the food product. A wrapper surrounds the frame and forms a top of the container. The top has an access opening so as to provide hand access to food contents of the container. A sealing layer is adhesively sealed to the top around the opening. The sealing layer is releasable from the top when a tab of the sealing layer is pulled back and reclosable against the top to seal the opening when the sealing layer is moved back to a flat position on the top. A tamper-evident structure is associated with the sealing layer.

BRIEF DESCRIPTION OF THE DRAWINGS

The invention will now be described in detail with respect to preferred embodiments with reference to the accompanying drawings, wherein:

FIG. **1** is a perspective view of a resealable container in a closed configuration in accordance with the present invention;

FIG. **2** is a perspective view of the container of FIG. **1** in a partially opened configuration;

FIG. **3** is a perspective view of a frame of the container of FIGS. **1** and **2**;

FIG. **4***a* is a perspective view of a resealable food container having tamper-evident tape extending along a portion of a top of the container with the container depicted in a sealed configuration;

FIG. **4***b* is a perspective view of the container of FIG. **4***a* with the tamper-evident tape partially withdrawn;

FIG. **5***a* is a perspective view of a resealable container with a tamper-evident removable film where the container is depicted in an unopened configuration;

FIG. **5***b* is a perspective view of the container of FIG. **5***a* depicted in a partially opened configuration;

FIG. **6** is a perspective view of a resealable container having a tamper-evident membrane sleeve encircling the container;

FIG. **7** is a perspective view of a resealable container having a tamper-evident scored seal tape extending along a portion of a top of the container;

FIG. **8** is a perspective view of a resealable food container having a tamper-evident overwrap surrounding the container;

FIG. **9** is a perspective view of a polygonal shaped resealable food container in accordance with another embodiment of the present invention;

FIG. **10** is a perspective view of a different polygonal shaped resealable food container;

FIG. **11** is a perspective view of a frame for a resealable food container in accordance with the present invention;

FIG. **12** is a perspective view of another frame for a resealable food container; and

FIG. **13** is a perspective view of another different frame for a resealable food container.

DETAILED DESCRIPTION OF THE INVENTION

Referring now to the drawings, like numbers represent like elements throughout the several views.

Referring now specifically to FIGS. **1** and **2**, resealable container **10** includes a wrapper **11** which forms top **12**, bottom **13**, opposing sides **14***a* and **14***b*, and opposing ends **15***a* and **15***b*. The top **12** has a flap **16** with a tapered end **17**. The flap **16**, when pulled back from the container **10**, forms an opening **18**.

A sealing layer **20** is affixed to the flap **16**. Advantageously, the sealing layer **20** is permanently affixed to the flap **16** using an appropriate adhesive. The sealing layer **20** covers a substantial portion of the top **12** extending from the proximity of end **15***b* to the proximity of end **15***a*.

Graphics may be formed on the sealing layer **20** which align with corresponding graphics on top **12** when the sealing layer **20** is sealed or in a flat position on top **12**. Alternatively, sealing layer **20** may be transparent, allowing graphics of top **12** to be visible through sealing layer **20**.

A starter portion, for example a tab **22** extends or projects past coner **24**. As a result, tab **22** can be grasped from above and below by ones fingers and/or thumb thereby the tab **22** is easily accessible for one to pull.

Adhesive **26** is applied to the surface of sealing layer **20** which is in contact with top **12**. Advantageously, the adhesive **26** provides a removable seal between the sealing layer **20** and top **12**.

Container **10** is transformed from a closed configuration depicted in FIG. **1** to a partially opened configuration depicted in FIG. **2** by grasping the tab **22** between ones fingers and/or thumb and pulling back on the sealing layer **20** to gain access to opening **18**. Once container **10** is opened, one can remove individual food product contained inside the container **10** through opening **18**.

Wrapper **11** surrounds a frame **30** which forms a tray for the contents of the food to be placed. Referring to FIG. **3**, the frame **30** is composed of a rigid material which forms the shape of the container **10**. Suitable rigid material includes plastics and cardboard. Frame **30** includes ends **31***a* and **31***b* a divider **32** which divides the frame **30** into a first section **34** and a second section **36**.

Frame **30** can be any polygonal shape such as the rectangular shape depicted in FIG. **3**. Accordingly, the rectangularly shaped frame **30** forms a rectangularly shaped container **10**. Alternately, different polygonal shaped frames will form containers having the corresponding polygonal shape.

In various further embodiments, tamper-evident structure are provided in an effort to indicate whether the container **10** has been previously opened or in some manner been tampered with.

Referring to FIGS. **4***a* and **4***b*, in one form, the tamper-evident structure includes tamper-evident tape **42** which is applied along two portions of the perimeter **45** where the sealing layer **20** contacts the top **12**. The tamper-evident tape **42** must be removed prior to or at the same time the sealing layer **20** is pulled back for the first time. Once the tamper-evident tape **42** is peeled back from the wrapper **11**, indicia **44** from the tamper-evident tape **42** remains on the top **20** as evidence that the tamper-evident tape **42** had been previously removed. For example, the indicia of lettering "OPENED" **46** in FIG. **4***b* evidences that the tamper-evident tape **42** has been removed.

Referring to FIGS. **5***a* and **5***b*, in an alternative tamper-evident structure, container **50** includes a film **52** disposed under the sealing label **20**. The film **52** may be plastic or foil and includes a film tab **54** which one pulls to remove the film **52**. In use, one opens the container **50** as container **10** and then removes and discards the removable film **52** to gain access to the food contents contained within the container **50**. To reseal the container **50**, sealing layer **20** is moved back to a flat position as depicted in FIG. **5***a*.

Referring now to FIG. **6**, in an alternative tamper evident structure, container **60** includes a membrane sleeve **62** which is shrink wrapped around the wrapper **11**. A pair of parallel perforations **64** are scored in the membrane sleeve **62** which allow one to tear open the membrane along the perforations **64**. After the membrane sleeve **62** has been removed, the membrane sleeve **62** is discarded. Then, one opens the container **60** as container **10** as previously described.

Referring now to FIG. **7**, in yet another tamper-evident structure includes scored seal tape **72** which is placed along two portions of the perimeter **75** where the sealing layer **20** contacts the top **12**. When the sealing layer **20** is pulled back from the top **12** for the first time, portion **74** of the scored seal tape **72** remains on top **12** thereby indicating that the seal layer **20** previously has been removed from the container **70**.

Referring now to FIG. **8**, in yet another tamper-evident structure, container **80** includes an overwrap **82** which completely surrounds the wrapper **11**. To gain access to the food product in container **80**, one breaks open and discards overwrap **82**. Then, one opens the container **80** as container **10** by pulling back on tab **22** to withdraw sealing layer **20** from the top **12**.

In an alternative embodiment, rather than a rectangular container, the container may be in the form of any polygonal shaped container although rectangular which includes square is the preferred polygonal shape. As previously discussed, the polygonal shape of the container takes its form from the frame which is covered by a wrapper. For example, referring to FIG. **9**, container **90** is a triangular shaped polygonal container formed by wrapper **91** surrounding frame **92**. In an alternative polygonal shape depicted, FIG. **10** depicts container **100** in the shape of a hexagon defined by wrapper **101** which surrounds frame **102**. As in the embodiment of FIGS. **1** and **2**, one gains access to the contents of containers **90**,**100** by pulling back on tabs **94**,**104** of sealing layer **96**,**106**, respectively.

In other alternative embodiments, other frames other than frame **30** which has a single divider **32**, extending longitudinally along the length of the frame **30** can be used to form resealable containers. For example, referring to FIG. **11**, frame **110** includes a plurality of dividers **112** which extend transversely across the width of the frame **110**. Alternatively, frame **120** includes a plurality of dividers **122** extending transversely across the frame **120** (FIG. **12**) and frame **130** (FIG. **13**) does not include a divider at all. Selection of a particular frame depends on the desired use. Further, the various frames may include ends such as frames **30**,**110** and **120** which have ends **31***a*,**31***b*, **111***a*,**111***b*, **121***a*,**121***b*; or the frame may be opened at the ends such as frame **130** with opened ends **131***a*,**131***b*.

The present invention offers numerous features and advantages over previous food containers. For example, in one form, the present invention includes a tab element which extends beyond a corner of a top or side of the container which makes the tab easily accessible for being grasped and for withdrawing a sealing layer from the container.

An additional feature of the present invention is provided by a resealable sealing layer which can be pulled back and then resealable against a top portion of the container. This configuration makes it possible to gain easy access to the food product within the container without having to open the end of the container, withdraw a tray containing the food product, remove the food product from the tray, return the tray back to the container, and close off the end of the bag.

A further feature of one form of the present invention is provided by a tamper-evident structure which indicates whether the container has been previously opened or otherwise tampered. This tamper-evident structure allows a consumer to know whether the container has been previously opened. Further, the tamper-evident structure helps ensure that the contents are fresh by indicating whether the container has been previously opened.

Although the invention has been described in detail with respect to the preferred embodiments thereof, it will be apparent to one of ordinary skilled in the art that the invention is capable of numerous modifications and variations within the scope and spirit of the invention.

What is claimed is:

1. A polygonal shaped food container comprising:

a frame defining the polygonal shape of the container, said container having a top, a bottom and sides connecting the top and bottom, the frame containing a food product comprised of discrete food articles;

a wrapper surrounding said frame, said wrapper forming the top sides and bottom of the container;

said top having an access opening sufficiently large to provide hand access to substantially all of the discrete food articles contained within the frame, such that substantially any one of the discrete food articles can be accessed and removed individually through said access opening; and

a sealing layer, adhesively sealed to said top around said opening, said sealing layer including a starter portion located near a side of the top which can be grasped by a user, said sealing layer being releasable when said starter portion is pulled in a direction away from said side to in turn pull and thereby release at least a portion of said sealing layer to provide the hand access to said top access opening and reclosable against said top to seal said opening when said sealing layer is moved back against the said top.

2. The polygonal shaped food container of claim **1**, wherein said top of said wrapper comprises a flap have substantially the same dimension as said opening and affixed to said sealing layer.

3. The polygonal shaped food container of claim **1**, wherein said starter portion comprises a tab which projects past an edge of said top at one side of the container, said tab being accessible beyond the edge to be grasped.

4. The polygonal shaped food container of claim **1**, wherein said top of the container includes graphics around said opening, and said sealing layer includes graphics which match the graphics on said top.

5. The polygonal shaped food container of claim **1**, wherein said sealing layer is transparent.

6. The polygonal shaped food container of claim **1**, further comprising a tamper-evident structure.

7. The polygonal shaped food container of claim **6**, wherein said tamper-evident structure comprises tape extending along at least a portion of a perimeter where said sealing layer contacts said top, along both said sealing layer and said top, said tape having to be removed prior to or at the same time said sealing layer is pulled back for a first time, said tape leaving an indicia on said top after said tape is removed.

8. The polygonal shaped food container of claim **6**, wherein said tamper-evident structure comprises a removable film disposed under said sealing layer, said film having to be removed to gain access to the contents of the container.

9. The polygonal shaped food container of claim **6**, wherein said tamper-evident structure comprises a membrane sleeve encircling said wrapper over said sealing layer, said membrane sleeve having to be removed prior to pulling back said sealing layer.

10. The polygonal shaped food container of claim **6**, wherein said tamper-evident structure comprises scored seal tape extending along at least a portion of a perimeter where said sealing layer contacts said top, along both said sealing layer and said top, said scored tape having to be removed prior to or at the same time said sealing layer is pulled back for a first time, said scored seal tape leaving a portion of the scored seal tape on said top after said scored seal tape is removed.

11. The polygonal shaped food container of claim **6**, wherein said tamper-evident structure comprises an overwrap surrounding said wrapper.

12. The polygonal shaped food container of claim **1**, wherein said starter portion comprises a tab.

13. A rectangular food container comprising:

a frame defining the rectangular shape of the container, said container having a generally rectangular top, a generally rectangular bottom and sides connecting the top and the bottom, said frame containing a food product comprised of discrete food articles;

a wrapper surrounding said frame, said wrapper forming said generally rectangular top of the container;

said top having an access opening sufficiently large to provide hand access to substantially all of the discrete food articles contained within the frame, such that substantially any one of the discrete food articles can be accessed and removed individually through said access opening; and

a sealing layer, adhesively sealed to said top around said opening, said sealing layer including a starter portion located near a side of the top which can be grasped by a user, said sealing layer being releasable when said starter portion is pulled in a direction away from said side to in turn pull and thereby release at least a portion of said sealing layer to provide the hand access to said top access opening and reclosable against said top to seal said opening when said sealing layer is moved back against said top.

14. The generally rectangular food container of claim **13**, wherein said top of said wrapper comprises a flap have substantially the same dimensions as said access opening and affixed to said sealing layer.

15. The generally rectangular food container of claim **13**, wherein said sealing layer covers substantially the entire top.

16. The generally rectangular food container of claim **13**, wherein said top of the container includes graphics around said opening, and said sealing layer includes graphics which match the graphics on said top.

17. The generally rectangular food container of claim **13**, further comprising a tamper-evident structure.

18. The generally rectangular food container of claim **17**, wherein said tamper-evident structure comprises tape extending along at least a portion of a perimeter where said sealing layer contacts said top along both said sealing layer and said top, said tape having to be removed prior or at the same time said sealing layer is pulled back for a first time, said tape leaving an indicia on said top after said tape is removed.

19. The generally rectangular food container of claim **17**, wherein said tamper-evident structure comprises a removable film disposed under said sealing layer, said film having to be removed to gain access to the contents of the container.

20. The generally rectangular food container of claim **17**, wherein said tamper-evident structure comprises a membrane sleeve encircling said wrapper over said sealing layer, said membrane sleeve having to be removed prior to pulling back said sealing layer.

21. The generally rectangular food container of claim **17**, wherein said tamper-evident structure comprises scored seal tape extending along at least a portion of a perimeter where said scored seal tape contacts said top along both said sealing layer and said top, said scored tape having to be removed prior or at the same time said sealing layer is pulled back for a first time, said scored seal tape leaving a portion of the scored tape on said top after said scored tape is removed.

22. The generally rectangular food container of claim **17**, wherein said tamper-evident structure an overwrap surrounding said wrapper.

23. The generally rectangular food container according to claim **13**, wherein said starter portion comprises a tab.

24. The generally rectangular food container according to claim **23**, wherein the tab projects past an edge of the top at a shorter side of the generally rectangular top so as to be accessible to be grasped beyond said edge.

25. The generally rectangular food container according to claim **13**, wherein said sealing layer is transparent.

* * * * *

UNITED STATES PATENT AND TRADEMARK OFFICE

CERTIFICATE OF CORRECTION

PATENT NO. : 6,918,532 C1
APPLICATION NO. : 90/008843
DATED : October 25, 2011
INVENTOR(S) : Gladys Odette Sierra-Gomez et al.

It is certified that error appears in the above-identified patent and that said Letters Patent is hereby corrected as shown below:

Column 1, line 22, delete "periphery" and insert --periphery portion--, therefor.

Column 2, line 57, delete "addtional" and insert --additional--, therefor.

Column 3, line 45, delete "claim 47" and insert --claim 46--, therefor.

Signed and Sealed this
Thirteenth Day of March, 2012

David J. Kappos
Director of the United States Patent and Trademark Office

US006918532C1

(12) **EX PARTE REEXAMINATION CERTIFICATE** (8638th)

United States Patent
Sierra-Gomez et al.

(10) **Number: US 6,918,532 C1**
(45) **Certificate Issued: Oct. 25, 2011**

(54) **RESEALABLE FOOD CONTAINER**

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(73) Assignee: **Kraft Foods Holdings, Inc.**, Northfield, IL (US)

Reexamination Request:
No. 90/008,843, Oct. 17, 2007

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Issued: **Jul. 19, 2005**
Appl. No.: **10/414,502**
Filed: **Apr. 16, 2003**

(51) **Int. Cl.**
B65D 65/26 (2006.01)
B65D 75/28 (2006.01)
B65D 85/00 (2006.01)
B65D 25/10 (2006.01)

(52) **U.S. Cl.** **229/87.08**; 229/87.05; 206/459.1; 383/203; 383/205; 426/119

(58) **Field of Classification Search** ..... None
See application file for complete search history.

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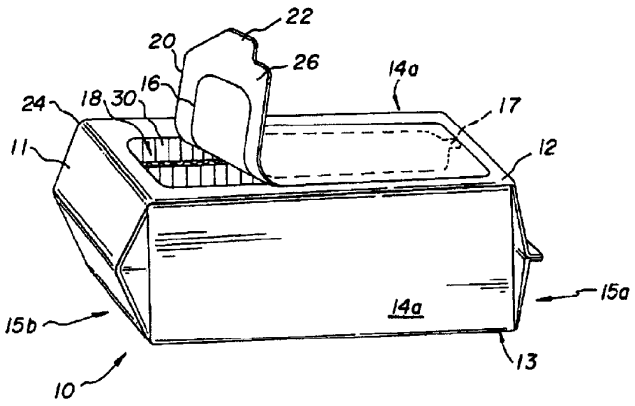
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(57) **ABSTRACT**

A container for a food product includes a wrapper which surrounds a frame. The container can be any polygonal shape which is defined by the shape of the frame. The wrapper forms a top of the container which has an access opening. A sealing layer is adhesively sealed to the top around the opening. The sealing layer is resealable when a tab of the sealing layer is pulled back. The sealing layer is resealable against the top layer to seal the opening when the sealing layer is moved back to a flat position on the top. Various tamper-evident structures are provided to indicate when the container has been initially opened or tampered with.



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Photograph depicting, on the right, Oreo pakaging of the type that is prior art.

Giant Baby Wipes package, item No. 80203–91, resealable packing having die cut–out portions (tabs) which remain affixed to the top of the package after label is withdrawn from the top, whereby tamper evidence is indicated by a misalignment of the die cut–out portions with the holes formed in the label.

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EX PARTE REEXAMINATION CERTIFICATE ISSUED UNDER 35 U.S.C. 307

THE PATENT IS HEREBY AMENDED AS INDICATED BELOW.

Matter enclosed in heavy brackets [ ] appeared in the patent, but has been deleted and is no longer a part of the patent; matter printed in italics indicates additions made to the patent.

AS A RESULT OF REEXAMINATION, IT HAS BEEN DETERMINED THAT:

The patentability of claims **1-25** is confirmed.

New claims **26-67** are added and determined to be patentable.

26. The polygonal shaped food container of claim 1 wherein the frame has an upper periphery and the top has a pair of facing perimeter portions adjacent the access opening, the pair of facing perimeter portions extending inward beyond at least a portion of the upper periphery portion to capture the frame in the wrapper against unintentional removal through the access opening.

27. The polygonal shaped food container of claim 26 wherein the facing perimeter portions extend to additional perimeter portions, the perimeter portions combined to surround the access opening, and the perimeter portions all extend inward beyond the upper periphery portion to capture the frame in the wrapper against unintentional removal through the access opening.

28. The polygonal shaped food container of claim 26 wherein the sealing layer is releasably sealed adhesively to the perimeter portions.

29. The polygonal shaped food container of claim 26 wherein the wrapper is unattached to the frame and defines an outer profile for the container extending at least in part outwardly from the frame.

30. The polygonal shaped food container of claim 29 wherein the outer profile of the container extends outward from the frame at an end of the container and the wrapper is sealed to itself at the end of the container.

31. The polygonal shaped food container of claim 26 wherein the starter portion is free from the remainder of the container such that it can be grasped simultaneously from above and below to open the container.

32. The polygonal shaped food container of claim 26 wherein the frame has at least one divider to separate discrete food articles.

33. The polygonal shaped food container of claim 26 wherein the discrete food articles are cookies susceptible to damage and the frame and the wrapper cooperate to protect the cookies from damage.

34. A polygonal shaped food container comprising:

a frame defining the polygonal shape of the container, the frame having a bottom, sides and an upper periphery portion, the frame containing a food product comprised of discrete food product articles;

an overwrap encasing the frame, the overwrap forming an overwrap top, overwrap bottom and overwrap sides of the container over the frame and defining the top, bottom and sides of the container, the overwrap top having at least a pair of facing overwrap perimeter portions inward of the periphery portion of the frame,

the overwrap top having a reclosable access opening defined at least in part by the perimeter portions, the opening sufficiently large to provide hand access to substantially all of the discrete food articles contained within the frame such that substantially any one of the discrete food articles can be accessed and removed individually through the reclosable access opening, the upper periphery portion of the frame supporting the overwrap perimeter portions so that the overwrap perimeter portions are in a plane generally parallel to the bottom of the frame, the overwrap perimeter portions capturing the frame in the encasing overwrap to guard against unintentional removal of the frame through the opening from the encasing overwrap; and

a sealing layer adhesively sealed to the overwrap top around the reclosable access opening, the sealing layer including a starter portion located near a side of the overwrap top which can be grasped by a user, the sealing layer being releasable when said starter portion is pulled in a direction away from the side to in turn pull and thereby release at least a portion of the sealing layer to provide the hand access to the reclosable access opening and reclosable against the overwrap top to seal the access opening when the sealing layer is moved back against the overwrap top.

35. The polygonal shaped food container of claim 34 wherein the facing perimeter portions extend to additional perimeter portions extending inward of the periphery portion of the frame, the facing perimeter portions and additional perimeter portions combined to surround the reclosable access opening, and the perimeter portions all extend inward beyond the periphery portion of the frame to capture the frame in the overwrap against unintentional removal through the reclosable access opening, the upper periphery portion of the frame supporting all of the overwrap perimeter portions so that the overwrap perimeter portions are in a plane generally parallel to the bottom of the frame after the reclosable access opening is opened to expose the food product articles.

36. The polygonal shaped food container of claim 35 wherein the frame has a plurality of dividers extending transversely across the frame.

37. The polygonal shaped food container of claim 36 wherein the discrete food articles are cookies susceptible to damage and the frame and the overwrap cooperate to protect the cookies from damage.

38. The polygonal shaped food container of claim 35 wherein the overwrap top comprises a flap having substantially the same dimensions as the reclosable access opening and affixed to the sealing layer.

39. The polygonal shaped food container of claim 35, wherein the sealing layer covers substantially the entire top.

40. The polygonal shaped food container of claim 34 wherein the overwrap perimeter portions each span from the upper periphery portion of the frame to an adjacent edge of the access opening.

41. The polygonal shaped food container of claim 35 wherein the facing perimeter portions and the addtional perimeter portions each span from the upper periphery portion of the frame to an adjacent edge of the access opening.

42. The polygonal shaped food container of claim 1 wherein the frame is the only support for elevating the wrapper at the top of the container.

43. The polygonal shaped food container of claim 42 wherein the frame has a bottom, sides and an upper periphery portion, and the wrapper at the top of the container is generally planar between the entirety of the upper periphery portion of the frame.

44. The polygonal shaped food container of claim 1 wherein:

the frame has a bottom, sides and an upper periphery portion;

the wrapper is unattached to the upper periphery portion of the frame and at the top of the container having at least a pair of facing perimeter portions each spanning inward from the periphery portion of the frame to an adjacent edge of the access opening, the upper periphery portion of the frame and an inward dimension of the facing perimeter portions of the wrapper cooperating to locate the facing perimeter portions to permit the sealing layer to be resealable to the facing perimeter portions of the wrapper when the sealing layer is moved back against the top.

45. The polygonal shaped food container of claim 13 wherein the frame has a bottom, sides and an upper periphery portion, the generally rectangular top being generally planar and spanning entirely between the upper periphery portion of the frame.

46. A polygonal shaped food container comprising:

a frame defining the polygonal shape of the container, said container having a top, a bottom and sides connecting the top and bottom, the frame containing a food product comprised of discrete food articles; a wrapper surrounding said frame, said wrapper forming the top sides and bottom of the container; said top having an access opening sufficiently large to provide hand access to substantially all of the discrete food articles contained within the frame, such that substantially any one of the discrete food articles can be accessed and removed individually through said access opening; and a sealing layer, adhesively sealed to said top around said opening, said sealing layer including a starter portion located near a side of the top which can be grasped by a user, said sealing layer being releasable when said starter portion is pulled in a direction away from said side to in turn pull and thereby release at least a portion of said sealing layer to provide the hand access to said top access opening and reclosable against said top to seal said opening when said sealing layer is moved back against the said top, wherein the access opening has a tapered end opposite the starter portion of the sealing layer.

47. The polygonal shaped food container of claim 47 wherein the tapered end of the access opening has a pair of segments that taper toward each other and away from the starter portion.

48. A polygonal shaped food container comprising:

a frame defining the polygonal shape of the container, said container having a top, a bottom and sides connecting the top and bottom, the frame containing a food product comprised of discrete food articles;

a wrapper surrounding said frame, said wrapper forming the top, sides and bottom of the container;

said top having a flap which can be pulled back to form an access opening sufficiently large to provide hand access to substantially all of the discrete food articles contained within the frame, such that substantially any one of the discrete food articles can be accessed and removed individually through said access opening; and

a sealing layer adhesively sealed to the flap with a first adhesive strength and adhesively sealed to said top around said opening with a second adhesive strength, the first adhesive strength being greater than the second adhesive strength, said sealing layer including a starter portion located near a side of the top which can be grasped by a user, said sealing layer being releasable when said starter portion is pulled in a direction away from said side to in turn pull and thereby release at least a portion of said sealing layer sealed to the top around said opening having the second adhesive strength to provide the hand access to said top access opening and reclosable against said top to seal said opening when said sealing layer is moved back against the said top.

49. The polygonal shaped food container of claim 48, wherein the flap remains attached to the sealing layer when the portion of the sealing layer is released to provide the hand access to the top access opening.

50. The polygonal shaped food container of claim 49, wherein the sealing layer is permanently sealed to the flap and the sealing layer is removably sealed to the top around the access opening.

51. A polygonal shaped food container comprising:

a frame defining the polygonal shape of the container, said container having a top, a bottom and sides connecting the top and bottom, the frame containing a food product comprised of discrete food articles; a wrapper surrounding said frame, said wrapper forming the top sides and bottom of the container; said top having an access opening sufficiently large to provide hand access to substantially all of the discrete food articles contained within the frame, such that substantially any one of the discrete food articles can be accessed and removed individually through said access opening; and a sealing layer, adhesively sealed to said top around said opening, said sealing layer including a starter portion located near a side of the top which can be grasped by a user, said sealing layer being releasable when said starter portion is pulled in a direction away from said side to in turn pull and thereby release at least a portion of said sealing layer to provide the hand access to said top access opening and reclosable against said top to seal said opening when said sealing layer is moved back against the said top, wherein the top has a flap which can be pulled back to form the access opening, the sealing layer has a first adhesive zone coextensive with the flap and adhered to the flap using a first adhesive strength and a second adhesive zone outward of the periphery of the flap and adhered to the top using a second adhesive strength, the first adhesive strength being greater than the second adhesive strength such that the portion of the sealing layer outward of the periphery of the flap can be released to provide the hand access to the top access opening with the flap remaining attached via the second adhesive zone to a portion of the sealing layer coextensive with the flap.

52. The polygonal shaped food container of claim 51, wherein the sealing layer is permanently sealed to the flap and the sealing layer is removably sealed to the top around the access opening.

53. The polygonal shaped food container of claim 48, wherein said starter portion comprises a tab which projects past an edge of said top at one side of the container, said tab being accessible beyond the edge to be grasped.

54. The polygonal shaped food container of claim 48, further comprising tamper-evident means.

55. The polygonal shaped food container of claim 48, wherein said starter portion comprises a tab.

56. The polygonal shaped food container of claim 48, wherein said sealing layer covers substantially the entire top.

57. The polygonal shaped food container of claim 48 wherein the frame has an upper periphery portion and the top has a pair of facing perimeter portions adjacent the access opening, the pair of facing perimeter portions extending inward beyond at least a portion of the upper periphery portion to capture the frame in the wrapper against unintentional removal through the access opening.

58. The polygonal shaped food container of claim 57 wherein the facing perimeter portions extend to additional perimeter portions, the perimeter portions combined to surround the access opening, and the perimeter portions all extend inward beyond the upper periphery portion to capture the frame in the wrapper against unintentional removal through the access opening.

59. The polygonal shaped food container of claim 57 wherein the sealing layer is releasably sealed adhesively to the perimeter portions.

60. The polygonal shaped food container of claim 57 wherein the wrapper is unattached to the frame and defines an outer profile for the container extending at least in part outwardly from the frame.

61. The polygonal shaped food container of claim 60 wherein the outer profile of the container extends outward from the frame at an end of the container and the wrapper is sealed to itself at the end of the container.

62. The polygonal shaped food container of claim 57 wherein the starter portion is free from the remainder of the container such that it can be grasped simultaneously from above and below to open the container.

63. The polygonal shaped food container of claim 57 wherein the frame has at least one divider to separate discrete food articles.

64. The polygonal shaped food container of claim 57 wherein the discrete food articles are cookies susceptible to damage and the frame and the wrapper cooperate to protect the cookies from damage.

65. The polygonal shaped food container of claim 48 wherein:

the frame has a bottom, sides and an upper periphery portion;

the wrapper is unattached to the upper periphery portion of the frame and at the top of the container having at least a pair of facing perimeter portions each spanning inward from the periphery portion of the frame to an adjacent edge of the access opening, the upper periphery portion of the frame and an inward dimension of the facing perimeter portions of the wrapper cooperating to locate the facing perimeter portions to permit the sealing layer to be resealable to the facing perimeter portions of the wrapper when the sealing layer is moved back against the top.

66. The polygonal shaped food container of claim 48 wherein the access opening has a tapered end opposite the starter portion of the sealing layer.

67. The polygonal shaped food container of claim 66 wherein the tapered end of the access opening has a pair of segments that taper toward each other and away from the starter portion.

* * * * *

CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of December, 2015 I filed the foregoing Brief for Plaintiff-Appellant Intercontinental Brands LLC with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(b).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 13,767 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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