

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MPL BRANDS NV, INC.

Petitioner,

v.

BUZZBALLZ, LLC

Patent Owner.

PTAB Case No. IPR2024-01098

U.S. Patent No. 11,738,904 B2

**PETITION FOR *INTER PARTES* REVIEW
OF U.S. PATENT NO. 11,738,904 B2**

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EXHIBIT LIST

Exhibit	Description
Ex. 1001	U.S. Patent No. 11,738,904 B2
Ex. 1002	Declaration of Nathan J. Delson, Ph.D. (“Delson”)
Ex. 1003	Prosecution History of U.S. Patent No. 11,738,904 B2
Ex. 1004	Prosecution History of U.S. Patent No. 10,604,296 B2
Ex. 1005	Comparison of Original and Amended Specifications
Ex. 1006	Prosecution History of U.S. Patent No. 11,338,955 B2
Ex. 1007	U.S. Patent Publication 2011/0253720 A1 (“Kick”)
Ex. 1008	German Unexamined Patent Publication 102004046423 A1 (“Ackermann”)
Ex. 1009	U.S. Patent No. 4,465,204 (“Kaminski”)
Ex. 1010	U.S. Patent Publication 2008/0044603 A1 (“Hutchinson”)
Ex. 1011	The American Heritage Dictionary

I. INTRODUCTION

U.S. Patent No. 11,738,904 (“’904 patent,” Ex. 1001), assigned to BuzzBallz, LLC. (“Patent Owner”), describes ordinary features of a beverage container that were known many years before its filing date. These include a body made from a resin, such as a plastic resin, and a metal lid that includes a tab to puncture a weakened section of the lid to access its contents. Aside from reciting such well-known features of a normal beverage container, the claims of the ’904 patent also require the volume of the container to be no more than 211.5 ml. That 211.5 ml volume is only disclosed in Figure 7 of the ’904 patent, but Figure 7 was not part of the original patent application that was filed on April 19, 2010. Thus, the earliest possible priority date for the claims of the ’904 patent is February 25, 2020. As explained in detail below, Patent Owner’s own patent application that was published in 2011 contained the entire specification of the ’904 patent, including Figure 7, and thereby anticipates every claim of the ’904 patent. The claims of the ’904 patent are also anticipated and/or obvious in view of other prior art references addressed below.

MPL Brands NV, Inc. (“Petitioner”) therefore respectfully requests that these claims be held unpatentable and cancelled.

II. MANDATORY NOTICES (37 CFR § 42.8(a)(1))

A. Real Party-in-Interest

The real party-in-interest is MPL Brands NV, Inc., which does business as Patco Brands.

5 B. Notice of Related Matters

The '904 patent was previously asserted against Petitioner's products as part of the following matter, filed on September 15, 2023, but was subsequently withdrawn from the matter on November 2, 2023:

- *BuzzBallz, LLC v. MPL Brands NV, Inc.*, No. 1:23-cv-1115-RP (W.D. 10 Tex.).

That case was transferred to the Northern District of California and is now captioned:

- *BuzzBallz, LLC v. MPL Brands NV, Inc.*, No. 4:24-cv-04004-HSG (N.D. 15 Cal.).

The '904 patent is involved in the following matter, which is currently stayed, where Petitioner seeks a declaratory judgment of non-infringement:

- *MPL Brands NV, Inc. v. BuzzBallz, LLC*, No. 3:24-cv-01282 (N.D. Cal. 20 June 21, 2024).

Another patent in the '904 patent family, U.S. Patent No. 11,932,441, is the subject of the following matters:

- *MPL Brands NV, Inc. v. BuzzBallz, LLC*, No. 3:24-cv-01282 (N.D. Cal.);
- *BuzzBallz, LLC v. MPL Brands NV, Inc.*, No. 2:24-cv-00548 (D. Nev.);
- IPR2024-01000; and
- PGR2024-00035.

C. Counsel and Service Information

Lead counsel: Babak Tehrani (Reg No. 55,937).

Back-up counsel: M. Craig Tyler (Reg. No. 41,519), Kristen Schunter (Reg. No. 76,519), Daniel T. Shvodian (Reg. No. 42,148), R. Tyler Kendrick (Reg. No. 73,930), Andrew Kalamarides (*pro hac vice* forthcoming).

These attorneys can be reached by mail at Perkins Coie LLP, 11452 El Camino Real, Suite 300, San Diego, CA 92130; by phone at (858) 720-5700; and by fax at (858) 720-5799.

Petitioner consents to electronic service. All services and communications to the attorneys listed above may be sent to:

Buzzballz-MPL-Service@perkinscoie.com

A Power of Attorney is being filed concurrently.

III. REQUIREMENTS FOR *INTER PARTES* REVIEW

A. Grounds for Standing

The '904 patent was filed on August 16, 2022, and issued on August 29, 2023.

See Ex. 1001. This Petition is being filed more than nine months after the issue date.

5 Additionally, Petitioner is not barred or estopped from requesting *inter partes* review of the challenged claims.

B. Overview of Challenge and Relief Requested

Petitioner respectfully requests cancellation of the challenged claims 1-6 of the '904 patent under 35 U.S.C. §§ 102 and 103.

10 1. Identification of prior art

Petitioner relies on the references listed in the Table of Exhibits, including:

- U.S. Patent Publication 2011/0253720 A1 (“Kick”)
- German Patent Publication DE102004046423 A1 (“Ackermann”)
- U.S. Patent No. 4,465,204 (“Kaminski”)
- 15 • U.S. Patent Publication 2008/0044603 A1 (“Hutchinson”)

All references are prior art under 35 U.S.C. §§ 102(a)(1) or 102(a)(2) with respect to the challenged claims.

Petitioner also relies on the expert declaration of Dr. Nathan Delson (“Delson”).

2. Grounds for challenge and challenged claims

Ground	Basis	Reference(s)	Challenged Claims
1	§ 102 or § 103	Kick	1-6
2	§ 103	Ackermann and Kaminski	1-6
3	§ 103	Ackermann, Kaminski, and Hutchinson	1-6

IV. OVERVIEW OF THE '904 PATENT

A. Prosecution History of the '904 Patent

5 The application for the '904 patent was filed on August 16, 2022, as a Track-1 (expedited) patent application with 5 claims. (Ex. 1003, 1-33.) The application purported to claim priority, through a series of continuation applications, to Application No. 12/762,934 (“the '934 application”), which was filed on April 19, 2010. (*Id.*, 8, 26, 37, 113, 261.)

10 Applicant canceled claims 1-5 in a preliminary amendment and added six new claims. (*Id.*, 41-45.) In an Office Action, dated February 16, 2023, the claims were rejected based on obviousness-type double patenting over claims of the purported parent patents—U.S. Patent Nos. 11,338,955 and 10,604,296. (*Id.*, 117-31.) Five pending claims were also rejected as being anticipated by PCT Publication WO
15 2006/029441 A1 to Wing *et al.*, and the sixth pending claim was rejected as being obvious over U.S. Design Patent Des. 244,739 to Durand. (*Id.*)

In a response filed on May 15, 2023, Applicant filed terminal disclaimers over the purported parent patents, amended the claims, as below, and made arguments to distinguish claim 1 from the prior art:

5 wherein the horizontally-extending portion comprises a bottom having a depression formed therein, said depression extending upwardly from an extant of the bottom; ...

10 wherein a lower portion of the container side wall extends downwardly from the middle portion of the container side wall to the horizontally-extending portion of the container body, said lower portion being greater in diameter along its entirety than the horizontally-extending portion, including the bottom, thereby rendering the container body stemless; ...

15 wherein an upper portion of the container side wall extends upwardly from the middle portion of the container side wall to the upper edge of the container side wall, said upper portion being greater in diameter along its entirety than the first opening to the interior of said container body; ...

20 said liquid fills, or nearly fills, the interior of the container body, which interior extends continuously along a height of the entirety of the upper portion of the container wall so as to be interrupted only by the liquid; and

25 an actual volume of the liquid contained in the container is equal to, or less than, 211.5 mL.

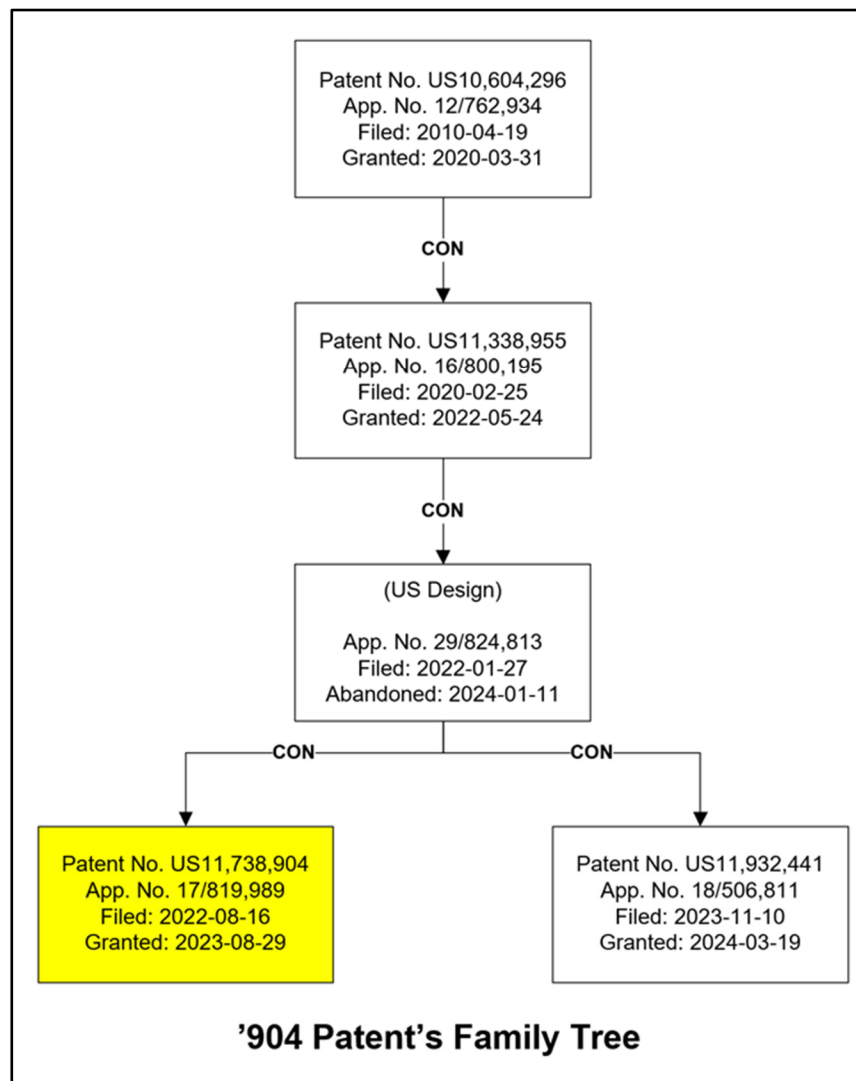
(*Id.*, 231-44.)

A Notice of Allowance issued on July 12, 2023, indicating that the closest
30 reference found, Wing, does not teach the amended limitations. (*Id.*, 249-56.)

B. Priority Date of the '904 Patent

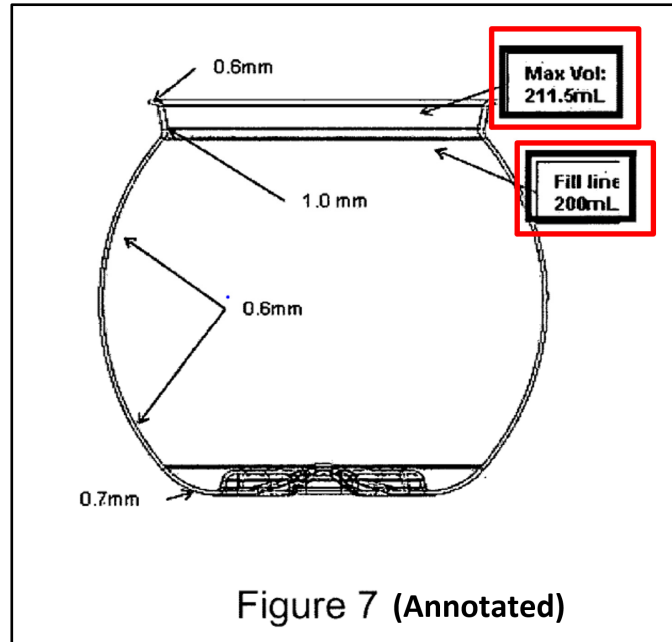
The priority date of the challenged claims of the '904 patent is no earlier than February 25, 2020, as explained below.

As mentioned above and illustrated below, the '904 patent claim priority
5 through a series of purported continuation applications to the '934 application, which was filed on April 10, 2024:



The prosecution history of the first patent in the chain (the '296 patent), however, shows that several figures and large corresponding sections of the detailed description were added during the prosecution of the '296 patent in an amendment received at the Patent Office on June 1, 2010—over two months after the April 19, 2010 filing date. (Ex. 1004, 34-56.)

Specifically, the '934 application, which ultimately issued as the '296 patent, was filed on April 19, 2010. (*Id.*, 1-27.) That original application contained Figures 1-6. (*Id.*, 14-17.) The Patent Office issued a Notice to File Corrected Application Papers, dated May 3, 2010, asking Applicant to submit replacement drawings that “must be reasonably free from erasures and must be free from alterations overwriting, interlineations, folds, and copy marks.” (*Id.*, 31-32.) Instead of only submitting the requested corrections to the figures, Applicant filed a substantially revised detailed description along with new and redrawn figures that improperly injected new matter into the application. (*Id.*, 34-56.) These additions included at least four new figures (Figures 6-9), more detail to previously submitted Figures 1-5, and additions to the detailed description. (*Compare* Ex. 1004, 48-55, *with id.*, 15-17; *see also* Ex. 1005 (showing the added material as underlined text).) Significantly for purposes of this Petition, Applicant added Figure 7, which includes text that states “Max Vol: 211.5mL” and “Fill Line 200mL.” (Ex. 1004, 54.)



Those two volume-related limitations, highlighted in red, were not contained in the original application. (*See id.*, 1-17.)

The addition of new matter during the prosecution is clearly prohibited. *See* 35 U.S.C. § 132(a) (“No amendment shall introduce new matter into the disclosure of the invention”); *see also* 37 C.F.R. § 1.121(f); MPEP §§ 608.02, 608.04. Additionally, “[a] preliminary amendment filed after the filing date of the application is not part of the original disclosure of the application.” 37 C.F.R. § 1.115 (a)(2). Therefore, the new matter improperly added during the prosecution of the ’934 application cannot be considered part of the disclosure of the original, April 19, 2010 application and/or relied upon for claiming priority in subsequent applications. *E.g., Akeva L.L.C. v. Nike, Inc.*, 817 F. App’x 1005 (2020) (finding break in priority chain due to new matter added to application in priority chain).

Prior to issuance of the '296 patent, Applicant filed application serial number 16/800,195 (the "'195 application") on February 25, 2020, which eventually issued as U.S. Patent No. 11,338,955. (Ex. 1006, 1-29, 116.) While Applicant designated the '195 application as a "continuation" of the '934 application (*id.*, 2, 9), it is, at best, a continuation-in-part (CIP) of the '934 application because it contained new content that was not part of the '934 application when it was filed. (*Id.*, 9-28 (adding new matter, including Figure 7 and its volume limitations).)

Accordingly, any claims in the subsequent applications that recite the new matter is entitled to, at the earliest, a priority date of February 25, 2020—the filing date of the '195 application.

Claim 1 of the '904 patent (and thus all the other claims, which all depend from Claim 1) recites the following limitation: "wherein ... an actual volume of the liquid contained in the container is equal to, or less than, 211.5 mL." (Ex. 1001, 5:8-16.) Claim 2 recites "wherein the actual volume of the liquid contained in the container is 200 mL." (*Id.*, 5:17-18.) Claim 6 of the '904 patent recites: "...wherein the container has a fill line so that, when the container is filled with the liquid up to the fill line, the actual volume of the liquid contained in the container is 200 mL." (*Id.*, 5:25-28.) None of these volume-related limitations were part of the '934 application and were not described or enabled by that application, as originally filed.

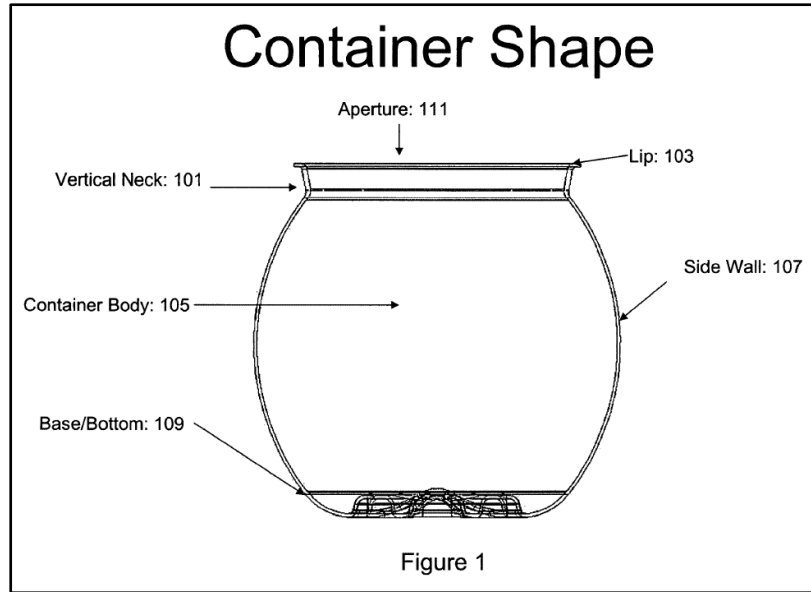
Under the written description requirement, the specification must show the inventor

actually invented the invention claimed. *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010). “One shows that one is ‘in possession’ of the invention by describing the invention, with all its claimed limitations, not that which makes it obvious.” *Lockwood v. Am. Airlines, Inc.*, 107 F.3d 1565, 1572 (Fed. Cir. 1997). Notably, any volume or fill line limitations, let alone the specific 211.5mL and 200mL requirements, only find proper support in Figure 7 of the ’195 application, which was filed on February 25, 2020.

Therefore, the priority date of the claims of the ’904 patent is no earlier than February 25, 2020.

C. The Alleged Invention

The ’904 patent describes a container for storing a liquid or a solid. (Ex. 1001, Abstract.) The container has a side wall, a bottom and a lid with a pop top arm which pivots and cooperates with a weakened area to provide access to the interior of the container body. (*Id.*) Figure 1 shows a side view of the container body 105 with a concave side wall 107. (*Id.*, 2:22-29.) An aperture 111 extends vertically through the neck 101 to provide access to the liquid/solid in the container body 105. (*Id.*, 2:35-37.) A lip 103 extends around the vertical neck 101. (*Id.*, 2:37-39.)



The container body may be formed from plastic or synthetic resin such as polyethylene terephthalate (“PET”) resin, or alternatively, from other synthetic resins having a sufficient resistance to chemicals. (*Id.*, 2:43-49.)

5 A bottom wall 109 of the container, shown in Figure 3, has a number of radially extending depressions 115 that increase in width as the radial distance from the center increases. (*Id.*, 3:19-25.) Each depression 115 is defined by a depression side wall 117 extending around the periphery of the depression 115. The bottom wall 109 also has a downward extending protrusion 119 centered with respect to the

10 depressions 115 and the bottom wall 109. (*Id.*, 3:25-30.)

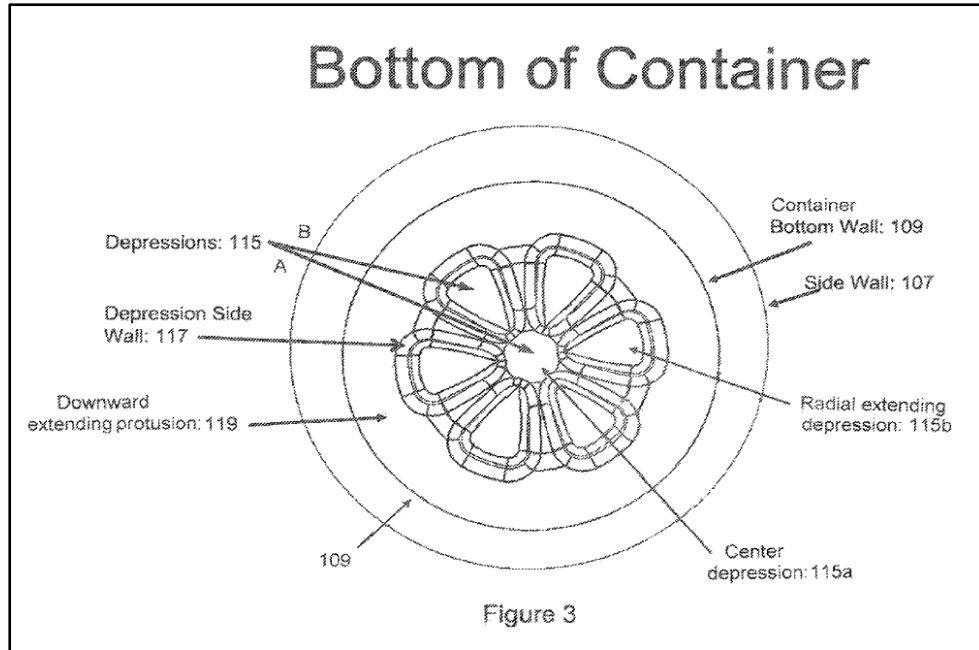


FIG. 4 illustrates a top view of the container having a deformable container lid 113 to provide access to the contents of the container. (*Id.*, 3:31-41.) The container lid 113, which can be made of a metal such as steel or aluminum, has a weakened (or scored) area 135 which deforms and provides an opening when the
5 'pull top' arm 133 is pulled by the user. (*Id.*)

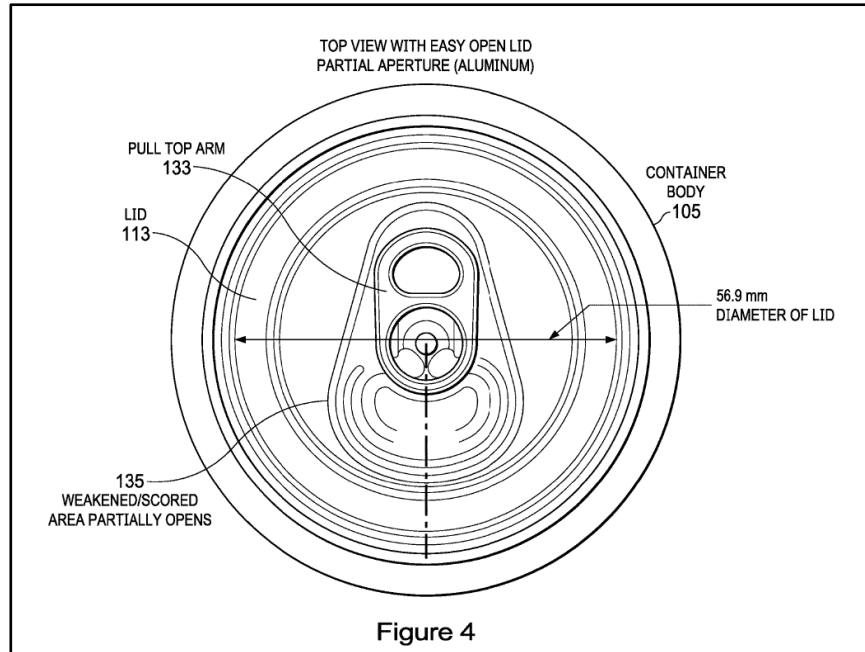
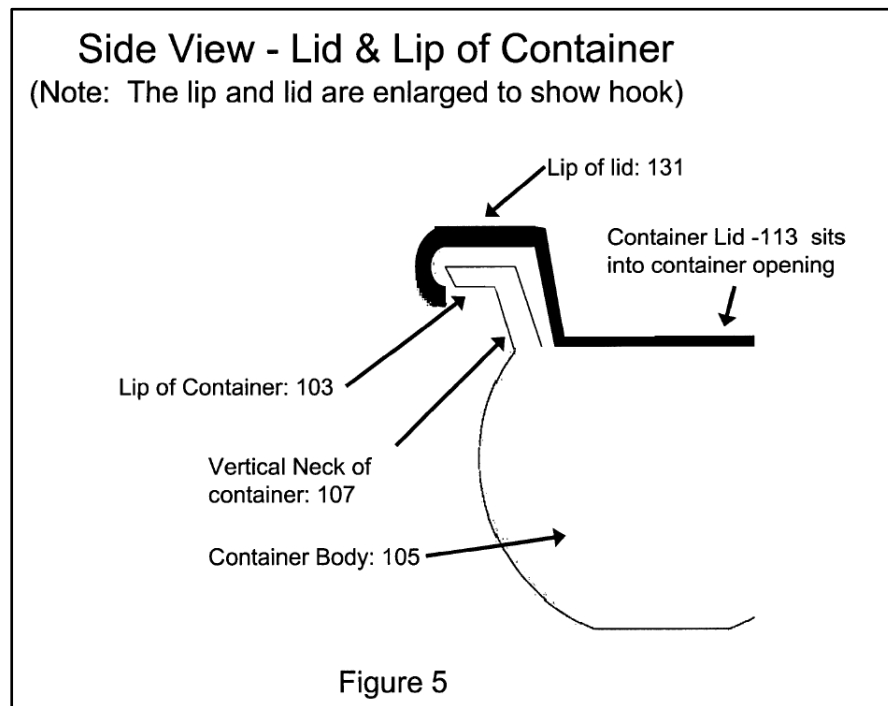


FIG. 5 shows a side view of the container lid 103 that extends over the vertical neck 107 and around the lip 131 to provide a substantially watertight seal/airtight seal for the contents of the container body 105. (*Id.*, 3:42-46.)



The '904 patent has 6 claims. Claim 1 is the only independent claim and recites a long list of limitations to capture various container elements shown in the figures of the '904 patent.

V. CLAIM CONSTRUCTION

5 The terms of the challenged claims should be construed “in accordance with the ordinary and customary meaning of such claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent.” 37 C.F.R. § 42.200(b); *see Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005). For this proceeding, Petitioner does not believe any claim constructions are needed.

10 Petitioner reserves the right to construe terms in the litigation and/or to respond to any constructions that Patent Owner presents in this proceeding.

VI. LEVEL OF ORDINARY SKILL IN THE ART

A person of ordinary skill in the art (“POSITA”) is a person having, as of the priority date of February 25, 2020: (i) an associate or bachelor’s degree in

15 mechanical, industrial or manufacturing engineering and (ii) at least two to three years of practical experience with designing or manufacturing mechanical products, such as food or beverage packaging. A POSITA could substitute additional education for industry experience and vice versa. (Delson, ¶14.) This description remains the same even if the priority date is determined to be April 19, 2010. (*Id.*)

VII. SPECIFIC GROUNDS FOR PETITION

A. **Ground 1: Claims 1-6 Are Anticipated By, Or Were Rendered Obvious By, Kick**

1. **Kick is prior art**

5 Kick, titled “Container,” is Patent Owner’s own ’934 application that published on October 20, 2011, as U.S. Patent Publication No. 2011/0253720 A1 and included the new matter and figures that were new matter added during the prosecution of the ’934 application. (*See* Section IV, *supra*.)

Kick is prior art under 35 U.S.C. § 102(a)(1) with respect to the claims of the
10 ’904 patent because it was published more than one year before the February 25, 2020, priority date of the challenged claims. (*See* Section IV.B, *supra*.)

2. **Kick anticipates or renders obvious claims 1-6 of the ’904 patent because it has the same detailed description and figures as the ’904 patent**

15 Kick’s detailed description and figures are identical to those in the ’904 patent. Therefore, Kick must teach and anticipate every claim of the ’904 patent, or else those claims would lack written description support. Petitioner nevertheless presents the following comparison between Kick and the claims of the ’904 patent to demonstrate that Kick anticipates or renders obvious the challenged claims.

3. Claim 1

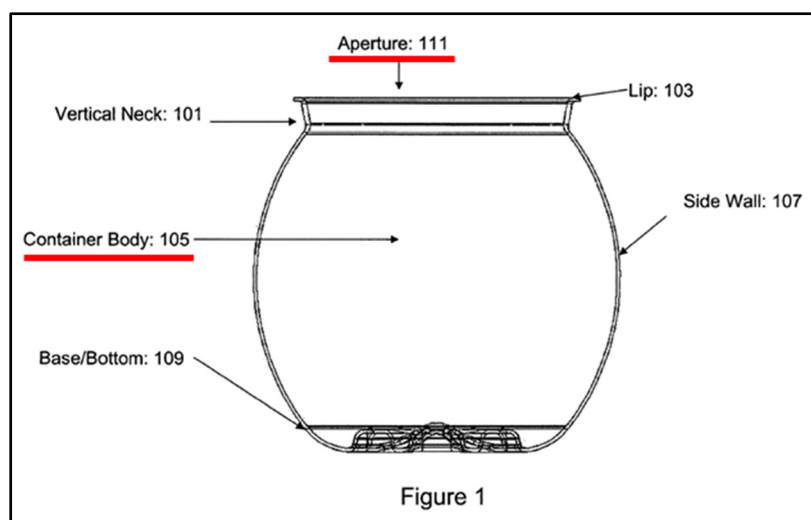
a. Limitation 1[Preamble]: “A container, comprising:”

Kick teaches a container with container body. For example, Kick teaches “[a] **container**¹ for storing a liquid or a solid may include a **container body** having a container side wall and a container bottom and a container lid.” (Kick, Abstract; *see also id.*, Figs. 1-9; *id.*, ¶0003 (“A container for storing a liquid . . .”).)

b. Limitation 1[a]: “a container body, said container body defining a first opening to an interior of said container body; and”

Kick teaches a container that has a container body. (*Id.*, ¶0013 (“FIG. 1 illustrates a side view of the **container body 105** which may include a side wall 107 which may extend radially around a periphery of the container body 105 and may include a convex side wall 107 or a concave side wall (not shown).”).) Kick also teaches that the container has an aperture (aperture 111 in Fig. 1), which is a first opening to an interior of said container body. (*Id.*, ¶0016 (“An aperture 111 may extend through the vertical neck 101 in order to provide access to the liquid/solid within the container body 105.”).)

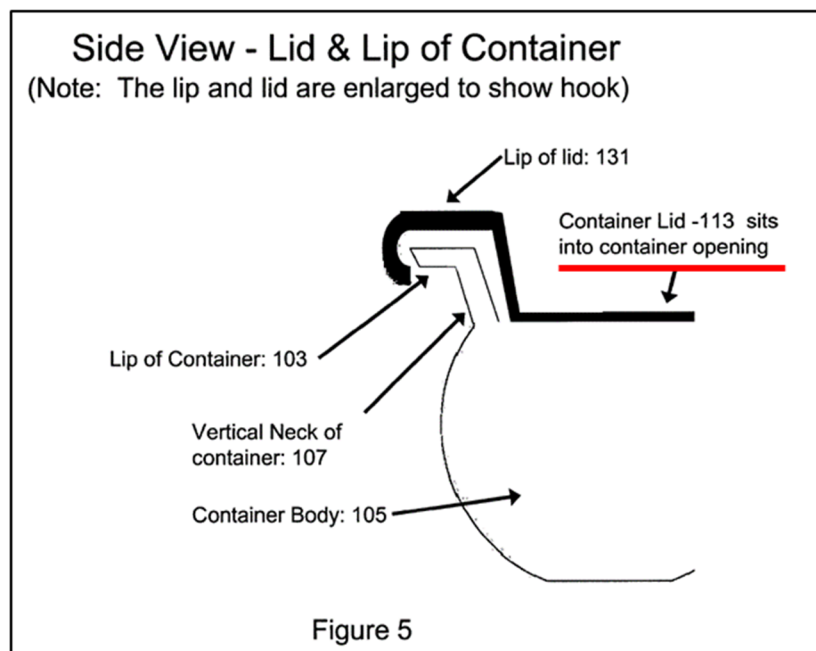
¹ All emphases in quotations added by Petitioner unless otherwise indicated.



(*Id.*, Fig. 1.)²

Additionally, Kick's Figure 5 teaches a lid that sits into the container opening, thereby teaching an opening into the interior of the container body.

² All colored words, elements, and highlighting in images are annotations added by Petitioner.



(*Id.*, Fig. 5.)

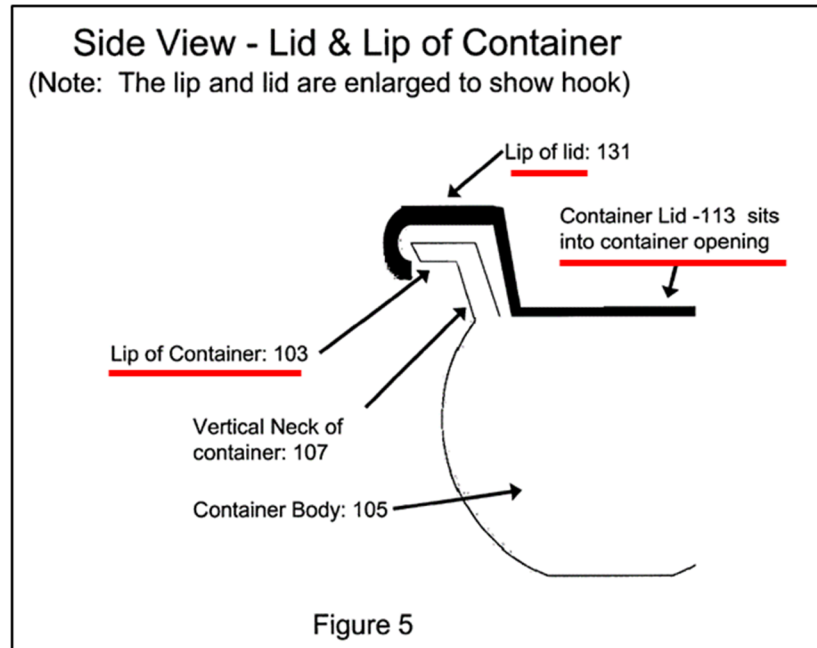
- c. **Limitation 1[b]: “a lid connected to the container body and covering the first opening to the interior of said container body;”**

5

Kick teaches a lid that covers the opening into the container body. (*Id.*, Abstract (“A container for storing a liquid or a solid may include a container body having a container side wall and a container bottom and **a container lid.**”). The lid covers the first opening because it extends over the container’s circular neck to cover

10 the opening into the container body. (*See, e.g., id.*, Fig. 5; *id.*, ¶0021 (“FIG. 5 illustrates a side view of the **container lid 103** which may extend over the vertical neck 107 and may extend around the lip 131 in order to **provide a substantially watertight seal/airtight seal for the contents of the container body 105.**”).) Kick teaches that the lid is connected to the container body to seal the contents inside the

container. (*Id.*, ¶0021; *id.*, ¶0016 (“A lip 103 may extend around the periphery of the substantially vertical neck 101 in order to **cooperate with the lid 113** (not shown in Fig. 2) **in order to provide a seal** so that the liquid or solid within the container body 105a does not leak out.”).)



5

(*Id.*, Fig. 5.)

d. Limitation 1[c]: “wherein the container body is made out of a resin;”

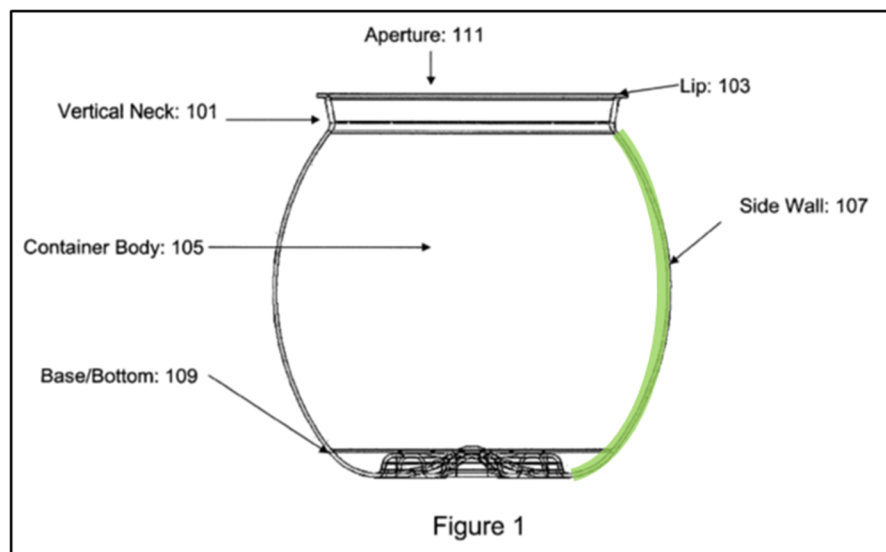
Kick teaches a container body made out of a resin. (*Id.*, ¶0015 (“The
10 **container body 105** according to the present invention **may be made of an appropriate plastic/synthetic resin, typically polyethylene terephthalate (PET) resin.**”).)

e. **Limitation 1[d]: “wherein the lid is made out of a metal;”**

Kick teaches a lid made out of a metal. (*Id.*, ¶0012 (“The present invention combines the flexibility and desirability of a container body 105 which may be formed from molding plastic or other appropriate material and **a metal lid** to cooperate with the container body.”).)

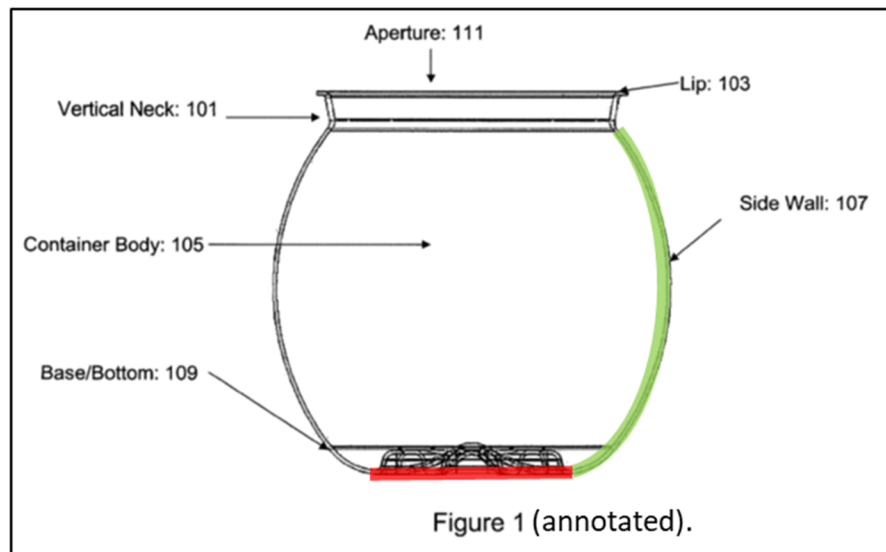
f. **Limitation 1[e]: “wherein the container body comprises a container side wall and a horizontally-extending portion connected to the container side wall;”**

Kick teaches a container that has a container side wall. (*Id.*, Abstract (“A container for storing a liquid or a solid may include a container body having **a container side wall** and a container bottom and a container lid.”); *id.*, Fig. 1; *id.*, ¶0013 (“FIG. 1 illustrates a side view of the container body 105 which may include **a side wall 107.**”).)



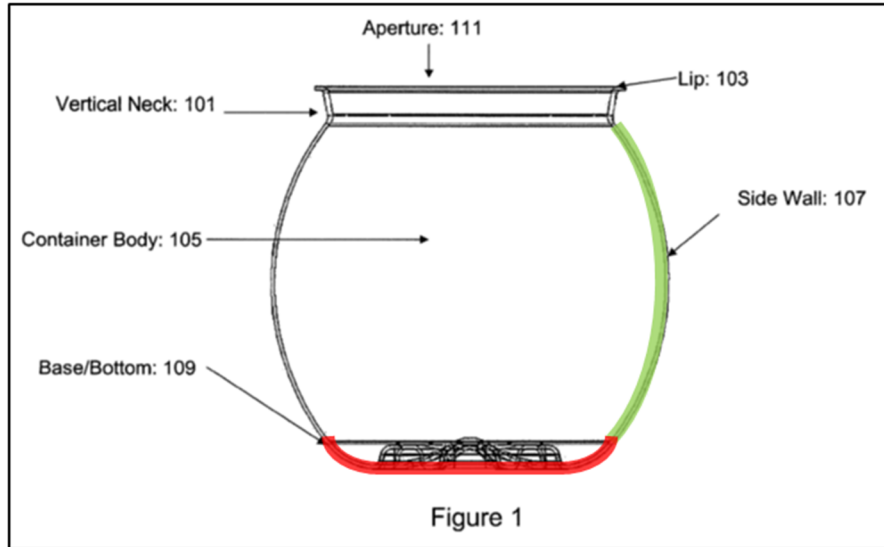
(*Id.*, Fig. 1.)

Kick also teaches or suggests a horizontally-extending portion connected to the side wall in the form of a horizontal section of the bottom of the container (red highlighted section of Figure 1 below), where the sidewall is connected to the horizontally-extending section.



(*Id.*, Fig. 1; *see also* Figs. 2, 5, 7, 8; Delson, ¶46.)

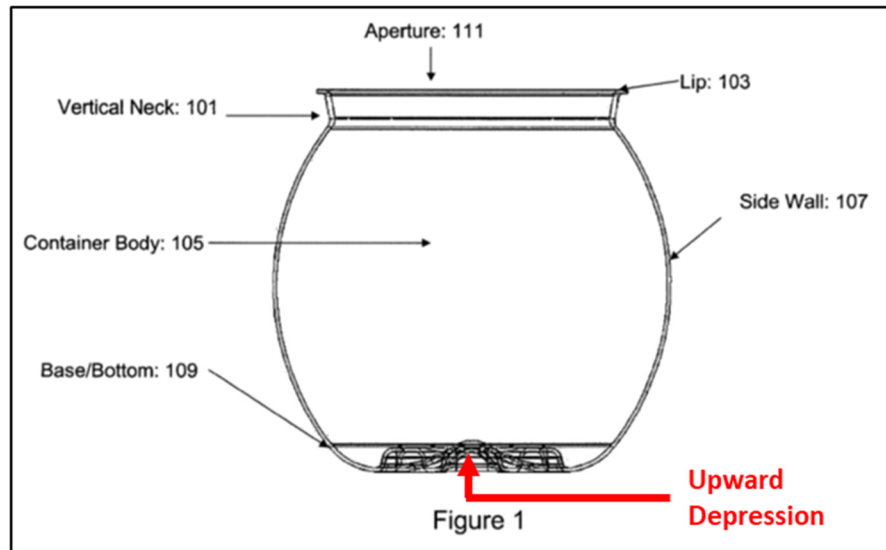
To the extent that Patent Owner asserts that the side wall in Kick stops at the line drawn in Figure 1, further up on the side of the container, Kick also teaches or suggests a horizontally-extending portion (red highlighted section in the figure below) that curves upward, but continues to also extend horizontally, and connects to the side wall.



(Kick, Fig. 1; Delson, ¶47.) It also would have been obvious to a POSITA to have the side wall connect to the horizontally-extending portion in order to form a closed container. (Delson, ¶48.)

- 5 g. **Limitation 1[f]: “wherein the horizontally-extending portion comprises a bottom having a depression formed therein, said depression extending upwardly from an extant of the bottom;”**

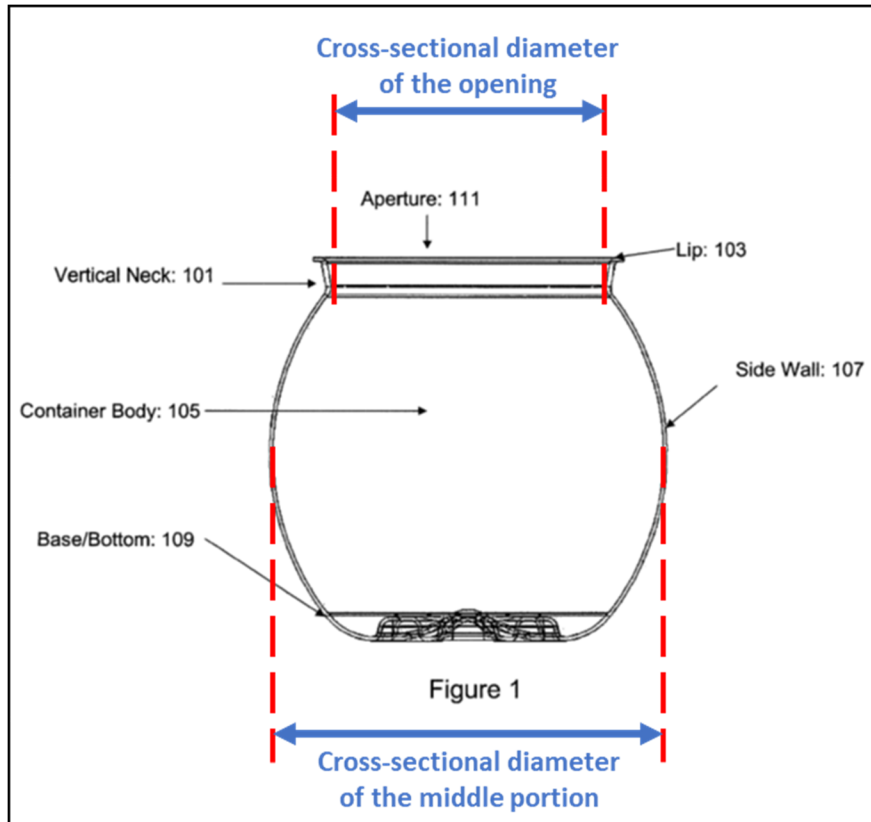
Kick teaches that the horizontally-extending portion has a bottom with a
10 depression that extends upwardly from the bottom, as shown in Figure 1 below:



(*Id.*, Fig. 1; *see also id.*, ¶0004 (“The bottom wall may include a depression, and the bottom wall may include a radial extending depression.”); *id.*, claim 6 (“wherein the bottom wall includes a depression”); *see also id.*, Figs. 2, 3, 7; Delson, ¶49.)

- 5 **h. Limitation 1[g]: wherein a cross-sectional diameter of the first opening to the interior of said container body is less than a cross-sectional diameter of a middle portion of said container body;”**

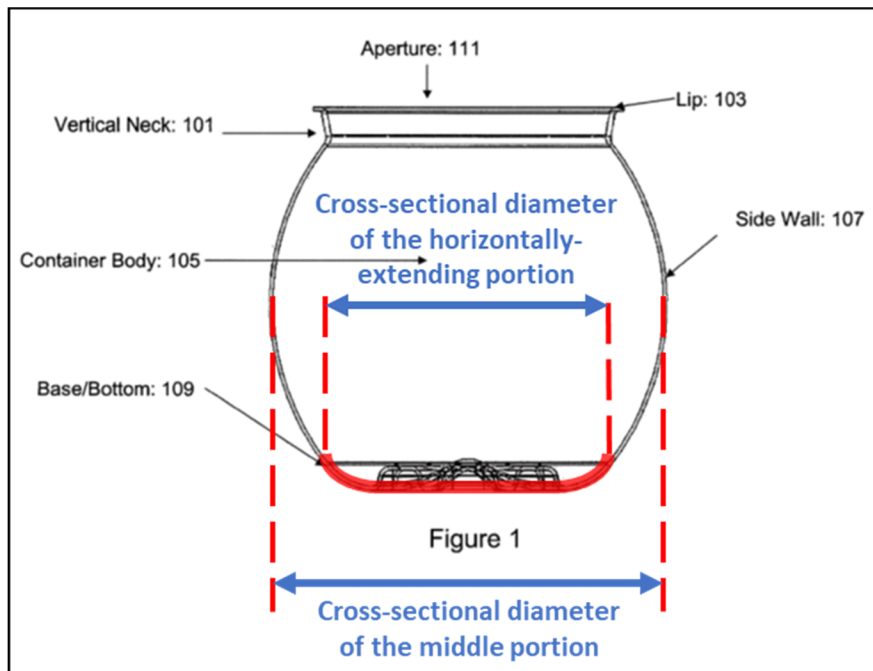
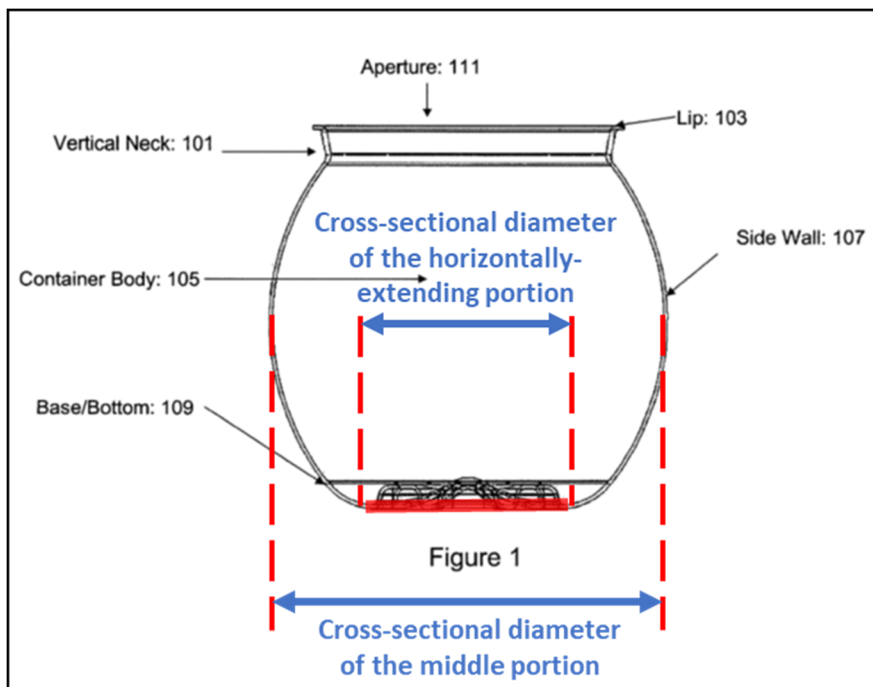
10 Kick teaches a container that has a smaller cross-sectional diameter for the opening into the container body than the cross-sectional diameter of the middle portion of the container body.



(*Id.*, Fig. 1.)

- i. **Limitation 1[h]: “wherein the horizontally-extending portion defines a diameter that is less than the cross-sectional diameter of the middle portion of said container body;”**

Kick teaches that the horizontally-extending portion defines a diameter that is less than the cross-section diameter of the middle position of the body, regardless of whether the “horizontally-extending portion” excludes or includes the portion that begins curving upward.



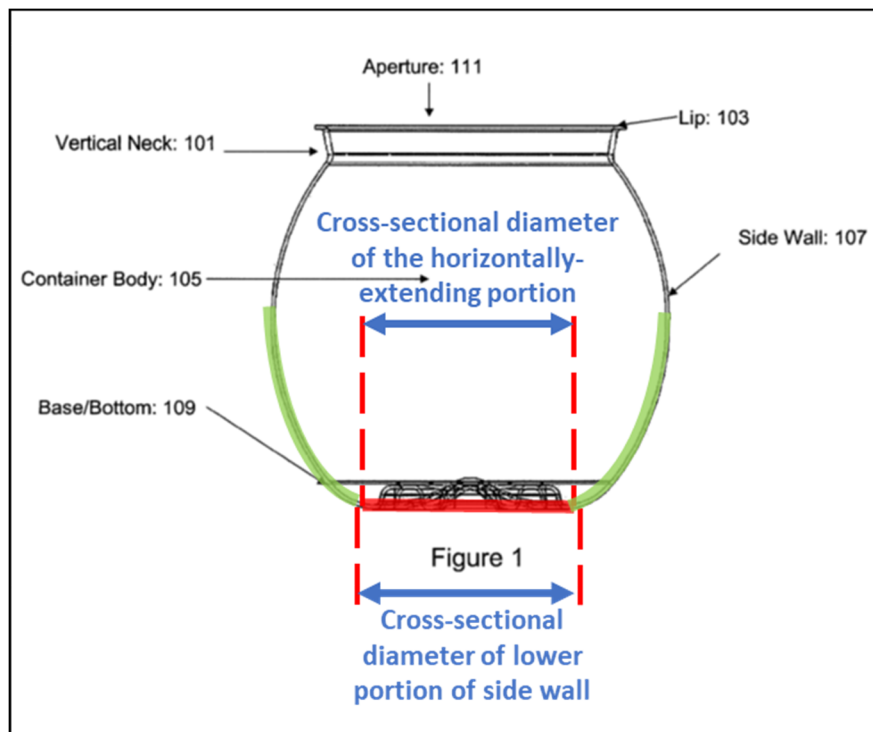
(*Id.*, Fig. 1.)

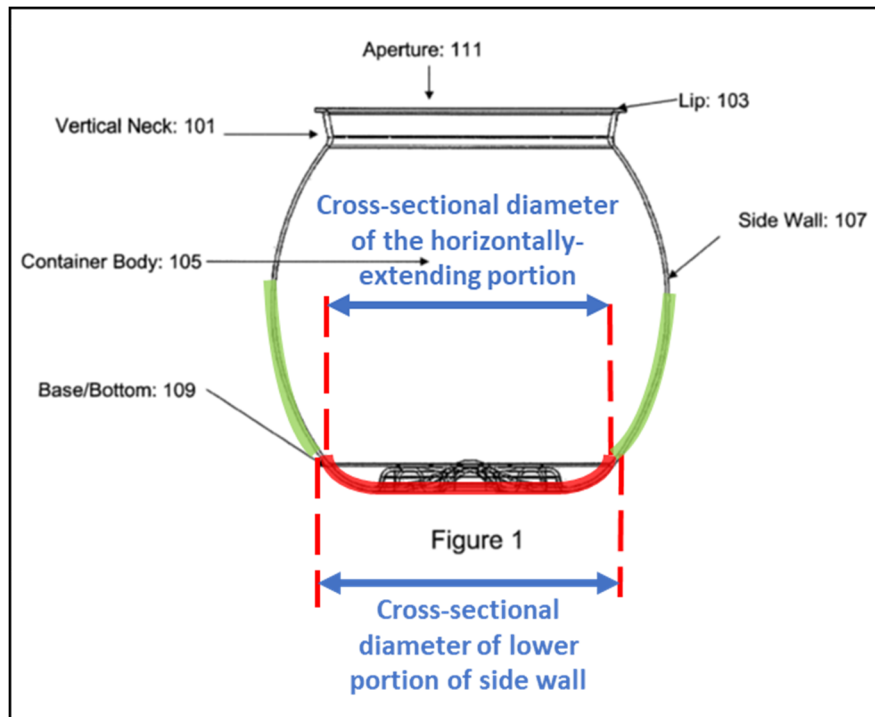
- j. **Limitation 1[i]: “wherein a lower portion of the container side wall extends downwardly from the middle portion of the container side wall to the horizontally-extending portion of the container body, said lower portion being greater in diameter along its entirety than the horizontally-extending portion, including the bottom, thereby rendering the container body stemless;”**

5

Given that the lower portion of the sidewall bends down and inward until it

10 connects with the horizontally-extending portion, Kick teaches that lower portion has a greater diameter along its entirety than the horizontally-extending. (Delson, ¶52.) This is true, regardless of whether the “horizontally-extending portion” excludes or includes the portion that begins curving upward.





(Kick, Fig. 1.) Kick also teaches, as shown in Figure 1, that the container is stemless.

(*Id.*; Delson, ¶52.)

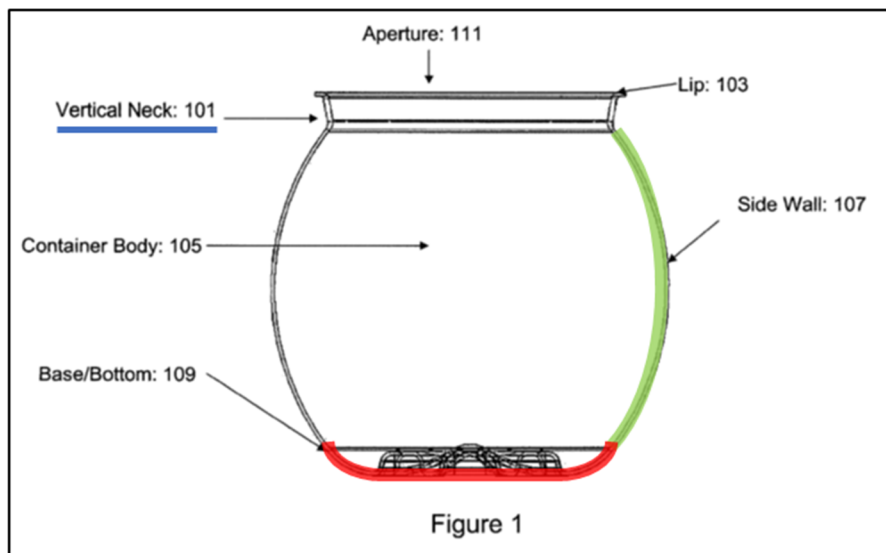
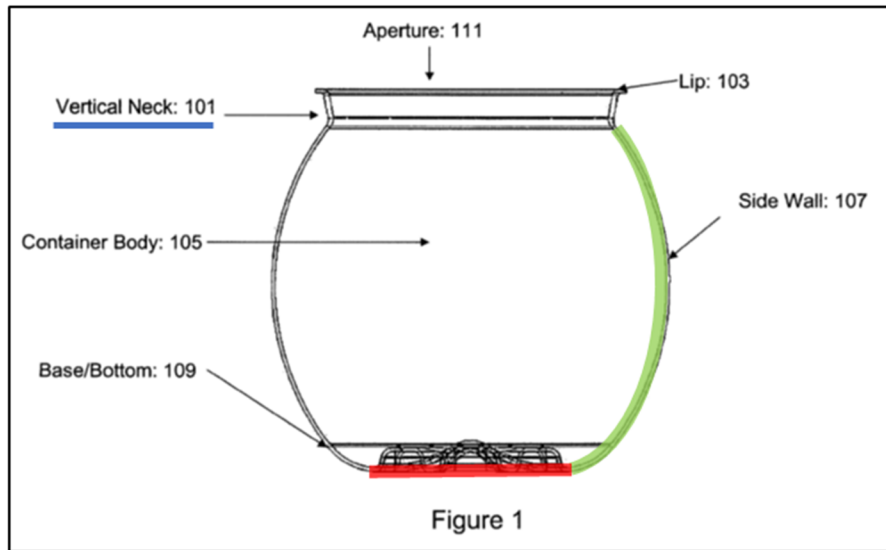
5

- k. **Limitation 1[j]: “wherein the container body further comprises a circular neck extending from the container side wall so that the container side wall extends between the circular neck and the horizontally-extending portion;”**

Kick teaches that the container has a circular neck (highlighted in blue in the
10 images below) in the form of vertical neck 101 above the container side wall 107.

(*Id.*, ¶0014 (“The distal end of the container side wall 107 may be connected to a base/bottom wall 109 in order to seal the first end of the container 105 and **the proximate end of the container side wall 107 may be connected to a substantially vertical neck 101 around the periphery of the container side wall**”

107.”); *id.*, Fig. 1.) Kick further teaches that the side wall extends from the vertical neck to the horizontally extending portion, under either interpretation of the side wall and horizontally-extending portion.

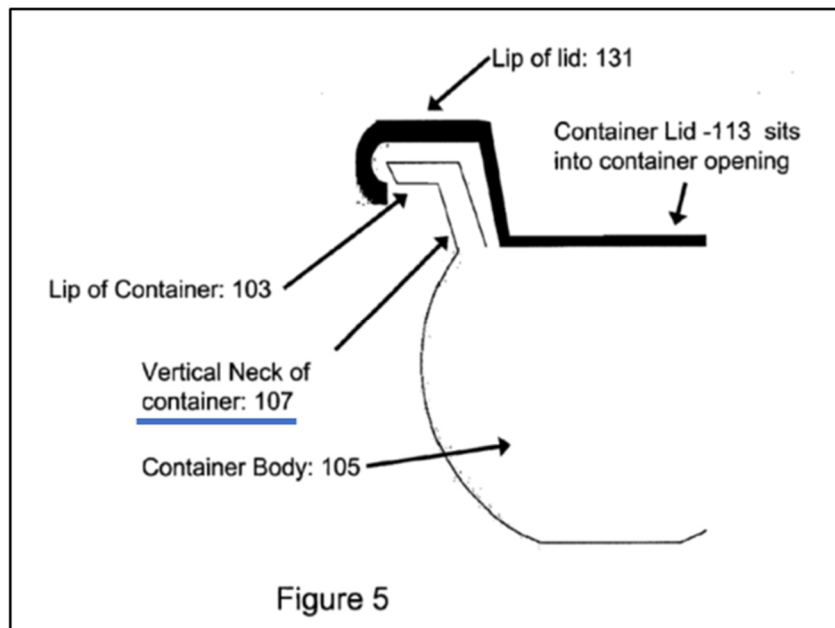


5

(Kick, Fig. 1; *see also id.*, Figs. 2, 5.)

l. Limitation 1[k]: “wherein an upper edge of said container side wall is adjacent to the circular neck of the container body;”

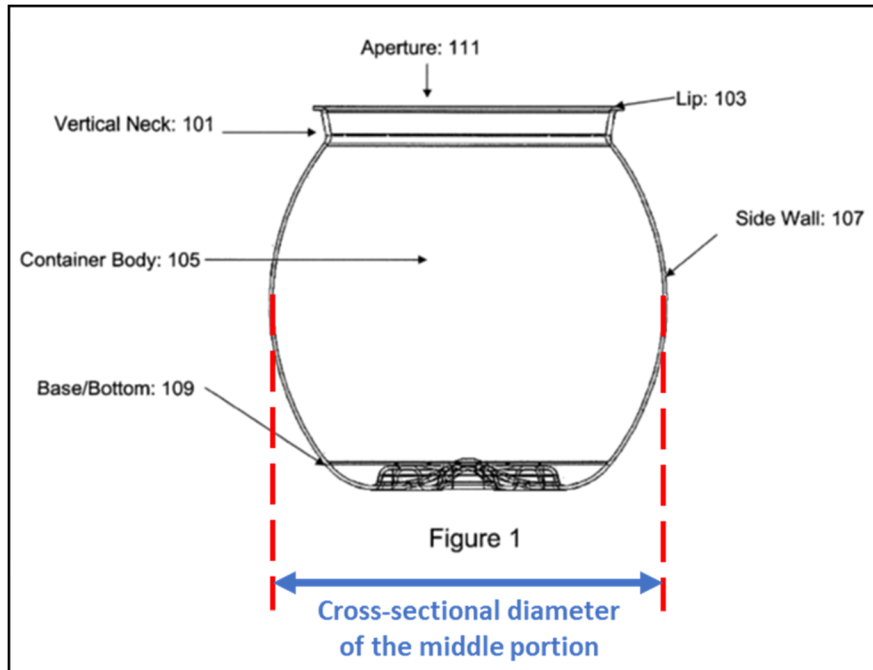
Kick teaches an upper edge of said container side wall is adjacent to the circular neck, as shown in annotated Figure 1 shown in Limitation 1[j] above. Kick also shows close up of the neck and container sidewall connection in Figure 5.



(*Id.*, Fig. 5.)

m. Limitation 1[l]: “wherein the cross-sectional diameter of the middle portion of said container body is defined by the container side wall;”

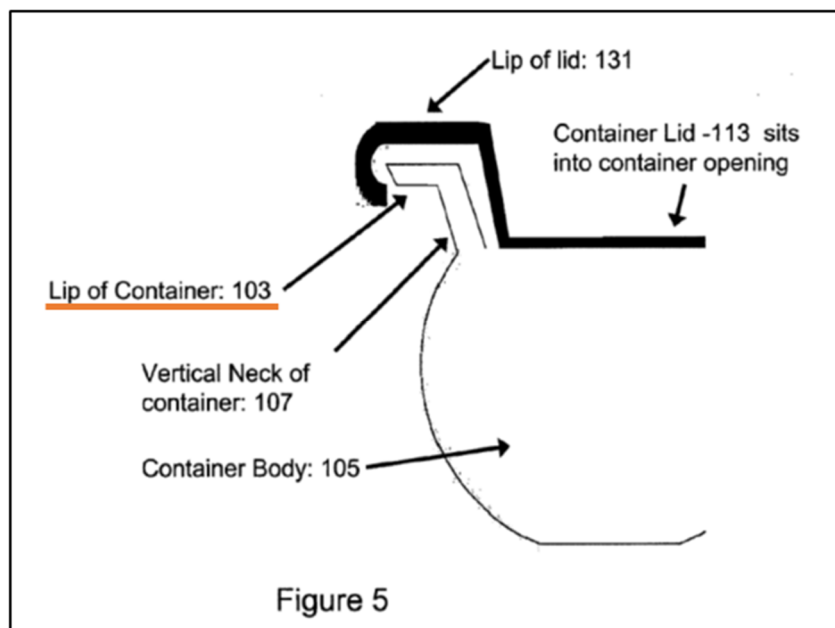
Kick teaches a curved container side wall 107 that defined a cross-sectional diameter at each vertical location of the container body along the side wall, including the cross-sectional diameter of the middle portion of the container side wall.



(*Id.*, Fig. 1.)

- n. **Limitation 1[m]: “wherein the container body further comprises a lip at the end of the circular neck opposite the upper edge of said container side wall;”**

Kick teaches that the container body has a lip at the upper end of the circular neck, which is on the opposite end of the neck from the upper edge of the container sidewall. (*Id.*, ¶0014 (“A lip 103 may extend around the periphery of the substantially vertical neck 101 in order to cooperate with the lid 113.”); *id.*, ¶0016, Fig. 1.) A close-up of that portion of the container, including the lip, is depicted in Figure 5, showing that the lip is at the opposite end of the neck from the upper edge of the container side wall.



(*Id.*, Fig. 5; *see also id.*, ¶0021.)

- o. Limitation 1[n]: “wherein said circular neck is adjacent to the lip;”**

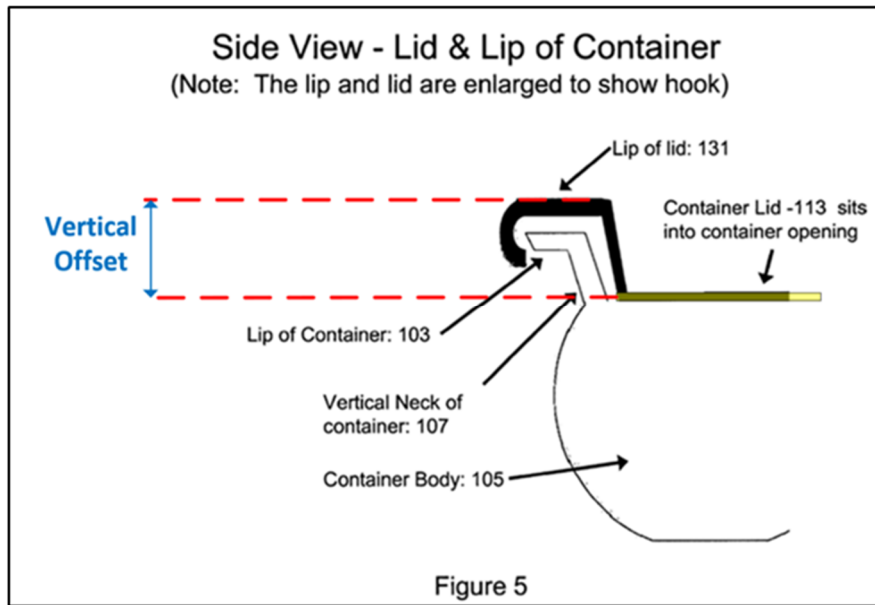
5 Kick teaches that the circular neck is adjacent to the lip, as shown in Figure 5 above in limitation 1[m]. (*See also id.*, ¶¶0014; 0016, 0021.)

- p. Limitation 1[o]: “wherein a first portion of the lid is above the lip of the container body;”**

Kick teaches that a first portion of the lid is above the lip of the container, as
10 shown as “Lip of lid: 131” in Figure 5 above in limitation 1[m]. (*See also id.*, ¶0021.)

- q. Limitation 1[p]: “wherein a second portion of the lid extends horizontally and is vertically offset from the first portion of the lid;”**

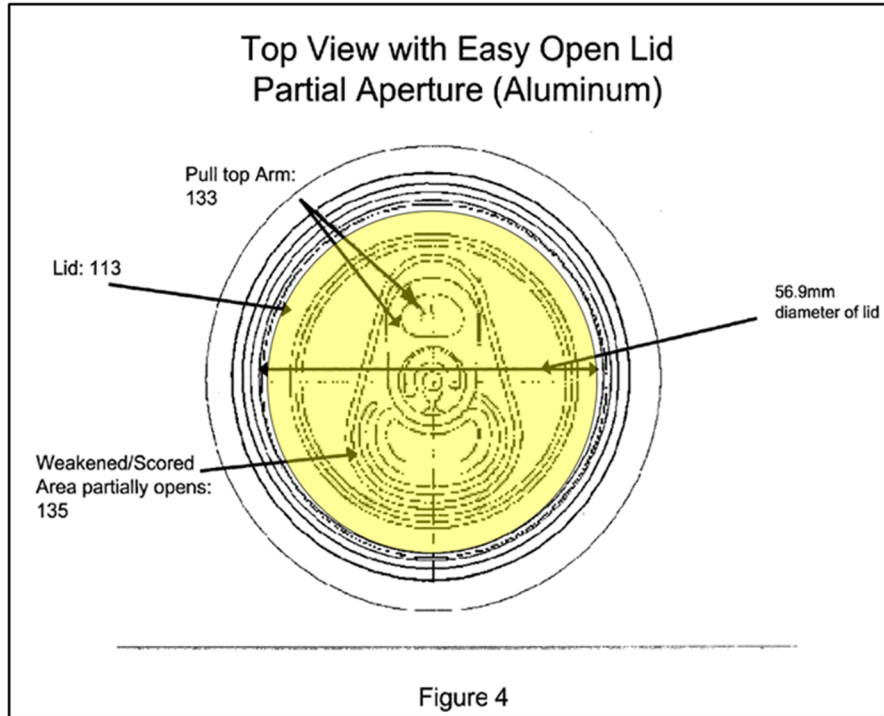
Kick teaches that a second portion of the lid (shown in yellow highlighting
15 below) extends horizontally and is vertically offset from the first portion of the lid (*i.e.*, Lip of lid: 131).



(*Id.*, Fig. 5.)

- r. **Limitation 1[q]: “wherein the second portion of the lid defines a total area across which the second portion of the lid extends horizontally;”**

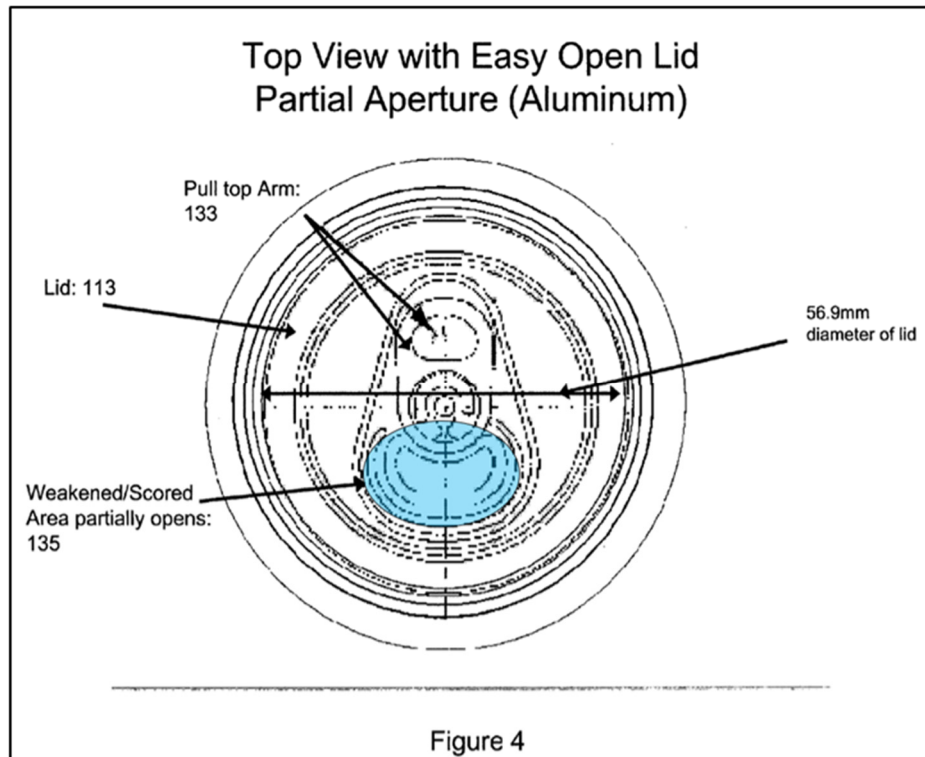
Kick teaches that the second portion of the lid, as shown above Limitation 1[o] in the yellow highlighted portion of Figure 5, extends horizontally across the opening of the container, thus covering the area above the opening. Kick also depicts the same in Figure 4, which shows a view looking at the top of the container, including the horizontally-extending portion of the lid.



(*Id.*, Fig. 4.)

s. **Limitation 1[r]: “wherein the second portion of the lid comprises a weakened or scored area;”**

5 Kick teaches that the second portion of the lid has a weakened or scored area, depicted in Figure 4 as “Weakened/Scored Area partially opens: 135,” which functions in conjunction with the tab to provide access to create an opening into the can. (*Id.*, ¶¶0003, 0020.)



(*Id.*, Fig. 4; *see also id.*, Fig. 6.)

- 5 **t. Limitation 1[s]: “wherein the weakened or scored area is less than the total area across which the second portion of the lid extends horizontally;”**

As shown in Limitation 1[r] above, Kick teaches that the weakened or scored area is less than the total area across which the second portion of the lid extends horizontally.

- 10 **u. Limitation 1[t]: “wherein the lid further comprises an arm connected to the second portion of the lid;”**

Kick teaches “an arm connected to the second portion of the lid” in the form of a tab that is used to press on the weakened/scored portion when the tab is lifted, with the arm shown as “Pull top Arm:133” in Figure 4 depicted in Limitation 1[r] above. (*See also id.*, Abstract, Fig. 6, ¶¶0003, 0020, 0022, 0026 (at no. 2).)

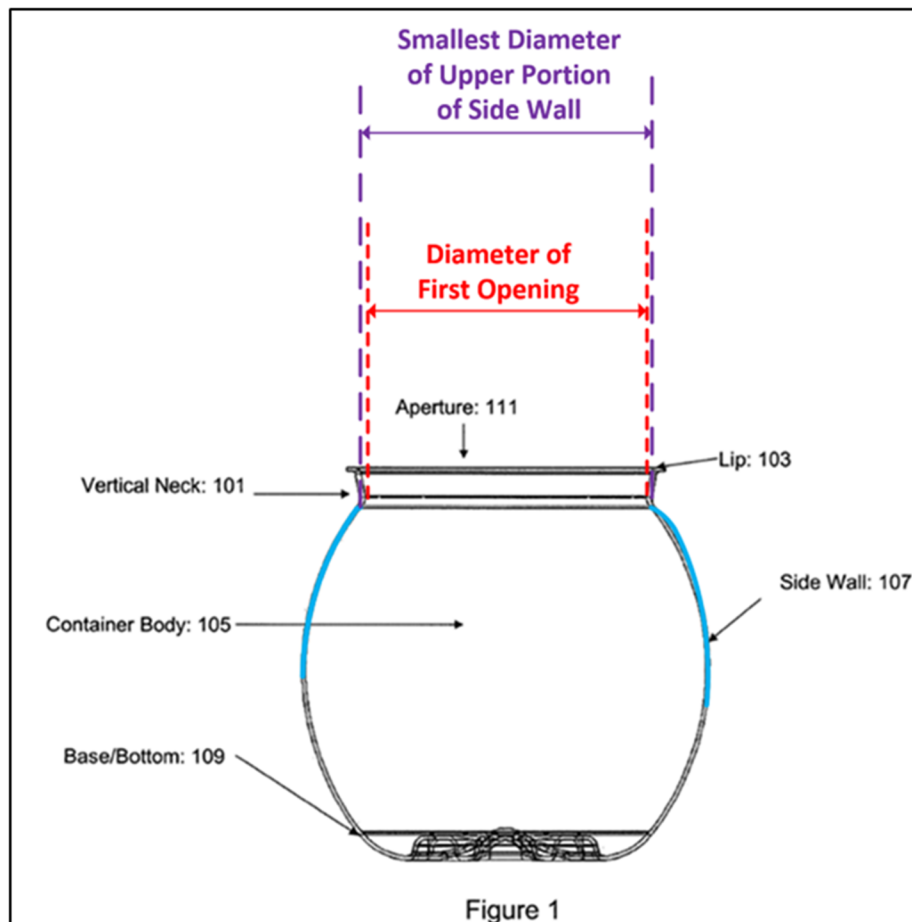
- 5 v. **Limitation 1[u]: “wherein the arm is pivotable from a first position, in which the arm extends horizontally and the weakened or scored area is not deformed, to a second position, in which the arm does not extend horizontally and the weakened or scored area is deformed to provide a second opening to the interior of said container body;”**

 Kick teaches that the tab/arm is pivotable from a first position when the arm is extended horizontally and has not deformed the weakened/scored area. (*Id.*, Figs. 4, 6, Abstract, ¶¶0020, 0022, 0026 (at no. 2).) Kick further teaches and suggests that the tab/arm can be pulled upward at one end, such that the tab/arm does not extend horizontally and presses down on the weakened deformed area at the other end to create a second, smaller opening into the interior of the container body. (*Id.*, Figs. 4, 6, Abstract, ¶¶0020, 0022, 0026 (at no. 2).) A POSITA would have known, based on Kick’s Figures 4 and 6 and the description in the specification that, when the arm pivots to deform the weakened area of the lid, the arm would be in a second (non-horizontal) position to allow the end of the arm to sever the weakened/scored area. (Delson, ¶65.) This is how the type of tab depicted in Figures 4 and 6 functions, which was well-known in the art and in general public use on beverage containers for decades prior to the filing of the application for the ’904 patent. (*Id.*)

10
15
20

- 5 w. **Limitation 1[v]: “wherein an upper portion of the container side wall extends upwardly from the middle portion of the container side wall to the upper edge of the container side wall, said upper portion being greater in diameter along its entirety than the first opening to the interior of said container body;”**

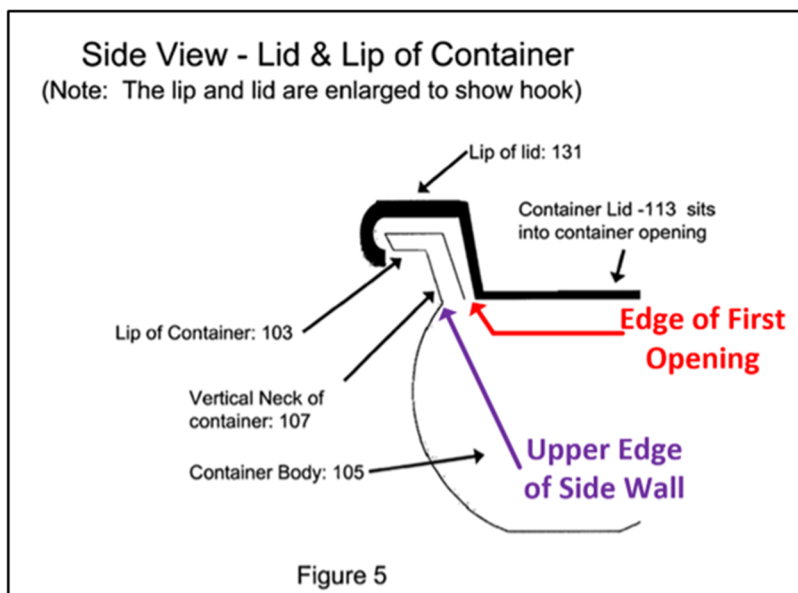
Kick teaches that the upper portion of the container side wall extends upwardly from the middle portion of the container side wall to the upper edge of the container side wall and that upper portion of the side wall is greater in diameter along
10 its entirety than the first opening to the interior of the container body.



(Kick, Fig. 1.) Given that the upper portion of the container side wall curves inwardly until it reaches the portion of the container where the first opening is

located, the upper portion of the container side wall must have a greater diameter than the first opening into the interior of the container body. (Delson, ¶66.)

This relationship can also be observed in Figure 5 (annotated below), which shows the edge of the first opening is positioned inside the upper edge of the sidewall. Therefore, the smallest diameter of the upper portion of the sidewall (at the edge location) is larger than the diameter of the first opening.



(Kick, Fig. 5.)

x. **Limitation 1[w]: “wherein the container contains a liquid; and”**

Kick teaches that the container can contain a liquid. (*Id.*, Abstract, ¶¶0003, 0013, 0014, 0026.)

- y. **Limitation 1[x]: “wherein, when the arm of the lid is in the first position and the weakened or scored area is not deformed:”**

As addressed above in Limitation 1[u], Kick teaches the arm/tab being in a

5 first, horizontal position where it does not deform the weakened/scored area.

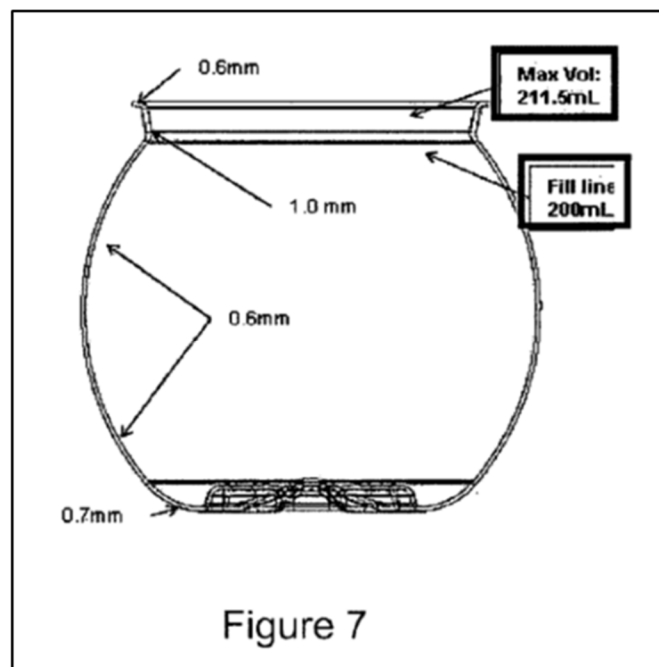
- z. **Limitation 1[y]: “said liquid fills, or nearly fills, the interior of the container body, which interior extends continuously along a height of the entirety of the upper portion of the container wall so as to be interrupted only by the liquid; and”**

10

Kick teaches filling or nearly filling the container with liquid. (Kick Fig. 7 (depicting a fill line of 200 mL and a maximum volume of 211.5 mL); *id.*, ¶0023.)

Kick also teaches that the interior of the container extends continuously along a height of the entirety of the upper portion of the container with nothing between

15 those portions of the side wall other than the liquid.



(*Id.*, Fig. 7; *see also* Figs. 1, 5.)

aa. **Limitation 1[z]: “an actual volume of the liquid contained in the container is equal to, or less than, 211.5 mL.”**

5 Kick teaches a container that has a maximum fill volume of 211.5 mL and thereby teaches that the volume of liquid in the container is equal to or less than 211.5 mL. (*Id.*, Fig. 7, ¶0023.)

Thus, Kick teaches or suggests claim 1 of the '904 patent.

10 4. **Claim 2: “The container of claim 1, wherein the actual volume of the liquid contained in the container is 200 mL.”**

Kick teaches filling the container with 200 mL of liquid in Figure 7, which has a “Fill line 200 mL.” (Kick, Fig. 7.)

5. **Claim 3: “The container of claim 1, wherein the resin is a polyethylene terephthalate (PET) resin.”**

15 Kick teaches that the container body can be made of a polyethylene terephthalate (PET) resin. (*Id.*, ¶0015 (“The **container body 105** according to the present invention **may be made of an appropriate plastic/synthetic resin, typically polyethylene terephthalate (PET) resin.**”).)

20 6. **Claim 4: “The container of claim 1, wherein the container body is formed using a blow molding process.”**

Kick teaches that the container can be made through a blow molding process. (*Id.* (“**The container may be formed by known molding processes, such as biaxial**

orientation blow molding process or direct blow molding process or injection blow molding.”.)

7. Claim 5: “The container of claim 1, wherein the metal is aluminum.”

5 Kick teaches that the metal lid can be made from aluminum. (*Id.*, ¶0020 (“**The container lid 113 may be formed from metal such as steel, aluminum or other types of metals.**”).)

10 **8. Claim 6: “The container of claim 1, wherein the container has a fill line so that, when the container is filled with the liquid up to the fill line, the actual volume of the liquid contained in the container is 200 mL.”**

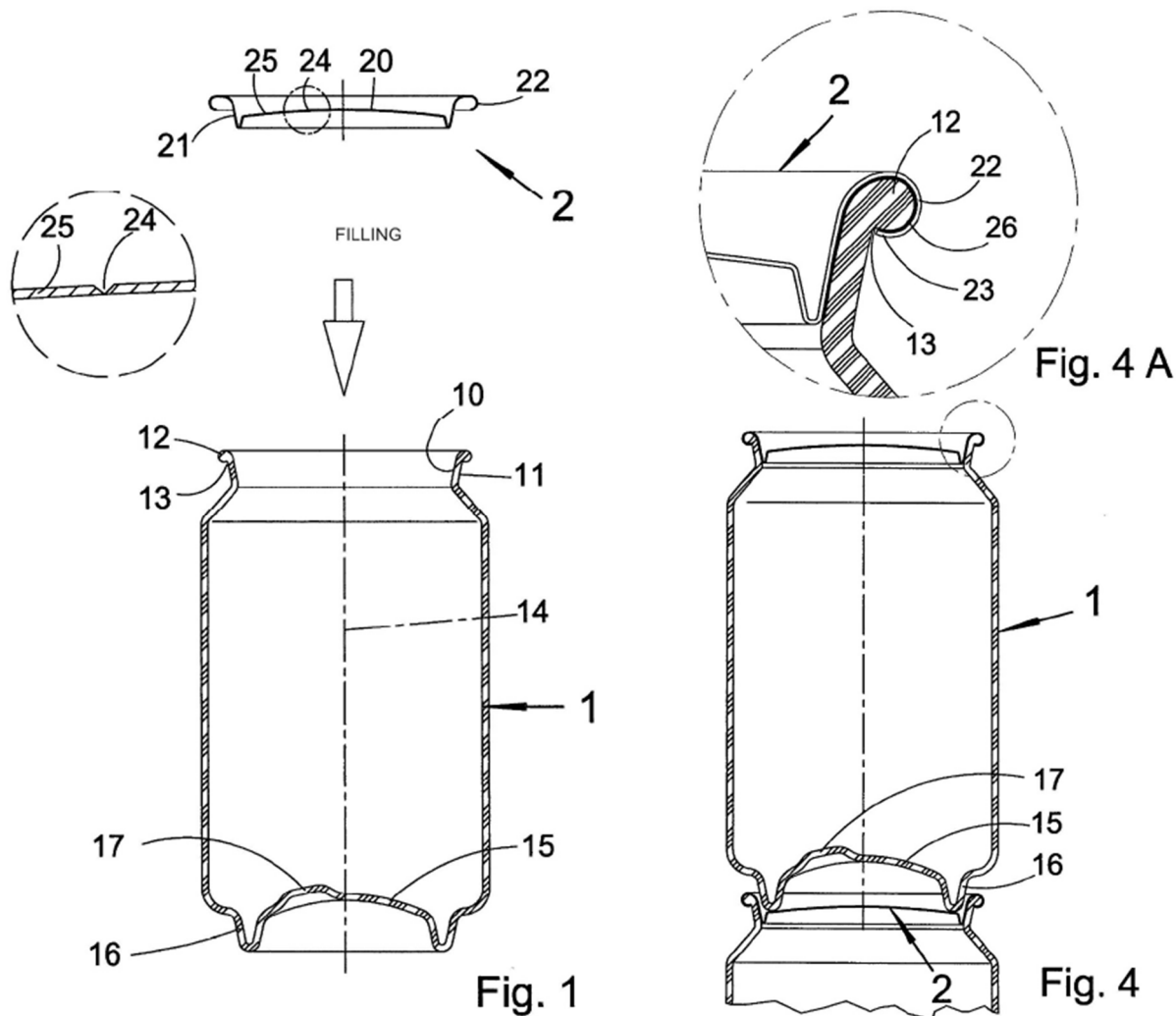
Kick teaches that the container has a fill line that indicates when the container is filled with 200 mL of liquid. (Kick, Fig. 7 (“Fill line 200 mL”).)

Kick therefore anticipates or renders obvious claims 1-6 of the ’904 patent.

15 **B. Ground 2: Claims 1-6 are obvious under 35 U.S.C. § 103 over Ackermann and Kaminski**

1. Summary of Ackermann

Ackermann describes a beverage container with a plastic body and a metal lid. (Ackermann, Abstract, ¶¶[0004], [0022], [0027].) Figure 1 shows a side view of the
20 container during filling, while Figures 4 and 4A show the container with an attached lid. (*Id.*, ¶¶[0011], [0014]-[0015], [0032]-[0033].)

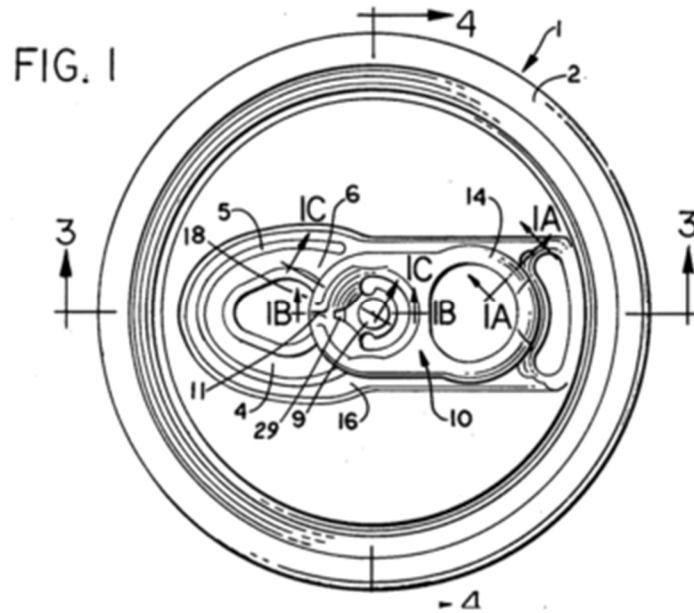


Ackermann, Figs. 1, 4, 4A

Ackermann was published December 22, 2005 (*id.*, cover page) and therefore qualifies as prior art under 35 U.S.C. § 102(a).

5 2. **Summary of Kaminski**

Kaminski describes an “easy open can end;” *i.e.*, a lid. (Kaminski, Abstract; 2:65.) The lid is manufactured from a “relatively ductile metal, such as aluminum” (*id.*, 3:2-3) and attached to a cylindrical container via a “circumferentially extending raised edge” (*id.*, 2:67-3:1). Figure 1 illustrates a top view of the lid.



Kaminski, Fig 1

Kaminski issued on August 14, 1984 (*id.*, cover page) and therefore qualifies as prior art under 35 U.S.C. § 102(a).

5 3. The Combination of Ackermann and Kaminski

As discussed in more detail below, the combination of Ackermann and Kaminski would have rendered the challenged claims obvious to a POSITA. Both Ackermann and Kaminski described aluminum lids for beverage containers. (*See* Ackermann, ¶¶[0005], [0027]; Kaminski, 2:65-3:3). A POSITA would have been motivated to augment the container from Ackermann to include lid-opening features from Kaminski, as Kaminski teaches a pop-top tab for opening a can of liquid, which was in common use by the February 25, 2020 priority date of the claims of the '904

patent. (Delson, ¶83.)³ Because that lid design was so common, it would have been readily accessible to, and a well-known design option for, can manufacturers. (*Id.*) Additionally, while Ackermann described lids that could be opened via a “tear-away removal opening 25” (Ackermann, ¶[0028]), Kaminski described a retained-tab lid
5 and explained how this lid configuration was superior to tear-away lids “[f]or ecological and safety reasons” (Kaminski, 1:14-16). The Ackermann-Kaminski combination would have been a simple combination of known elements by known methods, yielding predictable results. (Delson, ¶86.) A POSITA would have found it obvious to combine features of Ackermann’s container and lid with the lid-opening
10 features taught by Kaminski, which provided details about a pull-tab lid for a beverage container, to achieve benefits taught by Kaminski. (Kaminski, 1:5-8; *id.*, 1:14-17 (describing the tab being retained for ecological and safety reasons); *id.*, 1:27-31 (describing an easy-open lid using less metal); *see also* Delson, ¶¶83-87.)

³ The obvious analysis would not change even as of the April 19, 2010 priority date purportedly claimed in the ’904 patent, because the pop top design in Kaminski was in common, public use long before 2010. (Delson, ¶83.)

Although Ackermann did not specify the size of its plastic container, the size of a container is a simple design choice that is guided by the intended use of the container. (Delson, ¶¶83, 87.)

5 A POSITA would have had a reasonable expectation of success in making the Ackermann-Kaminski combination because it involved simple modifications to the lid based on Kaminski’s teachings. (*Id.*, ¶84.) The Ackermann-Kaminski combination would have also been a simple combination of known elements that would have yielded predictable results. Ackermann did not explicitly describe the volume of its container, and thus a POSITA would have found it obvious to consider
10 various sizes appropriate for the intended use. (*Id.*, ¶86.) A POSITA would have therefore been guided by these teachings and motivations to find the claims of the ’904 patent obvious. (*Id.*, ¶¶83-87.)

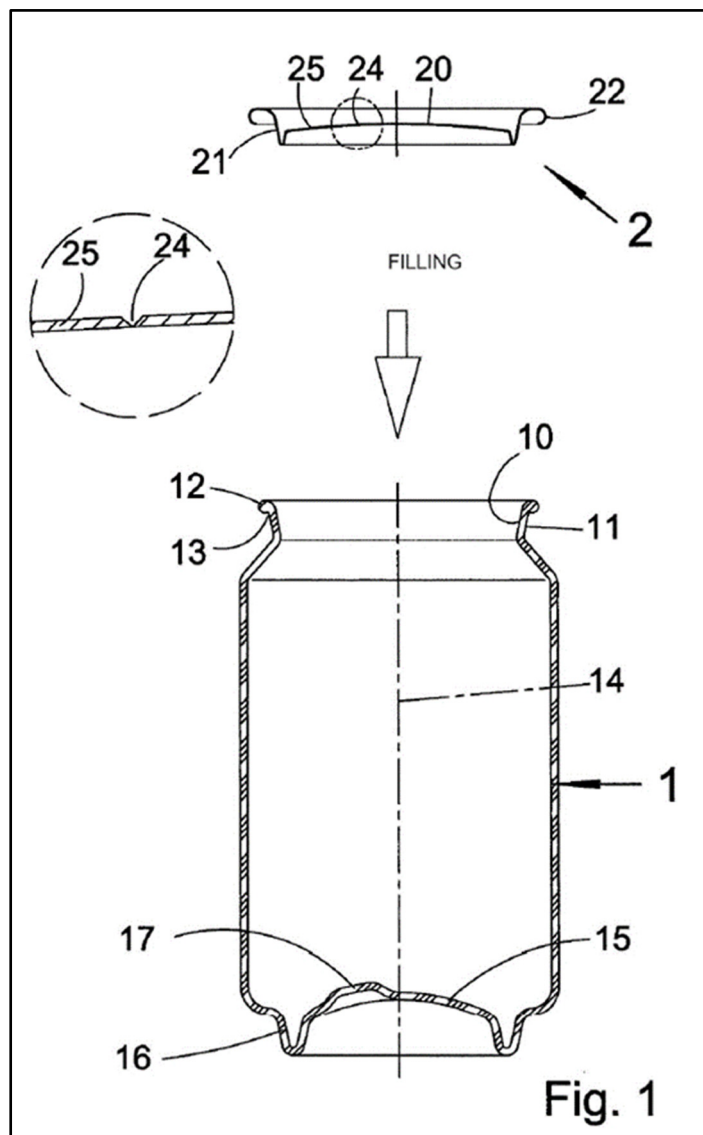
4. The Ackermann-Kaminski combination renders claims 1 of the ’904 patent obvious

15 As demonstrated below, the combination of Ackermann and Kaminski renders claims 1-6 of the ’904 patent obvious.

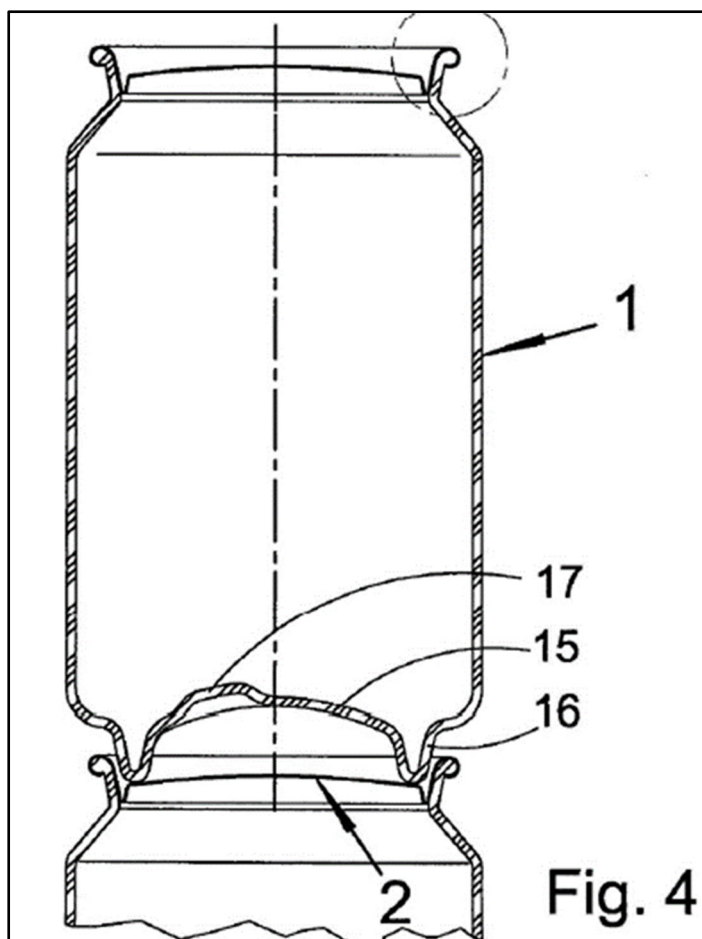
a. Limitation 1[Preamble]: “A container, comprising:”

Ackermann teaches a container, in particular a “reusable container, made of plastic.” (Ackermann, Title, Abstract (describing a container “made of plastic,
20 including a lid (2) made of metal for closing a large filling opening (10) of the container (1)”).) Figure 1 of Ackermann illustrates a side view of the container

during filling (*id.*, ¶[0011]), and Figure 4 shows closed and stacked containers (*id.*, ¶[0015].) (Delson, ¶88.)



(Ackermann, Fig. 1 (depicting a can before the lid is attached).)



(*Id.*, Fig. 4 (depicting one container stacked on another).)

- 5 **b. Limitation 1[a]: “a container body, said container body defining a first opening to an interior of said container body; and”**

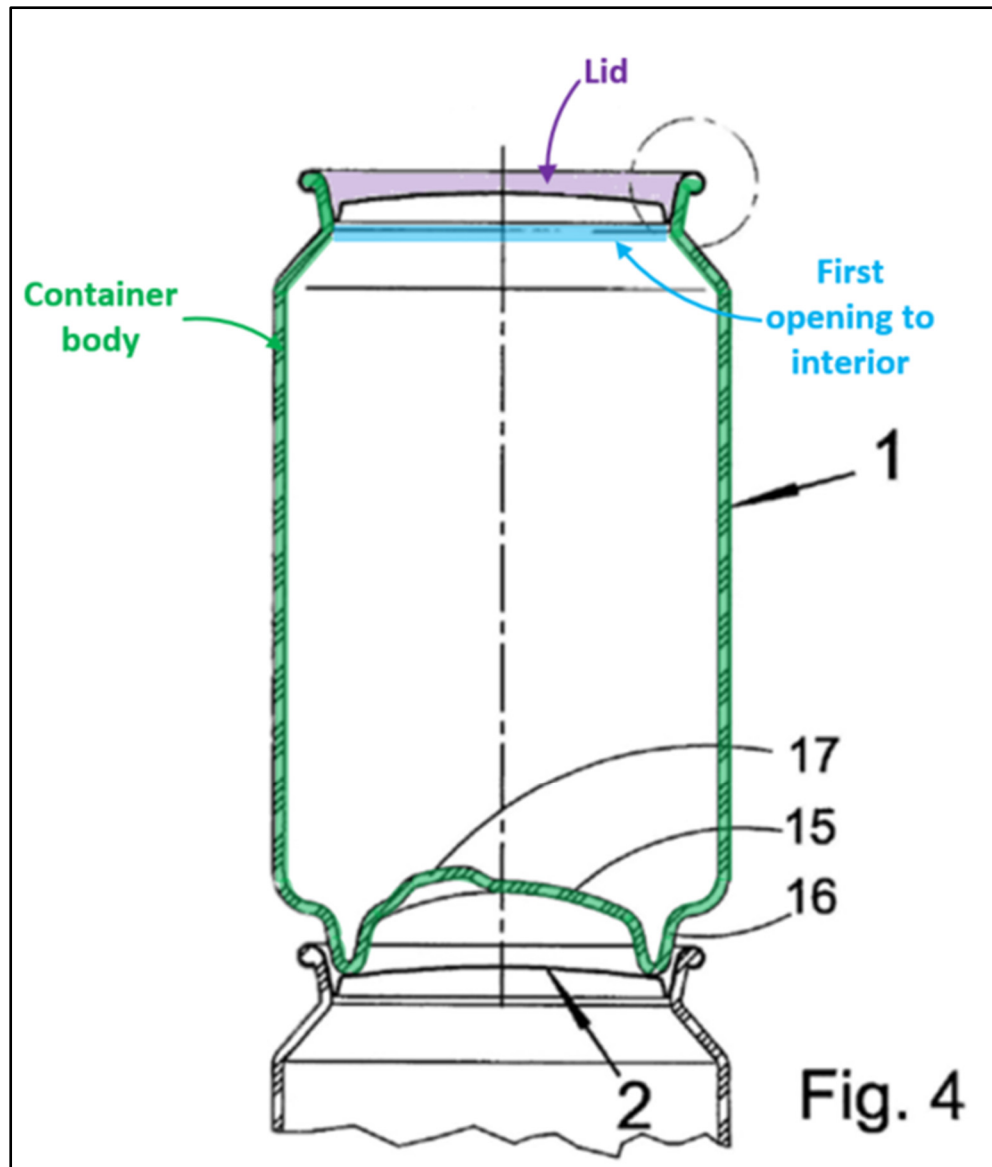
Ackermann teaches a “container body” in the form of the vertical side walls and the bottom of the container 1. (*See* Ackermann, Fig. 1; *see also id.*, ¶[0033] (referring to a “container body”).) The container has a first opening to an interior of the container body in the form of “container opening or filling opening 10.” (*Id.*,

10 ¶[0022]; *see also* ¶[0033] (referring to an interior of the container).) Figure 1 is

c. Limitation 1[b]: “a lid connected to the container body and covering the first opening to the interior of said container body;”

Ackermann teaches a “lid” in the form of “lid 2,” which can be made out of
5 aluminum or tinplate. (*Id.*, ¶[0027], Fig. 1 (element 2).) The lid connects to the
container body by engaging around a toroidal ridge on the container body. (*Id.*,
¶¶[0004], [0033], Fig. 2A.)

When attached to the container, Ackermann teaches that the lid covers the
first opening to the interior of said container body. (*See id.*, ¶[0027].) Ackermann
10 depicts this as follows:



(*Id.*, Fig. 4.)

d. Limitation 1[c]: “wherein the container body is made out of a resin;”

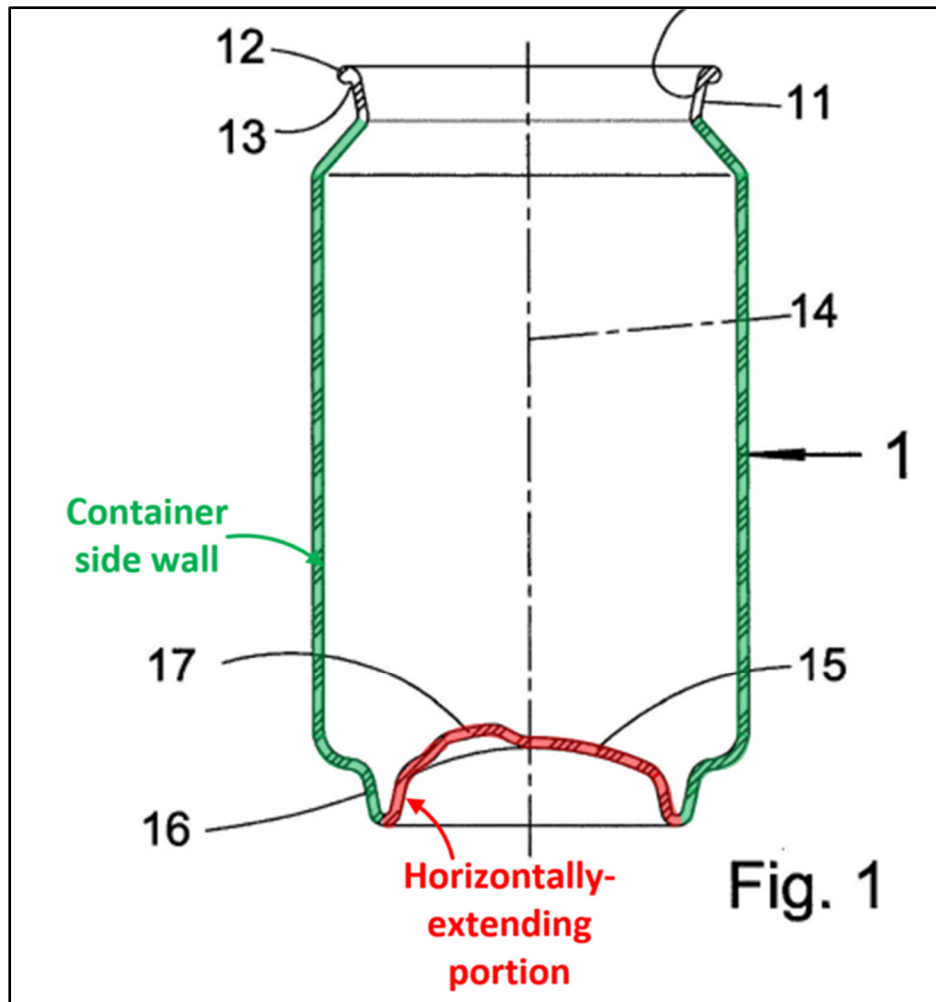
5 Ackermann teaches that the container is made out of a plastic, such as polyethylene terephthalate (PET). (*Id.*, ¶[0022].) PET is a type of resin. (See Ex. 1011 (defining resin as “[a]ny of numerous physically similar polymerized synthetics ... to form plastics.”); Delson, ¶[93].)

e. Limitation 1[d]: “wherein the lid is made out of a metal;”

Ackermann teaches using a container lid that is metal. (Ackermann, ¶[0027]
5 (describing “aluminum or tinplate” lids); Delson, ¶94.) Kaminski also teaches a lid
made of metal. (Kaminski, 3:1-4 (“In general, can end 1 will be manufactured of a
relatively ductile metal, such as aluminum, for example, but may be made from
plastic or other materials as required.”).)

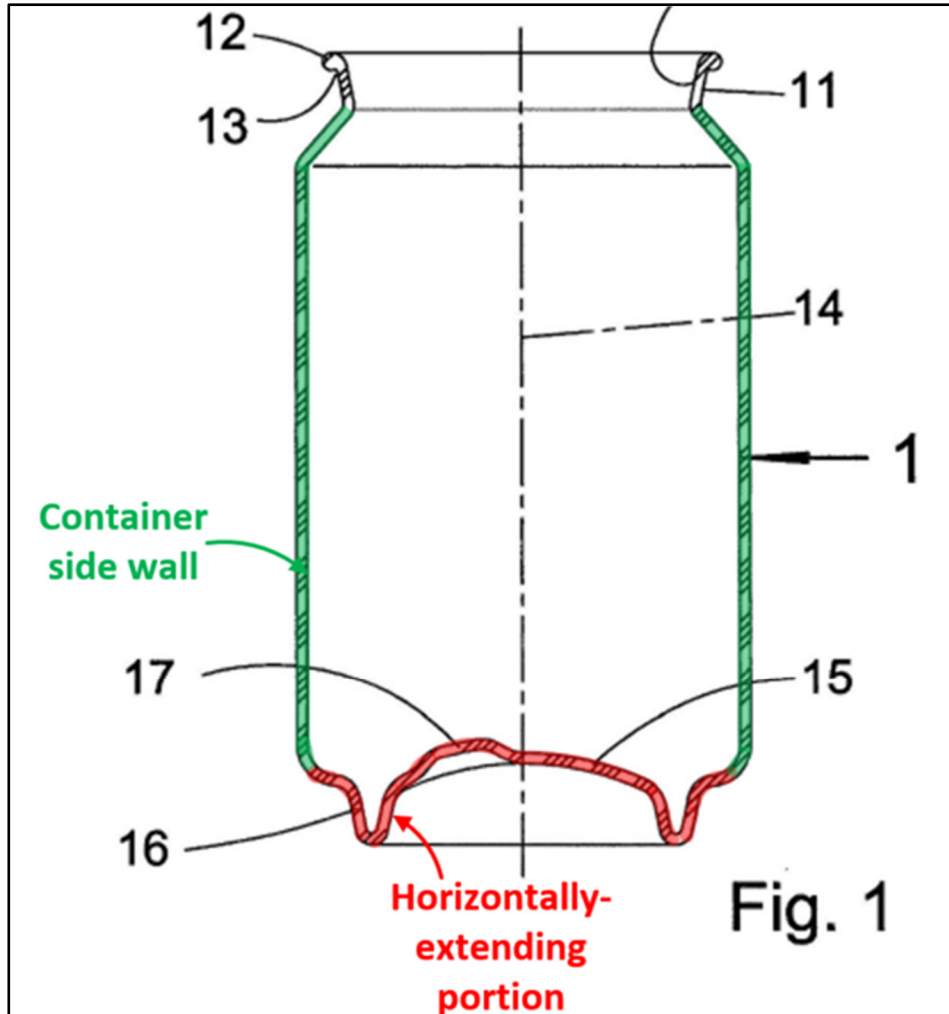
**f. Limitation 1[e]: “wherein the container body
10 comprises a container side wall and a horizontally-
extending portion connected to the container side
wall;”**

Ackermann teaches a “container side wall” in the form of the vertical side
walls and adjacent portions of the container 1, as annotated in green in Figure 1
15 below. Furthermore, the container 1 includes a “horizontally-extending portion
connected to the container side wall” in the form of a container base 15 (Ackermann,
¶[0026]), which extends across a horizontal space between the side walls as
annotated in red in Fig. 1 below, where the container side wall is interpreted as
extending all the way to the bottom of the container.



(*Id.*, Fig. 1 (cropped).)

Alternatively, if the **container side wall** is interpreted as ending where the side wall bends inward, then the **horizontally-extending portion**, comprises the entire
5 portion between the end of the side walls, as that portion of the container extends horizontally across that span, regardless of also extending up or down, as shown:

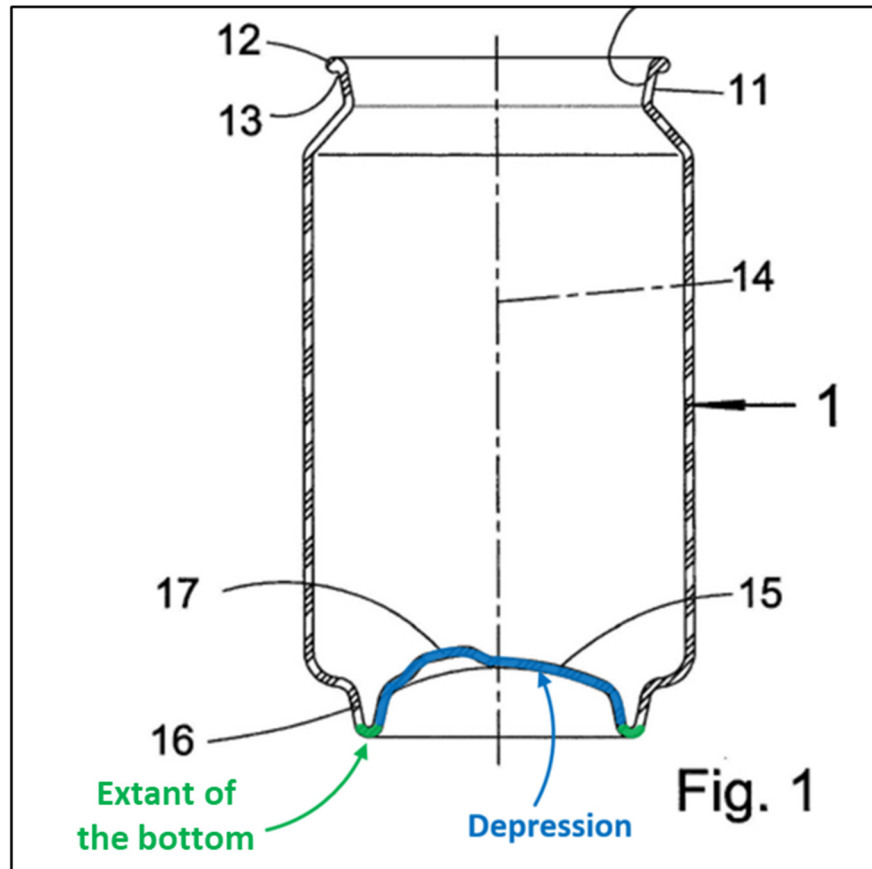


(*Id.*, Fig. 1 (cropped).) This is true regardless of the precise point where the **side wall** is deemed to transition into the **horizontally extending portion**. (Delson, ¶97.)

- g. **Limitation 1[f]: “wherein the horizontally-extending portion comprises a bottom having a depression formed therein, said depression extending upwardly from an extant of the bottom;”**

Regardless of the interpretation of the section of Ackermann’s container that represents the claimed “horizontally-extending portion” (as discussed in element 1[e]), Ackermann teaches that the horizontally-extending portion comprises a

bottom that has: (1) an **extant portion of the bottom** in the form of an annular surface on which the container stands; and (2) a **depression** in the middle of the annular surface that extends upward from the **extant portion**:

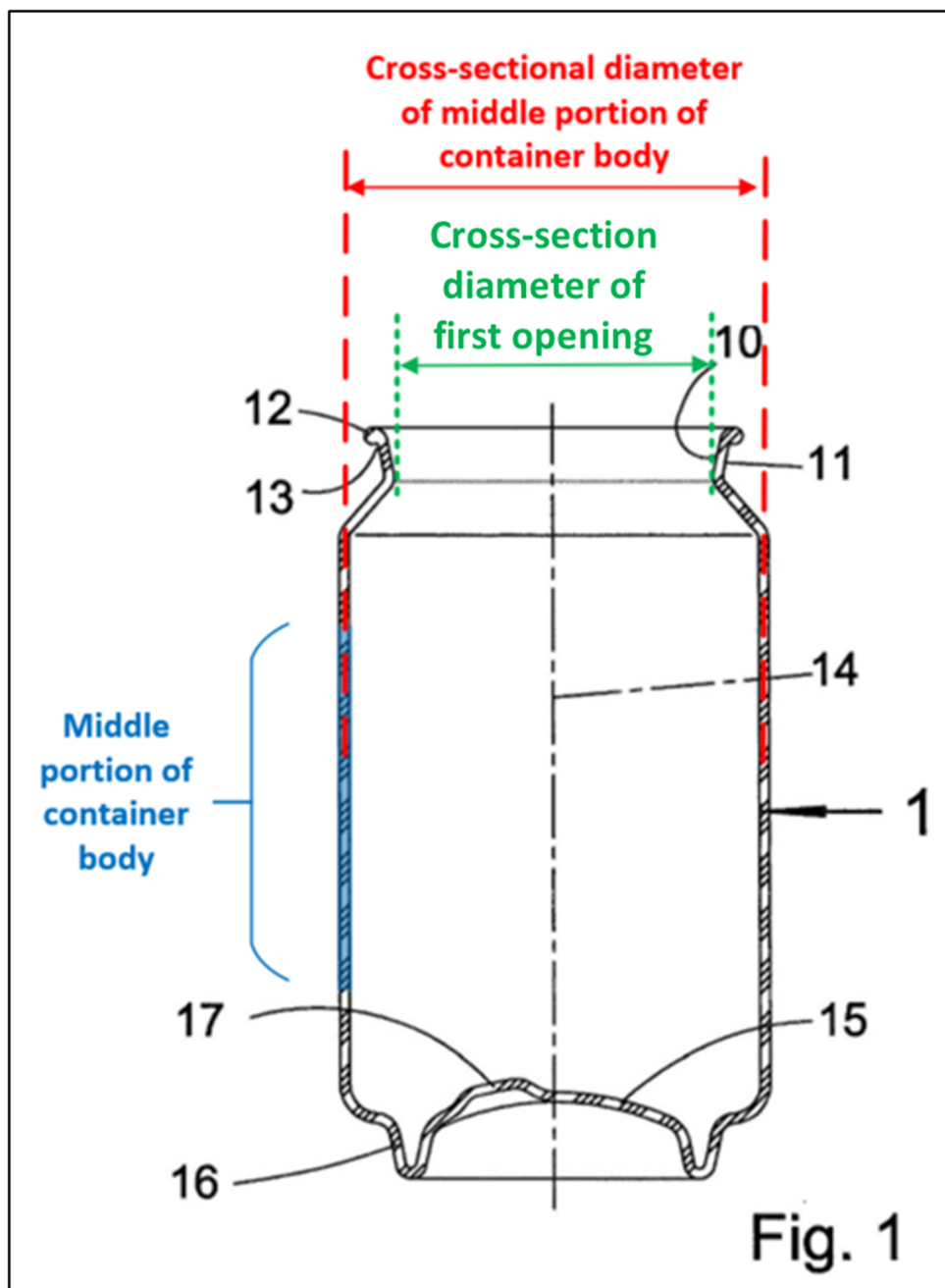


5 (Ackermann, Fig. 1 (cropped).)

- h. **Limitation 1[g]: “wherein a cross-sectional diameter of the first opening to the interior of said container body is less than a cross-sectional diameter of a middle portion of said container body;”**

10 Ackermann teaches that the container body has a **middle portion**, with the precise top and bottom boundaries of the middle portion being irrelevant given the constant diameter across most the of the height of the container. The container has

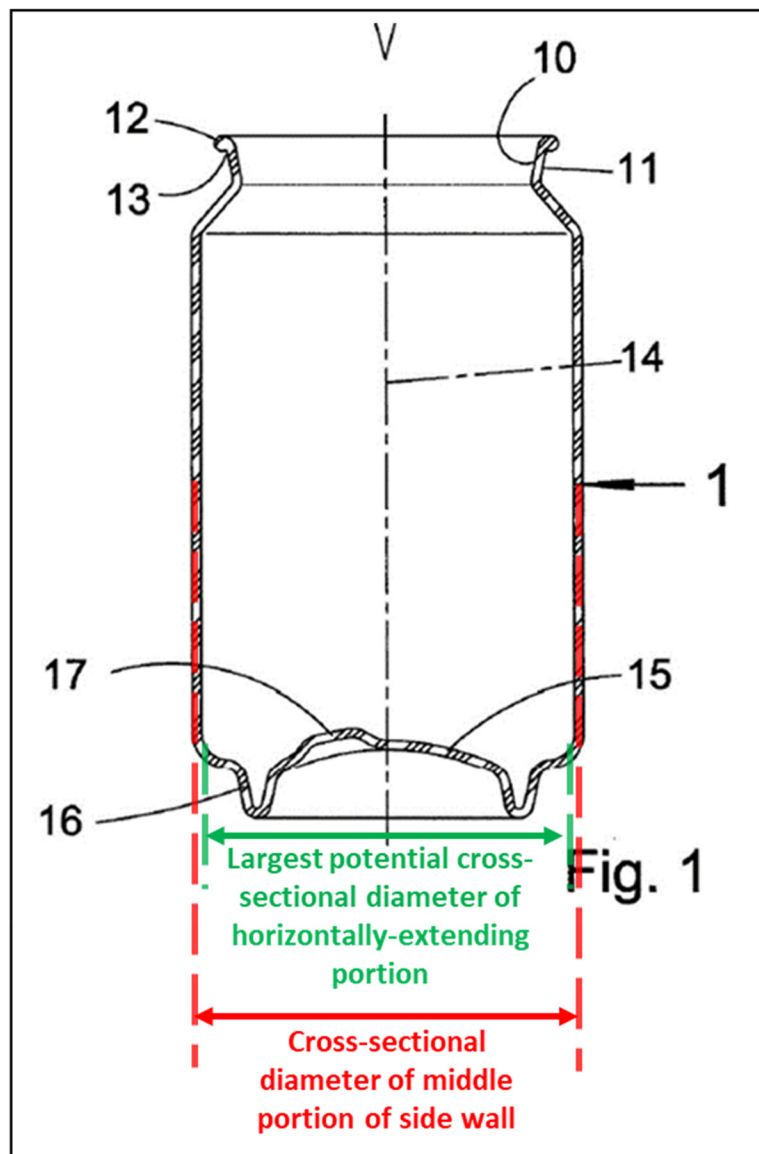
a cross-sectional diameter of the first opening that is less than and a cross-sectional diameter of the middle portion.



(*Id.*, Fig. 1 (cropped).)

- i. **Limitation 1[h]: “wherein the horizontally-extending portion defines a diameter that is less than the cross-sectional diameter of the middle portion of said container body;”**

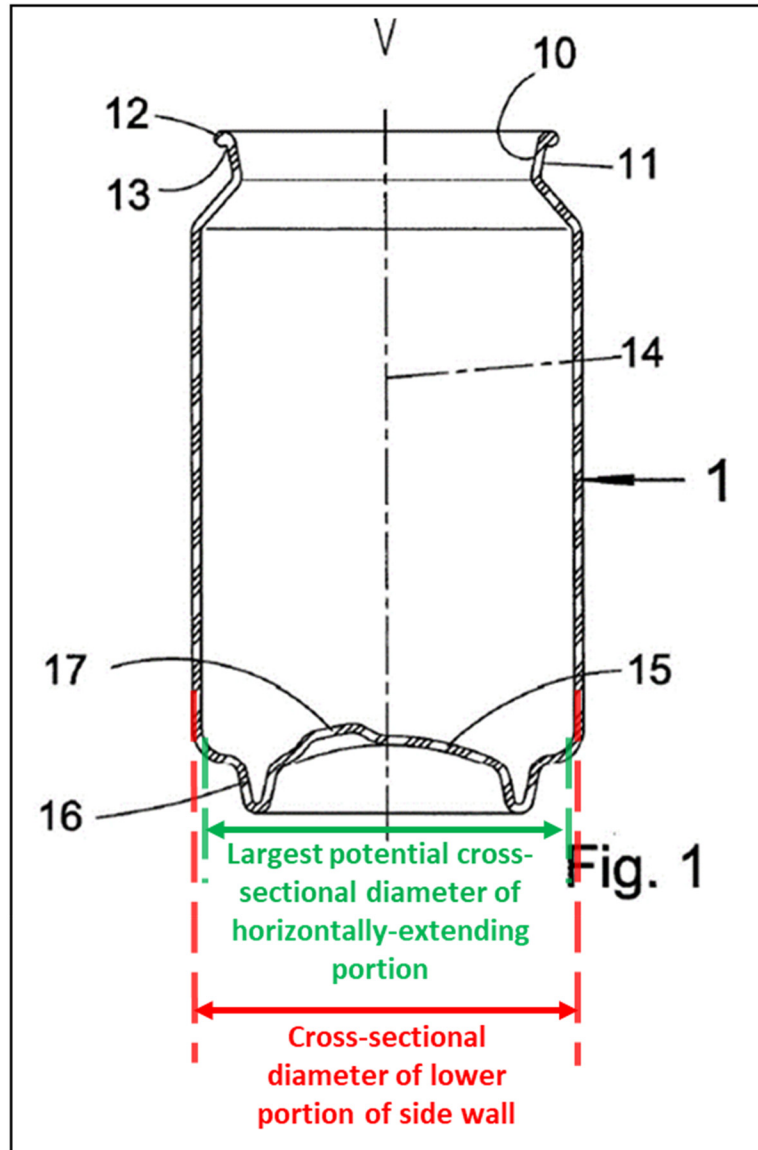
5 Regardless of the interpretation of the section of Ackermann’s container that represents the claimed “horizontally-extending portion” (as discussed in element 1[e]), the horizontally-extending portion defines a diameter that will always be less than the cross-sectional diameter of the middle portion of the side wall because, even under widest interpretation, the horizontally extending portion extends out towards,
10 but does not include, the side wall.



(*Id.*, Fig. 1 (cropped).)

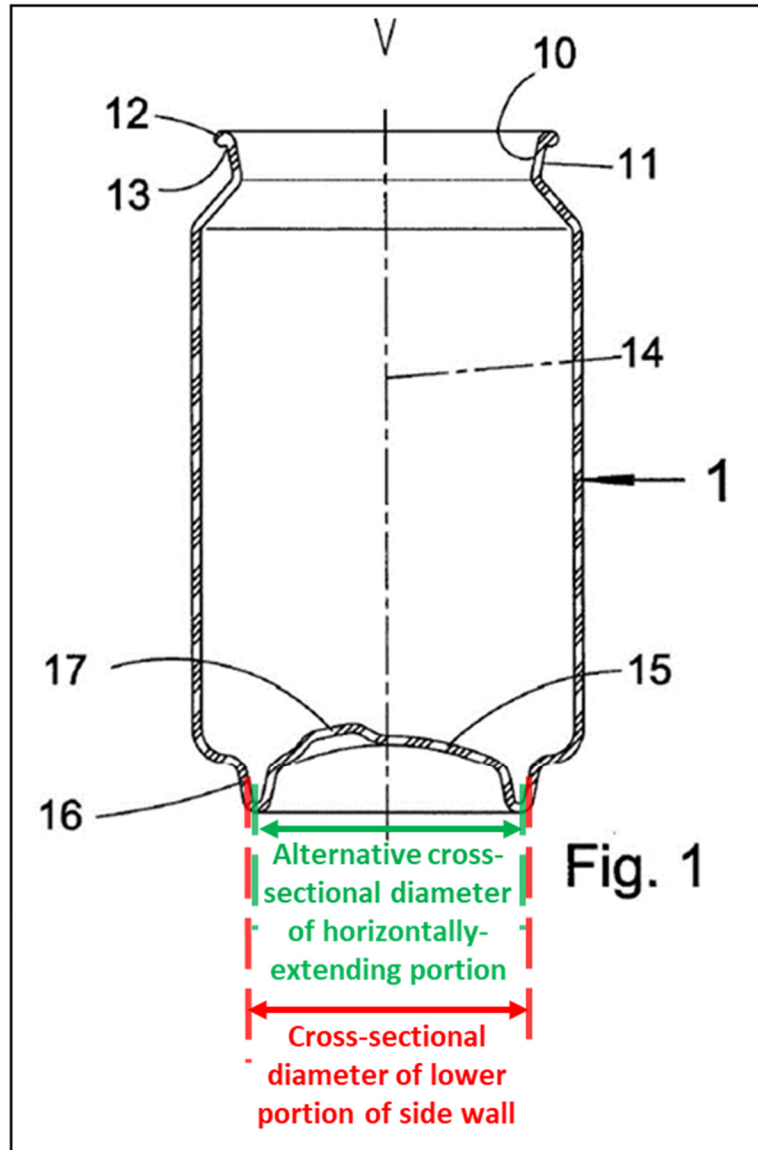
- 5 j. **Limitation 1[i]: “wherein a lower portion of the container side wall extends downwardly from the middle portion of the container side wall to the horizontally-extending portion of the container body, said lower portion being greater in diameter along its entirety than the horizontally-extending portion, including the bottom, thereby rendering the container body stemless;”**

10 Regardless of the interpretation of the dividing point between the “lower portion of the container side wall” and the “horizontally-extending portion,” Ackermann teaches that the lower portion of the container side wall will always have a greater diameter than the horizontally-extending portion because the horizontally extending portion extends outwardly towards, but does not include, the side wall portion of the container.



(*Id.*, Fig. 1 (cropped); Delson ¶101.) Ackermann therefore teaches a container that satisfies the “wherein” in limitation 1[i], and thereby renders the container stemless. (Ackermann, Fig. 1; Delson ¶103.)

5 This same analysis holds true even if the side wall in Ackermann is interpreted as extending down to the bottom of the container.



(Ackermann, Fig. 1 (cropped); Delson ¶102.)

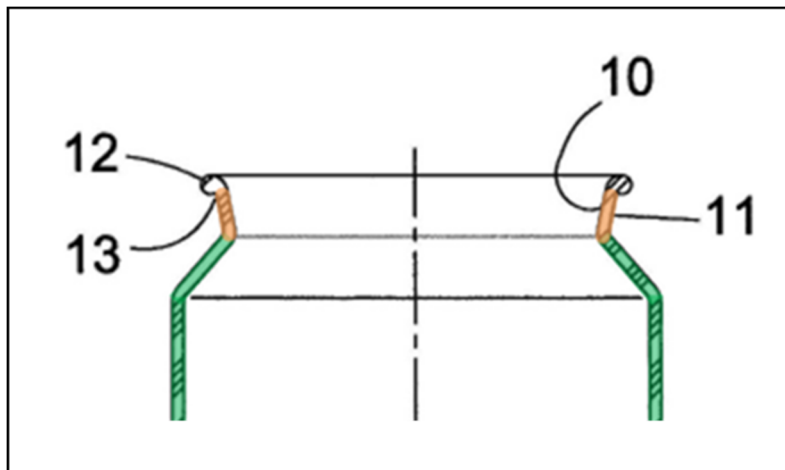
Additionally, the recitation following the thereby clause should not be given patentable weight because they merely state an intended result. *Bristol-Myers*

5 *Squibb Co. v. Ben Venue Lab'ys., Inc.*, 246 F.3d 1368, 1376 (Fed. Cir. 2001); *Texas Instruments Inc. v. U.S. Int'l Trade Comm'n*, 988 F.2d 1165, 1172 (Fed. Cir. 1993).

But, as noted above, even if such an intended result is given patentable weight, the limitation is met.

- 5 k. **Limitation 1[j]: “wherein the container body further comprises a circular neck extending from the container side wall so that the container side wall extends between the circular neck and the horizontally-extending portion;”**

As discussed above in regard to limitation 1[e], Ackermann teaches that the side wall extends on the bottom end to the point where it connects with the horizontally-extending portion of the container, regardless of the dividing point between the horizontally-extending portion and the lower portion of the sidewall. Ackermann further teaches that the **upper end of the side wall** connects to a **circular neck (annular wall 11)** that extends above the side wall.



15 (Ackermann, Fig. 1 (cropped); ¶¶[0022]-[0025].)

- l. **Limitation 1[k]: “wherein an upper edge of said container side wall is adjacent to the circular neck of the container body;”**

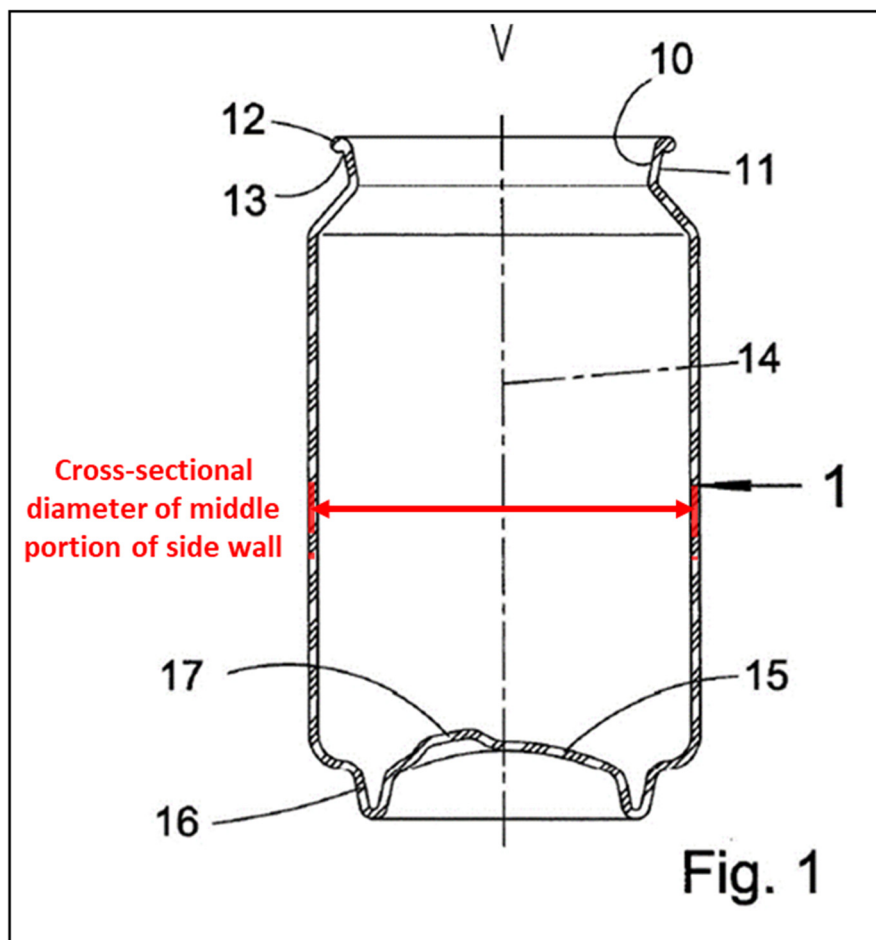
As demonstrated above in regard to limitation 1[j], the upper edge of the

5 container side wall is adjacent to the circular neck (annular wall 11).

- m. **Limitation 1[l]: “wherein the cross-sectional diameter of the middle portion of said container body is defined by the container side wall;”**

Ackermann teaches a circular container that has a cross-sectional diameter in

10 the middle of the container defined by the side wall.

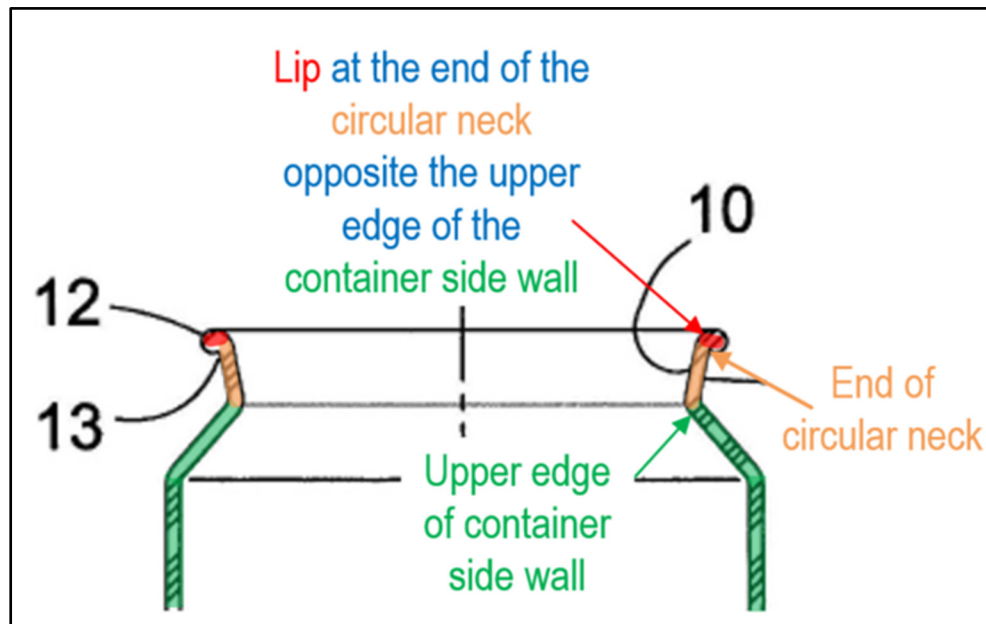


(*Id.*, Fig. 1 (cropped).)

n. Limitation 1[m]: “wherein the container body further comprises a lip at the end of the circular neck opposite the upper edge of said container side wall;”

Ackermann teaches the upper end of the neck has a lip, which is shown as an outward protrusion, which Ackermann identifies as “protruding ridge 12” that “projects beyond the contour of the annular wall 11 in order to form an undercut groove 13.” (*Id.*, ¶[0023]; *id.*, Fig. 1.) The ridge 12 is used for closing the container, as a rolled wall of a lid would engage around the ridge. (*Id.*, ¶[0027].)

As shown in Ackermann’s Figure 1, annotated below, the lip (protruding ridge 12) is at the end of (i.e., the top of) the circular neck (annular wall 11), opposite the upper edge of the container side wall.



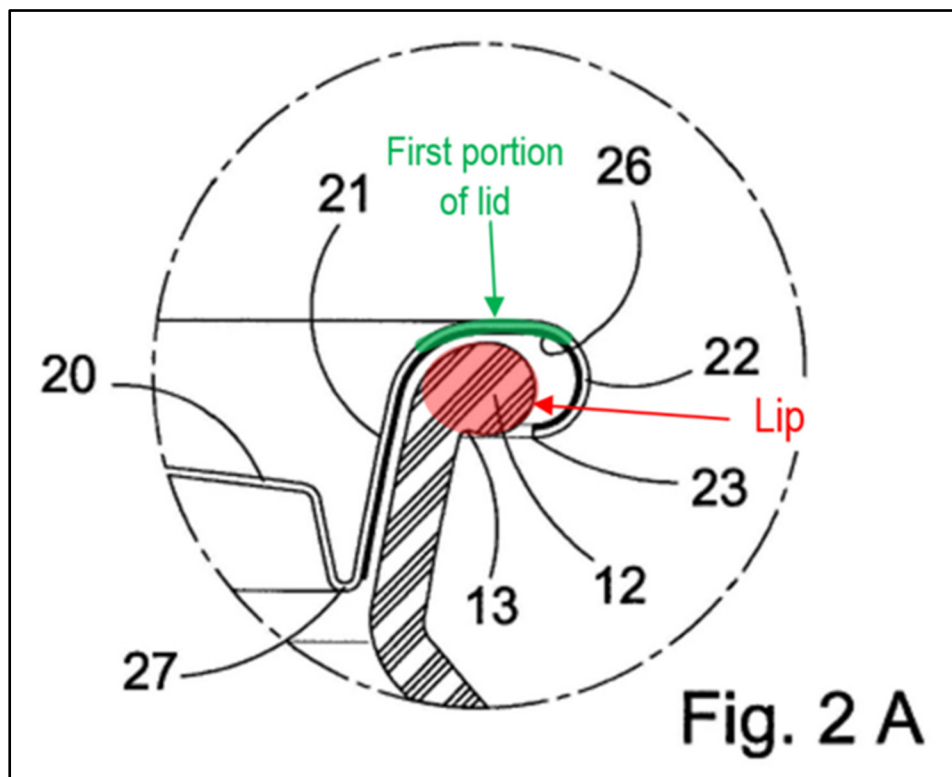
(*Id.*, Fig. 1 (cropped).)

o. Limitation 1[n]: “wherein said circular neck is adjacent to the lip;”

As illustrated by annotated Figure 1 in element 1[m], Ackermann teaches that the **circular neck** is adjacent to the **lip**. (*Id.*, Fig. 1.)

5 **p. Limitation 1[o]: “wherein a first portion of the lid is above the lip of the container body;”**

Ackermann teaches that a first portion of the lid is above the lip of the container body, as depicted in Figure 2A. Ackermann explains that Figure 2A shows an “enlarged detail” of “the container during mounting of the lid.” (*Id.*, ¶¶[0012]-
10 [0013].) As depicted in Figure 2A and annotated below, a **first portion of the lid** is above the **lip** of the container body.



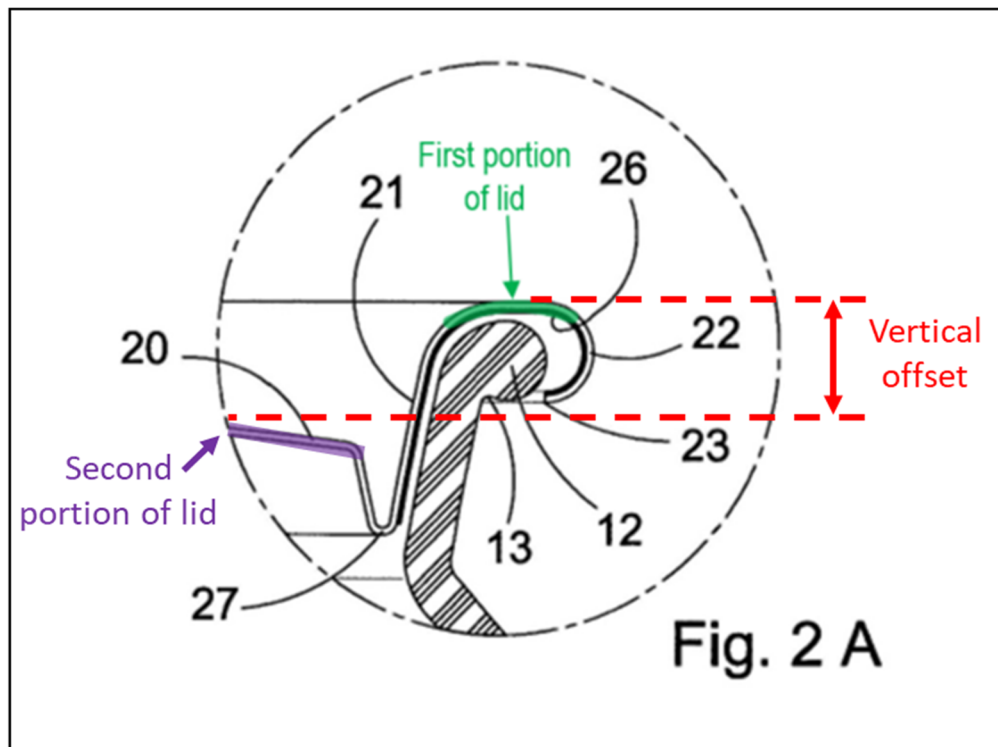
(*Id.*, Fig. 2A.)

- q. **Limitation 1[p]: “wherein a second portion of the lid extends horizontally and is vertically offset from the first portion of the lid;”**

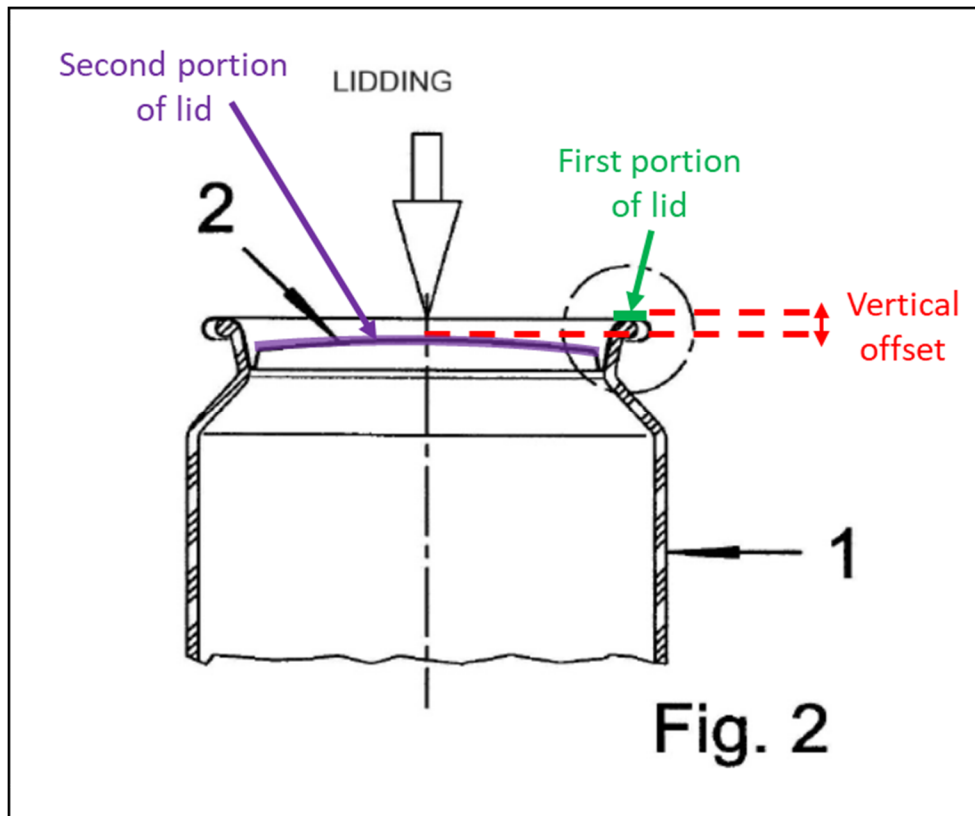
Ackermann teaches that the lid also has a second portion that is vertically

5 offset from the first portion, and that the second portion extends horizontally.

Figures 2 and 2A of Ackermann illustrated this feature. As shown in these figures as annotated below, a central region of the lid (a second portion of the lid) extends horizontally and is vertically offset from the first portion of the lid.



10 (*Id.*, Fig. 2A.)



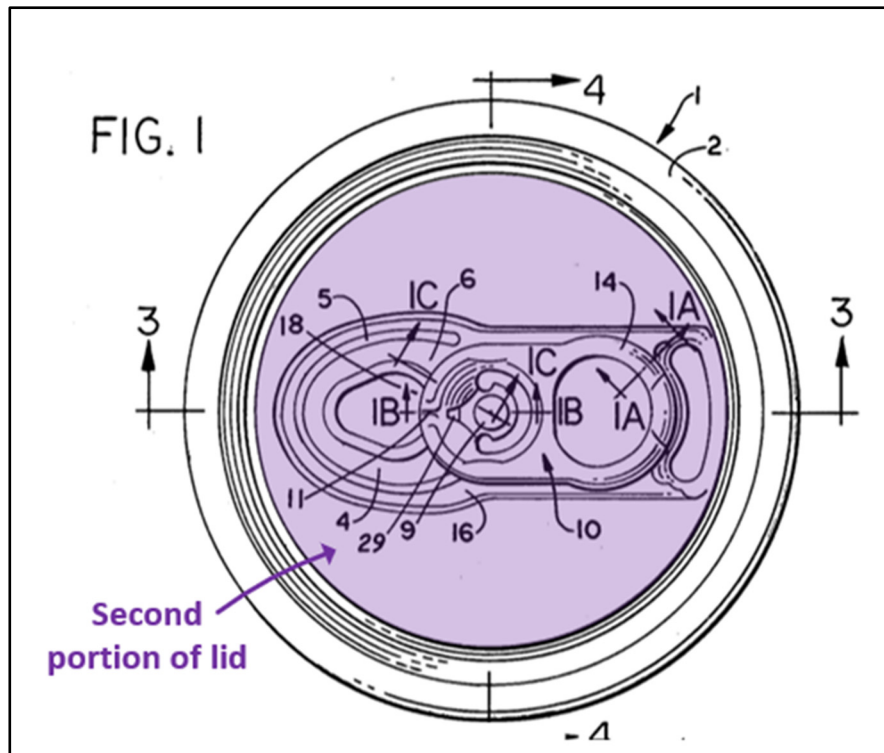
(*Id.*, Fig. 2.)

- 5 r. **Limitation 1[q]: “wherein the second portion of the lid defines a total area across which the second portion of the lid extends horizontally;”**

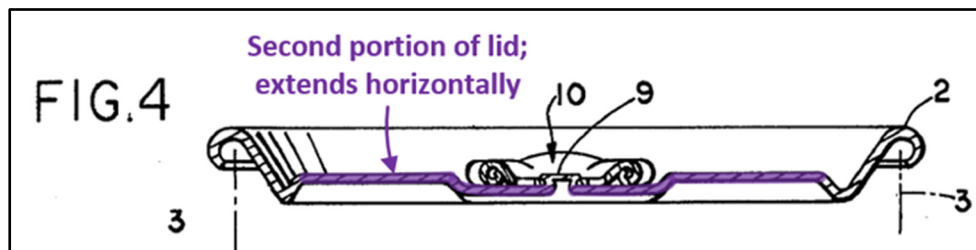
Ackermann teaches that the second portion of the lid extends horizontally and thereby defines a total area across which the second portion extends. While Figure 2 of Ackermann depicts the second portion of the lid from a sideview (*see* “second portion” in Fig. 2 in limitation 1[p] above), the second portion extends to form a

10 circular shape that defines a total area. (Delson, ¶113.)

Similarly, Kaminski teaches a lid that has a **second portion** that extends horizontally, thereby defining a total area.



(Kaminski, Fig. 1.)

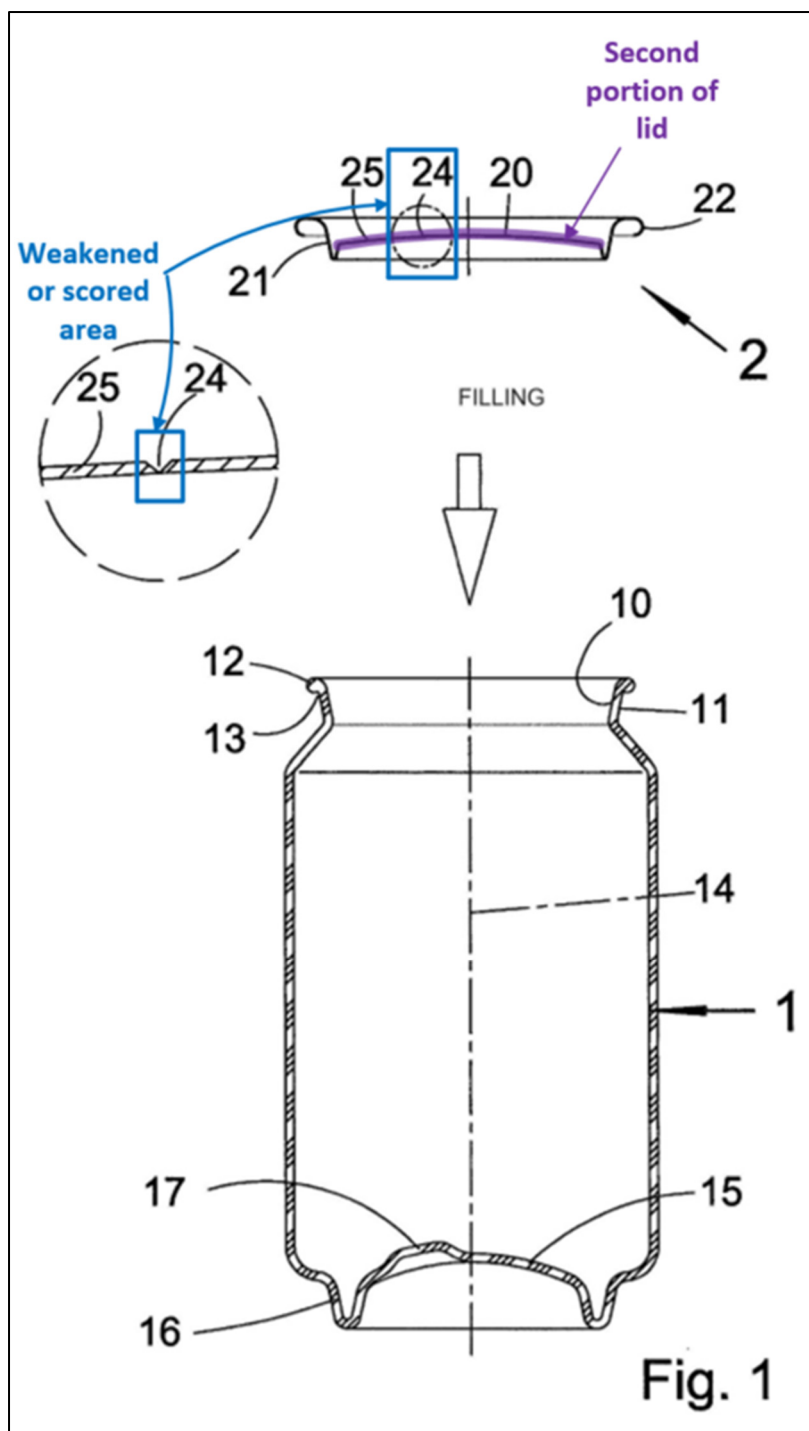


(*Id.*, Fig. 4; *see also* Delson, ¶115.)

s. Limitation 1[r]: “wherein the second portion of the lid comprises a weakened or scored area;”

Ackermann teaches that its lid 2 can include a **weakened or scored area** in the form of a “**weakening notch 24** around a tear-away removal opening 25.”

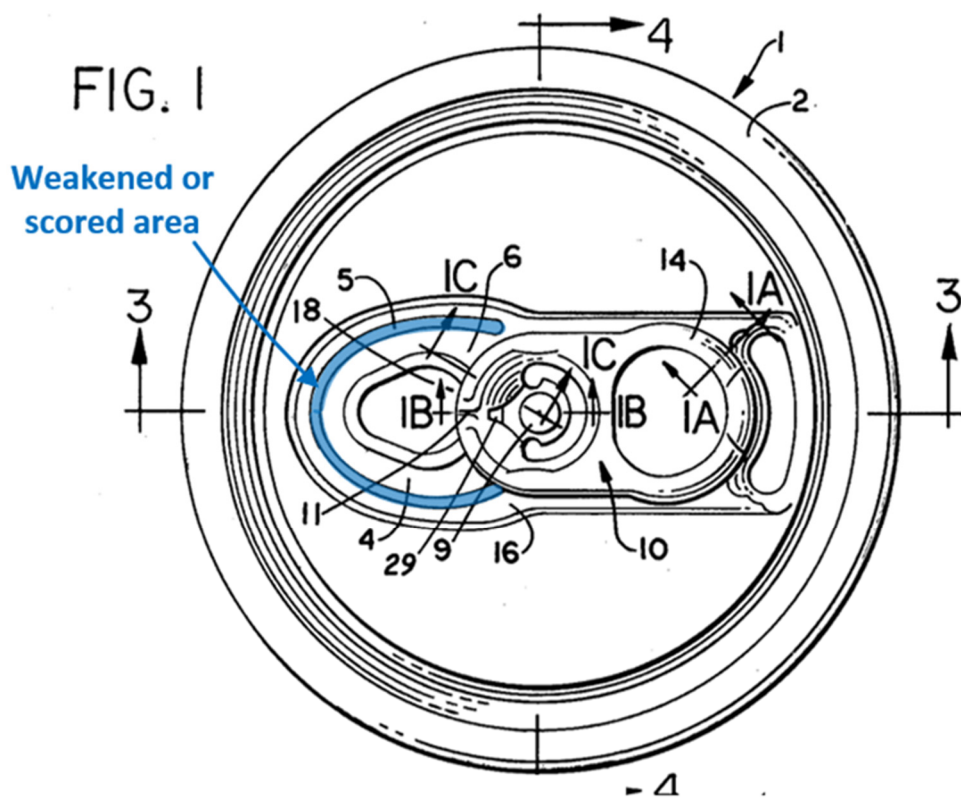
(Ackermann, ¶[0028].)



(*Id.*, Fig. 1.)

Kaminski also teaches a lid with a [weakened or scored area](#). Kaminski's lid is "of generally circular shape including a circumferentially extending raised edge 2

for attaching can end 1 to a suitable cylindrical beverage can 3.” (Kaminski, 2:65-3:4). The second portion of Kaminski’s lid had a **weakened or scored area** in the form of a “score or tear line 5.” (*Id.*, 3:7-10, Fig. 1.) Raising a pull tab 10 on the lid would “initiate[] a tear along the score line 5” (*id.*, 3:49-51), causing “the score line 5...to tear therearound” (*id.*, 3:56-58).



(*Id.*, Fig. 1.)

A POSITA would have found it obvious to modify the lid of Ackermann’s container to include Kaminski’s pop-top design because, by the time of the filing date for the ’904 patent, beverage containers with pop-tops like Kaminski’s design had been in wide-spread public use for decades. (Delson, ¶119.). For example, it

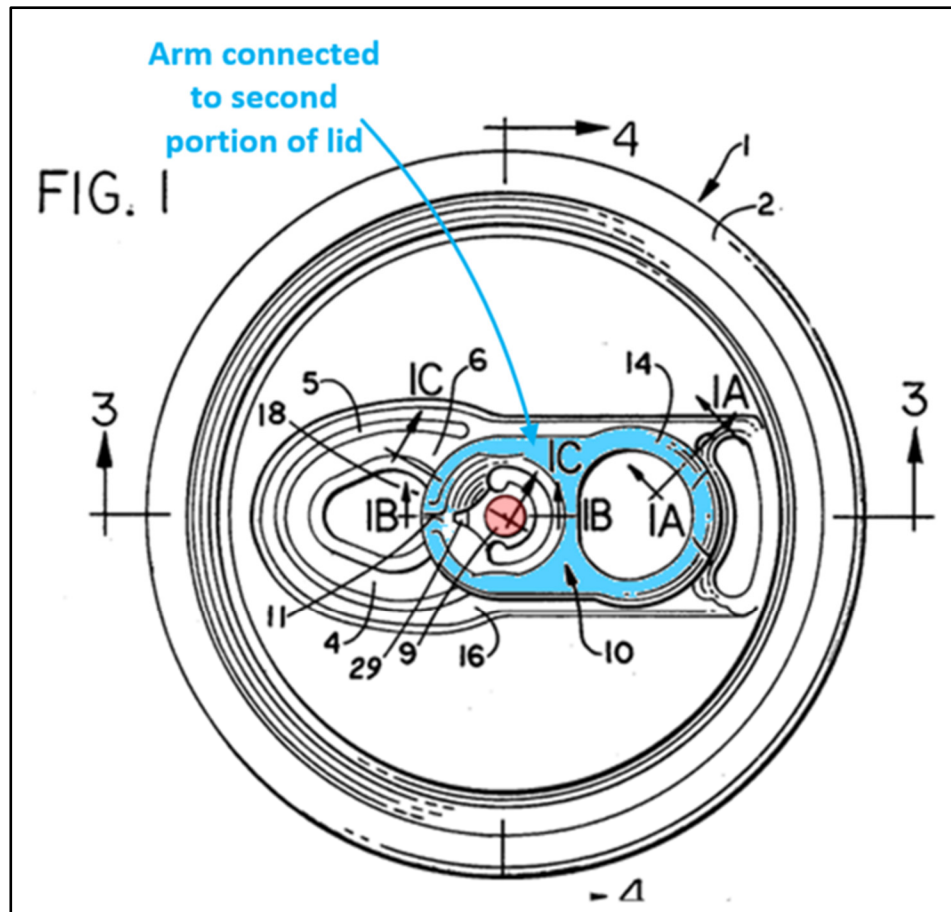
would have been obvious to modify Ackermann's lid to include the score line and pull tab of Kaminski as a mechanism to open the container, because such modifications would have been a simple substitution of one known element for another to obtain predictable results. (*Id.*) A POSITA would have been motivated to replace Ackermann's weakening notch and tear-away removal opening with Kaminski's score line and pull tab because, as explained by Kaminski, keeping the tab attached to the container has ecological and safety benefits (Kaminski, 1:5-8, 1:14-17) and is easy to open (*id.*, 1:27-31). (Delson, ¶119.)

t. Limitation 1[s]: “wherein the weakened or scored area is less than the total area across which the second portion of the lid extends horizontally;”

As shown in Figure 1 of Kaminski, as depicted above in limitation 1[r], the weakened or scored area of the lid is less than the total area across which the second portion of the lid extends horizontally.

u. Limitation 1[t]: “wherein the lid further comprises an arm connected to the second portion of the lid;”

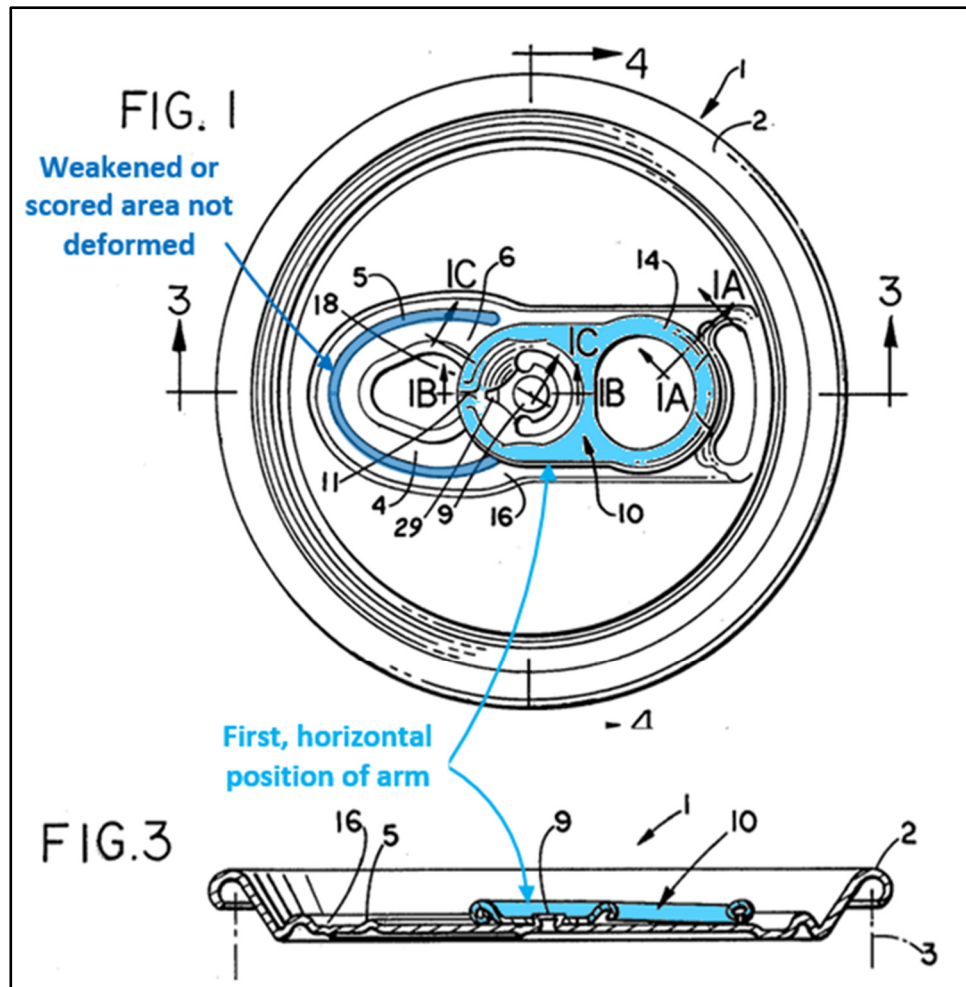
Kaminski teaches that the lid includes an **arm** in the form of “pull tab 10,” which is connected to a second portion of the lid through **rivet 9**. (Kaminski, 3:15-19; 3:49-52).



(*Id.*, Fig. 1.)

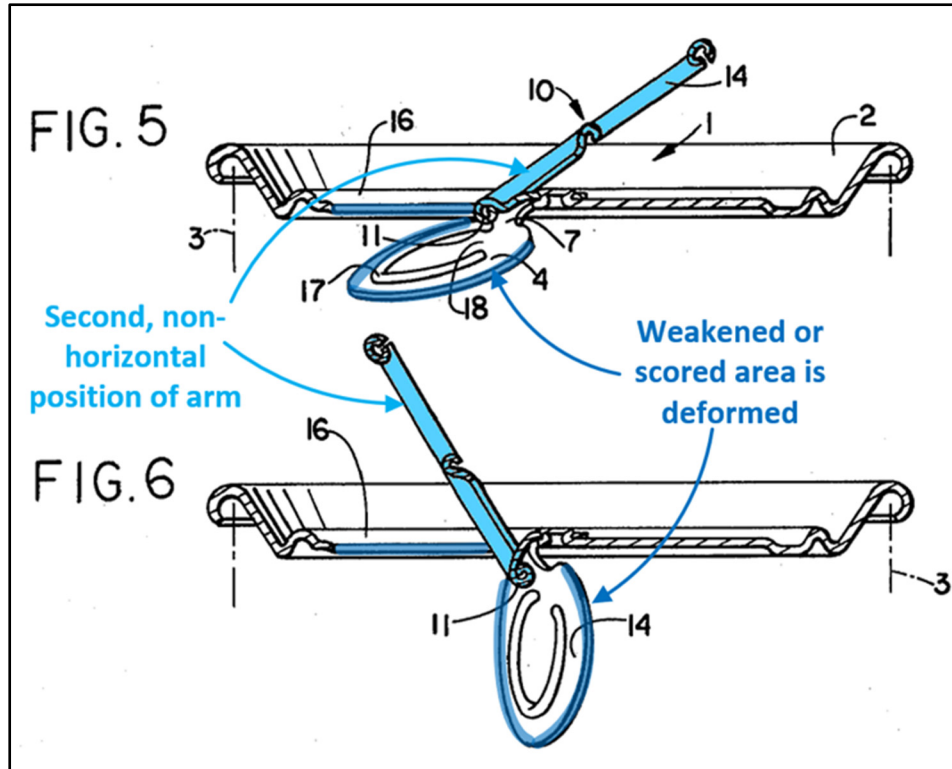
- v. Limitation 1[u]: “wherein the arm is pivotable from a first position, in which the arm extends horizontally and the weakened or scored area is not deformed, to a second position, in which the arm does not extend horizontally and the weakened or scored area is deformed to provide a second opening to the interior of said container body;”**

Kaminski's pull tab is pivotable, as illustrated in Figures 1, 3, and 5-6. Figures 1 and 3 depict a top and side view, respectively, in which the pull tab is in a first position and extends horizontally. In this position, the score or tear line 5 (i.e., weakened or scored area) is not deformed.



(*Id.*, Figs. 1 and 3.)

In Figure 5, Kaminski illustrates how “when the pull tab 10 is raised”—
pivoted to a second position in which it does not extend horizontally—“the nose
5 portion 11 thereof initiates a tear along the score line 5,” deforming the score line
and forming an opening in the lid. (*Id.*, 3:49-51.)

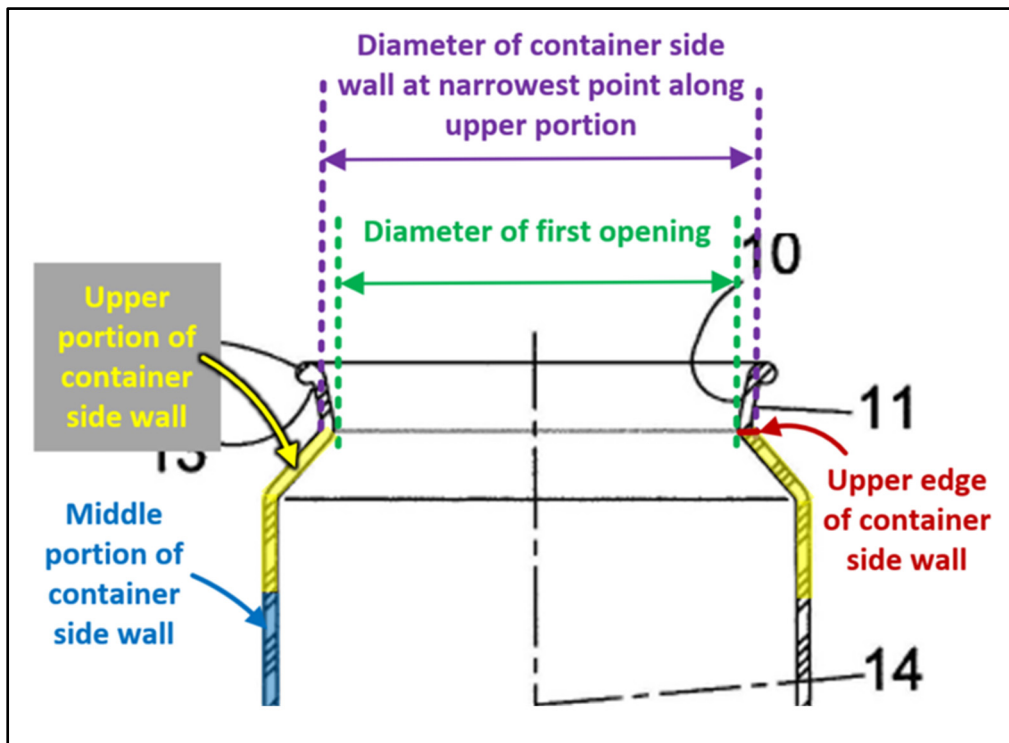


(*Id.*, Figs. 5-6.)

When combined with the container of Ackermann, the opening formed in Kaminski's lid would have been a second opening to the interior of the container body. (Delson, ¶123.)

As discussed above, a POSITA would have found it obvious to modify the lid of Ackermann's teachings to include features of the lid of Kaminski's teachings because Kaminski's lid was well-known and in wide public use for beverage containers, and such a modification would have been a simple substitution of one known element for another to obtain predictable results and would have offered the improvements taught by Kaminski. (See element 1[r]; Delson, ¶125.)

- w. Limitation 1[v]: “wherein an upper portion of the container side wall extends upwardly from the middle portion of the container side wall to the upper edge of the container side wall, said upper portion being greater in diameter along its entirety than the first opening to the interior of said container body;”**



(Ackermann, Fig. 1 (cropped); Delson, ¶¶126-127.)

x. Limitation 1[w]: “wherein the container contains a liquid; and”

Ackermann teaches that the container is a beverage container, and therefore would contain a liquid. (Ackermann, ¶[0005] (“For carbonated beverages...”); *id.*, ¶[0029] (“for **beverage** cans...”); *id.*, ¶[0031] (“The retention capability of the lid may be brought to the desired value (for example, 6.4 bar for **carbonated beverages**).”) Kaminski likewise teaches that its lid is for beverage containers. (Kaminski, 1:5-6 (“The present invention is directed to a pull tab for a metallic beverage-type can . . .”).)

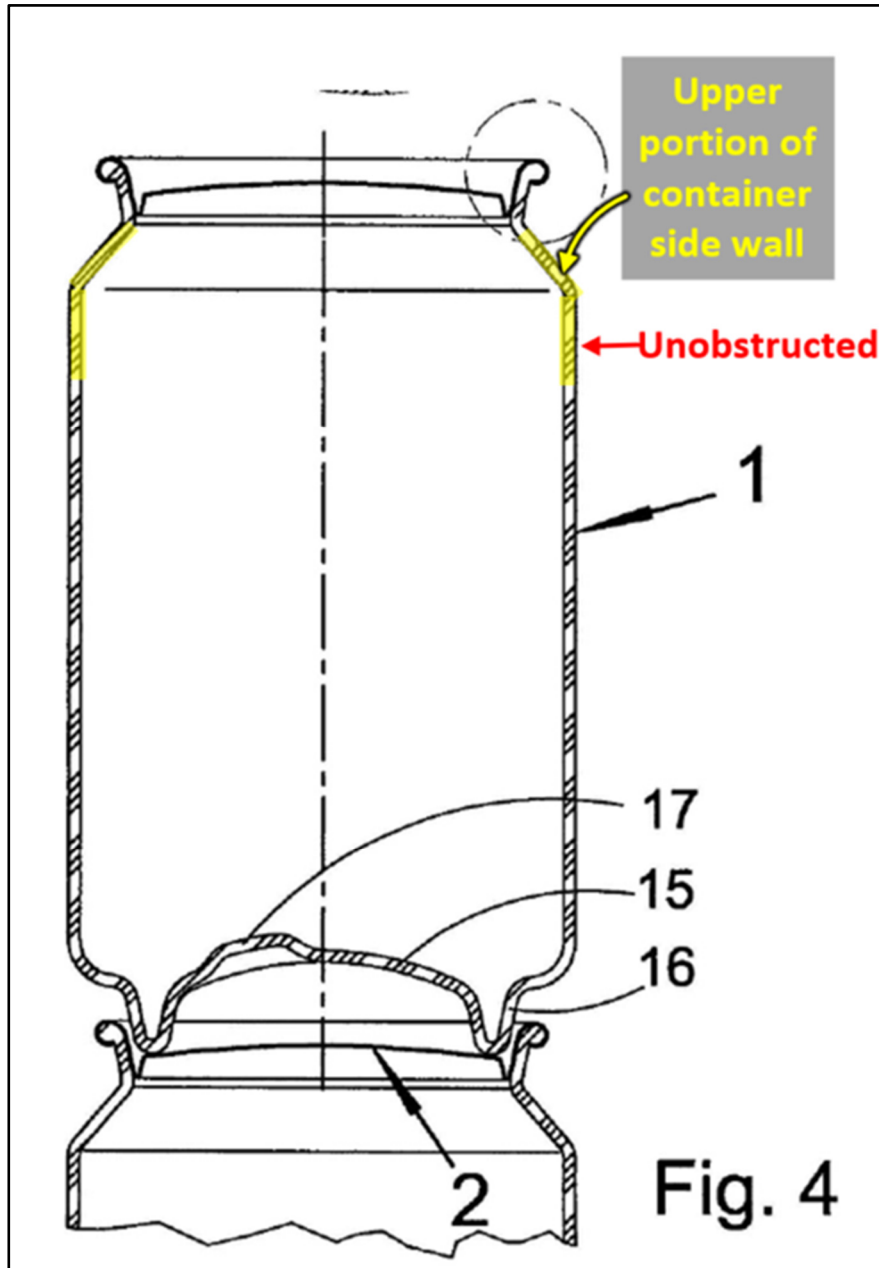
y. Limitation 1[x]: “wherein, when the arm of the lid is in the first position and the weakened or scored area is not deformed:”

Kaminski teaches that when the arm on the lid, i.e., the pull tab, is in the first position, the weakened or scored area is not deformed, as shown above in regard to limitation 1[u]. (*See* Kaminski, Figs. 1, 3.)

z. Limitation 1[y]: “said liquid fills, or nearly fills, the interior of the container body, which interior extends continuously along a height of the entirety of the upper portion of the container wall so as to be interrupted only by the liquid; and”

Ackermann teaches that the container is filled with a liquid (*see, e.g.*, Ackermann, ¶[0006]), which a POSITA would have understood would result in a liquid filling or nearly filling the container when the container is a beverage container (Delson, ¶132). Ackermann further teaches, as shown in Figure 4, that

along the upper portion of the container sidewall, there is nothing between the sidewalls other than the liquid.



(Ackermann, Fig. 4; Delson, ¶133.)

aa. Limitation 1[z]: “an actual volume of the liquid contained in the container is equal to, or less than, 211.5 mL.”

Ackermann does not explicitly describe a volume of its container, which
5 would simply be an obvious design choice. (Delson, ¶135.) It would have been
obvious to a POSITA that the beverage container could be made any preferred size,
including having an actual volume of liquid equal to or less than 211.5 mL. (*Id.*)
There is nothing special about that size that would provide any unexpected results,
such that the size would be non-obvious to a POSITA. (*Id.*, ¶137.) Moreover, a
10 claimed device is obvious over a prior art device where the only difference between
the prior art and the claims is a recitation of relative dimensions of the claimed
device. *Gardner v. TEC Sys., Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984).
Thus, the claimed volume of less than 211.5 mL would be obvious.

**5. Claim 2: “The container of claim 1, wherein the actual
15 volume of the liquid contained in the container is 200 mL.”**

As described with respect to element 1[z], a claimed device is obvious over a
prior art device where the only difference between the prior art and the claims is a
recitation of relative dimensions of the claimed device. Thus, even though
Ackermann does not explicitly state the volume of its container, it would have been
20 obvious for Ackermann’s container to hold an actual volume of 200 mL. (Delson,
¶138.)

6. **Claim 3: “The container of claim 1, wherein the resin is a polyethylene terephthalate (PET) resin.”**

As discussed with respect to limitation 1[c], Ackermann teaches a container made out of a polyethylene terephthalate (PET) resin. (Delson, ¶139.)

5 7. **Claim 4: “The container of claim 1, wherein the container body is formed using a blow molding process.”**

Claim 4 of the '904 patent is a product-by-process claim, and therefore invalid if “a product made by the process recited . . . is anticipated by or obvious from prior art products, even if those prior art products are made by different processes.”

10 *Amgen Inc. v. F. Hoffmann-La Roche Ltd.*, 580 F.3d 1340, 1370 n 14 (Fed. Cir. 2009). As demonstrated above, the container recited in claim 1 is obvious over the Ackermann-Kaminski combination. The '904 patent's specification does not attach significance to the blow molding process for forming the container body, but states that any one of several known alternatives may be used. ('904 patent, 2:49-52, 3:15-
15 18). Because claim 4 only recites a process by which claim 1's container body is formed, claim 4 is also obvious (Delson, ¶141.)

Even if claim 4 were given patentable weight, blow molding is Applicant Admitted Prior Art (“AAPA”). The '904 patent's explicitly states that its “container may be formed by *known molding processes*, such as *biaxial orientation blow*
20 *molding* process or *direct blow molding* process or *injection blow molding*.” (*Id.*, 2:49-52.)

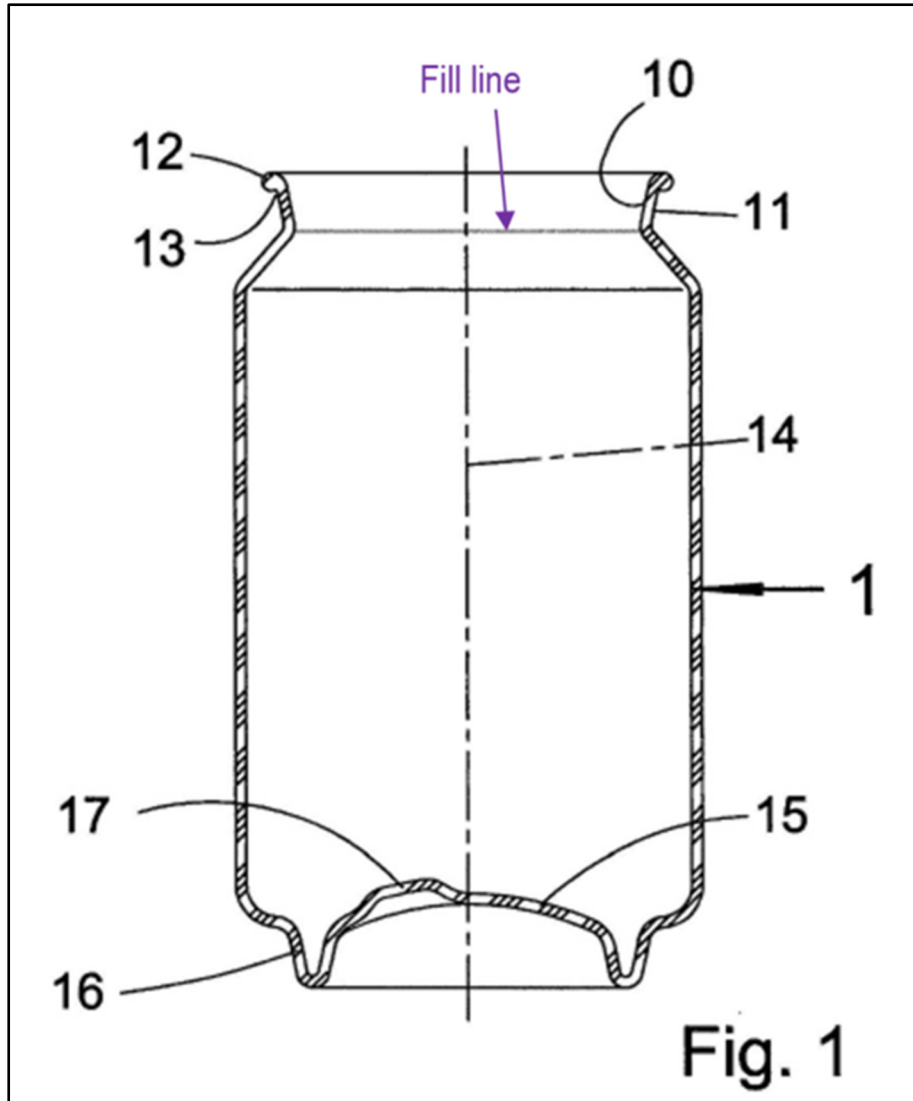
8. Claim 5: “The container of claim 1, wherein the metal is aluminum.”

Ackermann teaches that the container lid can be made out of aluminum. (Ackermann, ¶[0027].) Similarly, Kaminski teaches that the container lid can be made out of aluminum. (Kaminski, 3:1-3 (“In general, can end 1 will be manufactured of a relatively ductile metal, such as aluminum . . .”).)

9. Claim 6: “The container of claim 1, wherein the container has a fill line so that, when the container is filled with the liquid up to the fill line, the actual volume of the liquid contained in the container is 200 mL.”

Claim 6 would have been obvious in view of Ackermann and Kaminski for several reasons.

First, although Ackermann did not explicitly describe a fill line or the volume of the liquid that can be contained in the container, its Figure 1 depicts a line near the top of the container that suggests a **fill line**, as annotated below:



(Ackermann, Fig. 1 (cropped).) As discussed in regard to limitation 1[z] and claim 2, a container that holds a liquid volume of 200 mL would have been obvious to a POSITA. And if the container was to hold 200 mL of liquid, it would have been
5 obvious to a POSITA to have a fill line of 200 mL. (Delson, ¶144.) Having a fill line for the intended volume can help provide consistency in manufacturing and would have helped ensure that the actual volume of the liquid in the container is 200 milliliters. (*Id.*)

C. Ground 3: Claims 1-6 are obvious under 35 U.S.C. § 103 over Ackermann, Kaminski, and Hutchinson

1. Summary of Hutchinson

Hutchinson is directed to a plastic container “for storing beverages and other
5 foodstuffs.” (Hutchinson, Abstract). Like the ’904 patent’s AAPA (’904 patent,
2:49-52), Hutchinson teaches that the plastic container can be manufactured through
a variety of methods, including “blow molding, extrusion blow molding (EBM),
stretch blow molding (SBM), injection stretch blow molding (ISBM), and/or
combinations thereof.” (*Id.*, ¶[0006].) Hutchinson further discloses that the plastic
10 containers can be made to hold a variety of different volumes, including a volume
of approximately 200 milliliters. (*Id.*, ¶[0241]).

2. The Combination of Ackermann, Kaminski, and Hutchinson:

As discussed above, the teachings of Ackermann’s container and Kaminski’s
15 lid can be combined, and POSITA would have been motivated to make that
combination for the reasons stated. A POSITA would also have been motivated to
combine the teachings of Hutchinson regarding the size of the container with the
teachings of Ackermann and Kaminski. Though Ackermann did not identify
possible volumes of its container, a POSITA would have found it obvious to look to
20 other references for beverage containers, such as Hutchinson, which explained
suitable sizes for containers for storing beverages. (*Id.*, Abstract, ¶[0241]; Delson,
¶146.) This Ackermann-Kaminski-Hutchinson combination, as described below,

would have been a simple combination of known elements by known methods, yielding predictable results, and therefore would have been obvious to a POSITA. (Delson, ¶146.)

3. The Ackermann-Kaminski-Hutchinson combination renders claims 1-6 of the '904 patent obvious

As demonstrated below, the combination of Ackermann, Kaminski, and Hutchinson renders claims 1-6 of the '904 patent obvious.

a. Limitation 1[Preamble] through Limitation 1[y]

For the reasons stated above, limitations 1[Preamble] through 1[y] would have been obvious to a POSITA in view of the combination of Ackermann and Kaminski, and those limitations would be obvious for the same reasons in view of Ackermann, Kaminski, and Hutchinson.

b. Limitation 1[z]: “an actual volume of the liquid contained in the container is equal to, or less than, 211.5 mL.”

In addition to the reasons described above for this limitation in regard to the combination of Ackermann and Kaminski, this limitation would have been obvious in view of Ackermann, Kaminski, and Hutchinson. While Ackermann does not disclose the size of its container, it also does not place any restrictions on the size, so a POSITA would recognize that, for example, the container could be made to any size practically needed for a beverage container. (Delson, ¶149.) Hutchinson discloses a plastic beverage container that holds approximately 200 mL.

(Hutchinson, ¶[0241].) It therefore would have been obvious to a POSITA that Ackermann's beverage container could be made to contain 200 mL, which is less than 211.5 mL. (Delson, ¶149.)

Claim 1 would therefore have been obvious to a POSITA in view of
5 Ackermann, Kaminski, and Hutchinson. (*Id.*, ¶150.)

c. Claim 2: “The container of claim 1, wherein the actual volume of the liquid contained in the container is 200 mL.”

In addition to the reasons described above in regard to the combination of
10 Ackermann and Kaminski, this limitation and claim also would have been obvious to a POSITA in view of the combination of Ackermann, Kaminski, and Hutchinson for the reasons set forth in Limitation 1[z].

d. Claim 3: “The container of claim 1, wherein the resin is a polyethylene terephthalate (PET) resin.”

15 As discussed in regard to the combination of Ackermann and Kaminski, this limitation and claim also would have been obvious to a POSITA in view of Ackermann, Kaminski, and Hutchinson because Ackermann and Hutchinson both teach that the container can be made of a PET resin. (Ackermann, ¶[0022]; Hutchinson, ¶[0014]; Delson, ¶152.)

e. **Claim 4: “The container of claim 1, wherein the container body is formed using a blow molding process.”**

As explained above, Claim 4 of the '904 patent is a product-by-process claim,
5 and therefore invalid if “a product made by the process recited . . . is anticipated by
or obvious from prior art products, even if those prior art products are made by
different processes.” *Amgen Inc.*, 580 F.3d at 1370 n 14. As demonstrated above,
the container recited in claim 1 is obvious over the Ackermann-Kaminski-
Hutchinson combination. The '904 patent's specification does not attach
10 significance to the blow molding process for forming the container body, but states
that any one of several known alternatives may be used. ('904 patent, 2:49-52, 3:15-
18). Because claim 4 only recites a process by which claim 1's container body is
formed, claim 4 is also obvious.

Even if claim 4 were given patentable weight, blow molding is Applicant
15 Admitted Prior Art (“AAPA”). The '904 patent's explicitly states that its “container
may be formed by *known molding processes*, such as *biaxial orientation blow
molding* process or *direct blow molding* process or *injection blow molding*.” (*Id.*,
2:49-52.) Additionally, Hutchinson teaches that the container can be made through
a blow molding process. (*See, e.g.*, Hutchinson, ¶¶[0023], [0101].)

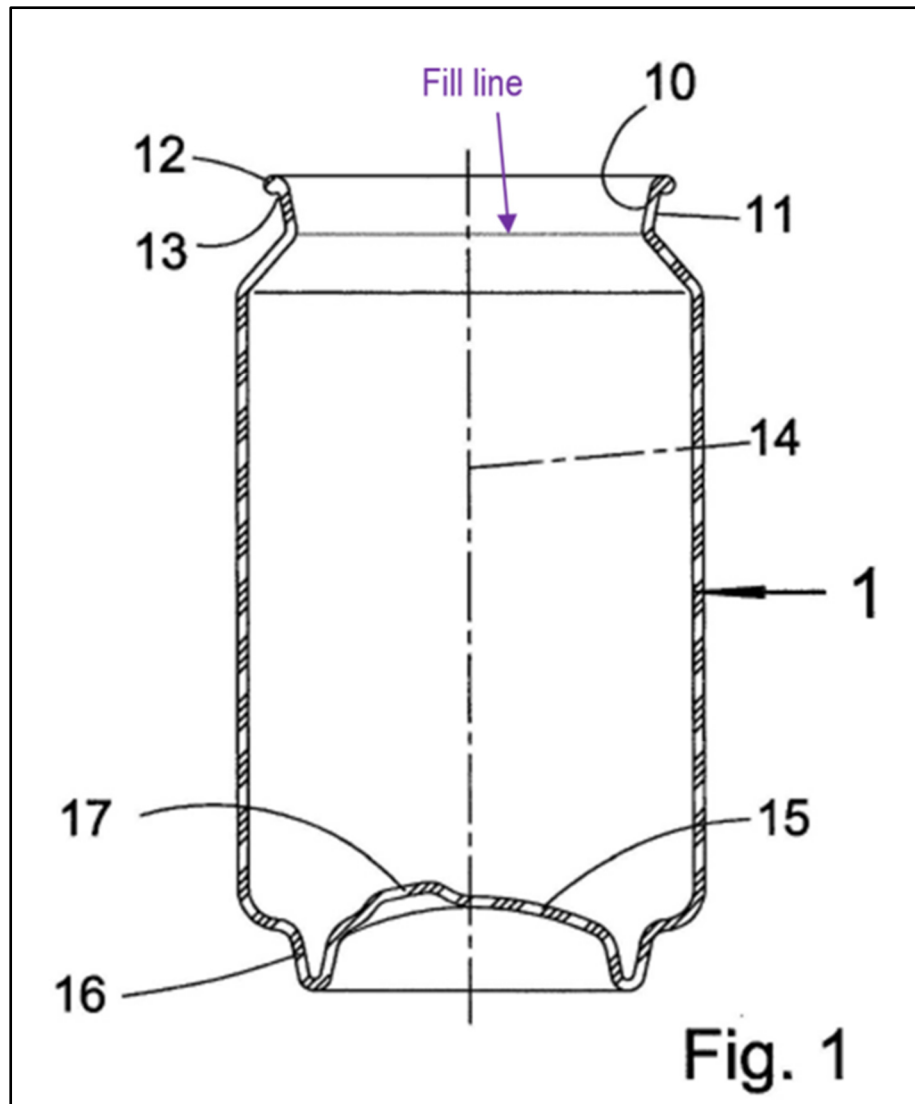
f. Claim 5: “The container of claim 1, wherein the metal is aluminum.”

As discussed above, Ackermann teaches that the container lid can be made out of aluminum. (Ackermann, ¶[0027].) Similarly, Kaminski teaches that the container lid can be made out of aluminum. (Kaminski, 3:1-3 (“In general, can end 1 will be manufactured of a relatively ductile metal, such as aluminum . . .”).)

g. Claim 6: “The container of claim 1, wherein the container has a fill line so that, when the container is filled with the liquid up to the fill line, the actual volume of the liquid contained in the container is 200 mL.”

Claim 6 would have been obvious in view of Ackermann, Kaminski, and Hutchinson for several reasons.

First, although Ackermann did not explicitly describe a fill line or the volume of the liquid that can be contained in the container, its Figure 1 depicts a line near the top of the container that suggests a **fill line**, as annotated below:



(Ackermann, Fig. 1 (cropped).) As discussed in regard to limitation 1[z] and claim 2, a container that holds a liquid volume of 200 mL in view of the Ackermann-Kaminski-Hutchinson combination would have been obvious to a POSITA. And if
5 the container was to hold 200 mL of liquid, it would have been obvious to a POSITA to have a fill line of 200 mL. (Delson, ¶157.) Having a fill line for the intended volume can help provide consistency in manufacturing and would have helped ensure that the actual volume of the liquid in the container is 200 milliliters. (*Id.*)

VIII. FOR THE FOREGOING REASONS, CLAIMS 1-6 WOULD HAVE BEEN OBVIOUS TO A POSITA IN VIEW OF THE ACKERMANN, KAMINSKI, HUTCHINSON COMBINATION. THE BOARD SHOULD NOT DECLINE REVIEW UNDER § 325(D) OR § 314(A)

A. § 325(d)

The Board should not exercise its discretion under 35 U.S.C. § 325(d) under the two-step framework established in *Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH*, No. IPR2019-01469, Paper 6 at 8 (PTAB Feb. 13, 2020) (precedential). All prior art in this Petition are entirely new references that were not cited or considered during the original examination. Further, this Petition is neither cumulative, nor provides overlapping arguments with those in the original examination. Notably, the references in this Petition describe different features from those in WO 2006/029441 A1 to Wing *et al.*, and U.S. Design Patent Des. 244,739 to Durand used during the prosecution. (See Section IV.A, *supra*). In particular, Kick in Ground 1 and the Ackermann-Kaminski combination in Ground 2 describe containers having all of the claimed limitations.

Additionally, this Petition is accompanied by the expert testimony of Dr. Delson, which the Office lacked during the original prosecution.

B. § 314(a)

The '904 patent is involved in a declaratory judgment action for non-infringement, described in Section II.B, *supra*. That matter is currently stayed, and invalidity has not been asserted in that litigation. See Minute Entry, *MPL Brands*

NV, Inc. v. BuzzBallz, LLC, No. 3:24-cv-01282-JD, (N.D. Cal.), ECF No. 40.

Therefore, the Board should not deny this Petition under its discretionary authority under 35 U.S.C. § 314(a).

IX. CONCLUSION

5 Petitioner respectfully request institution of *inter partes* review and cancellation of the challenged claims.

Dated: July 17, 2024

Respectfully submitted,

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Andrew Kalamarides, *pro hac vice* to be
submitted

Attorneys for Petitioner
MPL Brands NV, Inc.

CERTIFICATION OF WORD COUNT UNDER 37 C.F.R. § 42.24(d)

Pursuant to 37 C.F.R. § 42.24(d), the undersigned hereby certifies that the word count for the foregoing *Petition for Inter Partes Review* of U.S. Patent No. 11,738,904 totals 10,951, excluding the parts exempted by 37 C.F.R. § 42.24(a). Accordingly, this Petition is under the word count limit of 18,700 words.

This word count was calculated by using the built-in word-count tool in Microsoft Word 2016, the software used to prepare the document.

Dated: July 17, 2024

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Andrew Kalamarides, *pro hac vice* to be
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **PETITION FOR *INTER PARTES* REVIEW OF U.S. PATENT NO. 11,738,904** and supporting materials (Exhibits 1001 – 1011 and Power of Attorney) have been served this 17th day of July, 2024, by FedEx® mail delivery service on Patent Owner at the correspondence address for the attorney of record for the '904 patent shown in USPTO Patent Center:

Haynes and Boone, LLP
IP Section
2801 N. Harwood St., Suite 2300
Dallas, TX 75201

A courtesy electronic service copy is also being sent to the following counsel in the related litigation:

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Dated: July 17, 2024

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