

**THIS OPINION WAS NOT WRITTEN FOR PUBLICATION**

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 20

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte JOHN S. CULLEN  
and GEORGE E. McKEDY

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Appeal No. 1996-2901  
Application 08/072,879

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ON BRIEF

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Before JOHN D. SMITH, PAK, and WALTZ, Administrative Patent Judges.

WALTZ, Administrative Patent Judge.

**DECISION ON APPEAL**

This is an appeal under 35 U.S.C. § 134 from the examiner's final rejection of claims 1 through 20, which are the only claims remaining in this application.

Appeal No. 1996-2901  
Application No. 08/072,879

According to appellants, the invention is directed to a method of removing oxygen from a container having a product and a high moisture environment where oxygen was previously flushed out of the container (Brief, page 1). Claim 1 is illustrative of the subject matter on appeal and a copy of this claim is attached as an Appendix to this decision.

The examiner has relied upon the following references as evidence of obviousness:

Gammill et al. (Gammill) 1958	2,819,491	Jan. 14,
Nakamura et al. (Nakamura) 1983	4,384,972	May 24,

Claim 1 stands rejected under the second paragraph of 35 U.S.C. § 112, as indefinite (Answer, page 3). Claims 1 through 20 stand rejected under 35 U.S.C. § 103 as unpatentable over Nakamura in view of Gammill (*id.*). We reverse both of the examiner's rejections for reasons which follow.

#### OPINION

##### A. *The Rejection under § 112, ¶2*

The examiner states that "it is not clear how the moisture is 'supplied' to the O<sub>2</sub>-sorber and CO<sub>2</sub>-generator since

Appeal No. 1996-2901  
Application No. 08/072,879

'supplied' indicates that means are employed to actively supply the moisture." (Answer, page 3).

Appellants note that claim 1 does not contain the word "supplied." (Brief, page 4). Appellants submit that the word "supplying" is recited in the last clause of claim 1 but that this word does not necessarily imply that there must be a means employed to actively supply the moisture (Brief, pages 4-5).

"The legal standard for definiteness is whether a claim reasonably apprises those of skill in the art of its scope." *In re Warmerdam*, 33 F.3d 1354, 1361, 31 USPQ2d 1754, 1759 (Fed. Cir. 1994). The initial burden of presenting a *prima facie* case of unpatentability, on review of the art or on any other ground, rests with the examiner. *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992).

On the record before us, the examiner has failed to meet this initial burden. The examiner has not presented any convincing evidence or reasoning as to why "supplied [sic, supplying]" indicates that means are employed to "actively supply" the moisture or why one of ordinary skill in the art would not have been apprised as to the scope of "supplying."

Appeal No. 1996-2901  
Application No. 08/072,879

The latter question is especially pertinent in view of the examiner's determination, as discussed in the Answer (page 8), that the dry water-attracting component of Nakamura inherently stabilizes the composition against premature oxygen absorption and carbon

dioxide generation and thus "supplies" moisture. Accordingly, the rejection of claim 1 under the second paragraph of 35 U.S.C.

§ 112 cannot be sustained.

*B. The Rejection under § 103*

The method of claim 1 on appeal specifically recites the step of "flushing the container with carbon dioxide to remove other gases from said container" (see claim 1). Appellants argue that "in Nakamura the carbon dioxide is only generated in situ after the combined oxygen absorber and carbon dioxide generator has been placed into the container." (Brief, page 8). Appellants also argue that Nakamura "teaches away" from using a carbon dioxide flush (*id.* at pages 9, 14 and 17).

The examiner admits that "[t]he independent claims differ from the reference [Nakamura] in that ... carbon dioxide

Appeal No. 1996-2901  
Application No. 08/072,879

flushing be in addition to the antioxidant." (Answer, page 4). However, the examiner concludes that it would have been obvious "to substitute carbon dioxide for nitrogen in Nakamura's process because Nakamura teaches the art recognized equivalence of carbon dioxide and nitrogen for package flushing." (*Id.* at page 5). In response to appellants' argument, the examiner finds that Nakamura, col. 8, ll. 3-6, "explicitly states that the carbon dioxide gas was substituted for the absorbed oxygen" and that Nakamura teaches gas flushing of a food package with carbon dioxide is conventional alone or with the incorporation of deoxygenation agents (Answer, paragraph bridging pages 10-11, pages 11 and 12, citing Nakamura, col. 1, ll. 16-21 and 22-26). We do not agree with the examiner's underlying findings and conclusion of obviousness regarding the reference evidence of Nakamura. Nakamura does not disclose or suggest gas flushing and addition of an antioxidant/deoxygenating composition but merely discloses that each of these steps is known in the art (col. 1, ll. 16-21). Furthermore, Nakamura teaches the *disadvantages* of using nitrogen or carbon dioxide sealed into the interior of evacuated packages (col. 1, ll. 22-37).

Appeal No. 1996-2901  
Application No. 08/072,879

Nakamura also teaches the disadvantages of other gas substitution methods at col. 1, l. 58-col. 2, l. 16.

We also note that the examiner has misconstrued the disclosure of Nakamura at col. 8, ll. 3-6, as teaching the beneficial results of carbon dioxide flushing when Nakamura is referring to the *in situ* generation of carbon dioxide to achieve these results, not gas flushing with carbon dioxide (see all of Example 1 and also col. 6, ll. 57-61).

Although appellants and Nakamura admit that gas flushing a container with carbon dioxide is well known *per se* (Brief, page 12; Nakamura as cited above), the examiner has not cited any disclosure or teaching in Nakamura suggesting the combination of carbon dioxide gas flushing with the foodstuff freshening agent composition of Nakamura. We agree with appellants that Nakamura teaches the disadvantages of carbon dioxide gas flushing (col. 1-col. 2 as discussed above). Furthermore, Nakamura discloses the poor results achieved with gas packaging for 100% nitrogen gas, blank (air holding), and various amounts of carbon dioxide (see Table 4, col. 7, ll. 52-56; Table 6, col. 9, ll. 19-25; Table 8, col. 10, ll. 63-66; Table 10; and Table 12). Appellants disclose that the

Appeal No. 1996-2901  
Application No. 08/072,879

gases in their container are flushed out with a gas containing carbon dioxide to the extent that the carbon dioxide content of the container is at least 20% with the remaining atmosphere containing less than about 17% oxygen (specification, page 5, ll. 8-13; see claims 18-20 on appeal). Nakamura specifically discloses that a container with an atmosphere of 80% nitrogen and 20% carbon dioxide gave extremely poor results (see Table 12, last two entries). See *In re Gurley*, 27 F.3d 551, 553, 31 USPQ2d 1130, 1132 (Fed. Cir. 1994).

For the foregoing reasons, we find no factual basis for the examiner's conclusion of obviousness and, in fact, determine that Nakamura teaches away from using carbon dioxide gas flushing of the container. Gammill has been cited by the examiner to show the use of silica/silica gel as a desiccant equivalent to the activated alumina/carbon of Nakamura (Answer, pages 5-6). Therefore, Gammill does not remedy the deficiencies noted above in the reference evidence to Nakamura. Accordingly, we determine that the examiner has not established a *prima facie* case of obviousness in view of the reference evidence and we reverse the rejection of the claims

Appeal No. 1996-2901  
Application No. 08/072,879

on appeal under 35 U.S.C. § 103 over Nakamura in view of  
Gammill.

*C. Summary*

The rejection of claim 1 under the second paragraph of 35  
U.S.C. § 112 is reversed. The rejection of claims 1-20 under  
35 U.S.C. § 103 as unpatentable over Nakamura in view of  
Gammill is reversed.

Appeal No. 1996-2901  
Application No. 08/072,879

The decision of the examiner is reversed.

**REVERSED**

	John D. Smith	)	
	Administrative Patent Judge	)	
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		)	
		)	
	Chung K. Pak	)	BOARD OF
PATENT		)	
	Administrative Patent Judge	)	APPEALS AND
		)	INTERFERENCES
		)	
		)	
	Thomas A. Waltz	)	
	Administrative Patent Judge	)	

TAW:tdl

Appeal No. 1996-2901  
Application No. 08/072,879

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**APPENDIX**

1. A method of removing oxygen from a container having a product and a high moisture environment and wherein oxygen was previously flushed out of said container and replaced by a gas containing carbon dioxide and wherein some oxygen may have remained and into which additional oxygen may have entered comprising the steps of providing a container, placing a product which produces a high moisture environment into said container, flushing the container with carbon dioxide to remove other gases from said container, sealing said container, and inserting into said container which has a high moisture environment after said flushing step and before said sealing step a mixture of an oxygen-absorbing component for absorbing oxygen from said container, a carbon dioxide generating component for generating carbon dioxide in said container, an acidifying component for activating said carbon dioxide generating component, and a dry water-attracting component for stabilizing the mixture against premature oxygen absorption and premature carbon dioxide generation before the mixture has been placed into said high moisture environment in said container and thereafter attracting moisture from the high moisture environment and supplying said moisture to said oxygen-absorbing component and said carbon dioxide generating component to thereby activate said oxygen-absorbing component to absorb said oxygen and also activate said acidifying component to combine with said carbon dioxide generating component to cause it to generate carbon dioxide.