

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MPL BRANDS NV, INC.
Petitioner

v.

BUZZBALLZ, LLC,
Patent Owner

IPR2024-01098

U.S. Patent 11,738,904

PATENT OWNER'S PRELIMINARY RESPONSE

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I. INTRODUCTION

Patent Owner, BuzzBallz, LLC, submits this Preliminary Response under 35 U.S.C. § 313 and 37 C.F.R. § 42.107 in response to the Petition for *Inter Partes* Review (“Petition”) challenging claims 1–6 of U.S. Patent No. 11,738,904 (“the ’904 Patent”) (EX1001).

First, the Petition incorrectly asserts that the challenged claims are anticipated by the ’904 Patent’s own priority application, U.S. Patent Application No. 12/762,934 (“the ’934 Application”). Pet., 16–41. According to Petitioner, “new matter” was added when Patent Owner submitted replacement figures showing the same container as the original drawings but cleaning up informal aspects of the original drawings and including annotations indicating the maximum volume (211.5 mL) and the volume associated with a fill line (200 mL) of the container. Pet., 7–11. Based on this, Petitioner alleges the ’904 Patent should be stripped of its claimed priority date and the ’934 Application transformed from a priority application into *prior art* against the ’904 Patent. Pet., 7–11.

Petitioner’s argument is incorrect. The claims of the ’904 Patent are fully supported by the ’934 Application as originally filed. A POSITA would have understood from at least the originally filed figures and detailed description of the ’934 Application that the inventor was in possession of the volume measurements at issue. Both the original drawings and the replacement figures of the ’934 Application

illustrate the same container having the same volumes claimed by the '904 Patent.

The as-filed '934 Application conveyed to a POSITA that the disclosed container had a maximum internal volume of 211.5 mL, such that the actual volume of liquid contained in the container is necessarily equal to or less than 211.5 mL. The '934 Application also shows that the originally disclosed container included a fill line associated with filling the container with 200 mL of fluid.

Because the claims of the '904 Patent are fully supported by the as-filed '934 Application, there is no break in priority and the '934 Application cannot be used as prior art against the '904 Patent. Accordingly, ground 1 is deficient.

Second, recognizing the Board would likely determine the '904 Patent retained its priority, Petitioner provided alternative grounds 2 and 3 attempting to show that the claimed container was rendered obvious by other prior art predating the April 19, 2010 priority date. Pet., 41–85. However, these alternative grounds also fail for multiple reasons.

Both grounds 2 and 3 are based on a combination of Ackermann and Kaminski that requires replacing the lid of Ackermann's *reusable container* with Kaminski's *single-use pop-top lid*. However, Ackermann explicitly teaches away from such a combination. For example, Ackermann discourages using single-use pop-top lids, like Kaminski's, because such lids prevent a reusable container from being used multiple times. EX1008, [0001]–[0003] (contrasting its inventive reusable

container with the use of “a standard lid made of aluminum that is joined to the rim of the container opening by seaming” forms “a container” that “is *usable only once*.”) (emphasis added). Petitioner does not acknowledge, let alone address, the fact that incorporating Kaminski’s lid design with Ackermann’s container would render Ackermann’s container unsatisfactory for its intended purposes, including ensuring the container is *reusable* and can be *cleaned and used multiple times*. See Pet., 43–45.

Beyond this fundamental problem with Petitioner’s proposed combination—that taints both grounds 2 and 3—ground 2 additionally fails because it does not identify *any prior art disclosure* teaching the recited volume limitations. Pet., 77. Similarly, Petitioner’s ground 3 fails because the Petition does not identify *any reason* to combine an additional reference, Hutchinson, with Ackermann and Kaminski to meet the volume limitations. Pet., 81–82.

Because the Petition fails to show how each claim element is anticipated or rendered obvious by the prior art and fails to provide sufficient reasoning for why a POSITA would be motivated to make Petitioner’s proposed combinations, Petitioner has failed to meet its burden of showing a likelihood to prevail with respect to any challenged claim. Therefore, Patent Owner respectfully requests the Board deny institution.

II. THE '904 PATENT

A. Overview

The '904 Patent claims a novel and non-obvious container. EX1001, Abstract, Claims 1–6. The claims of the '904 Patent require a “container body” that “is made out of a resin” and a “lid” that “is made out of metal.” EX1001, 4:13–14. Figure 1, reproduced below, illustrates an exemplary container. EX1001, 2:26–27.

Container Shape

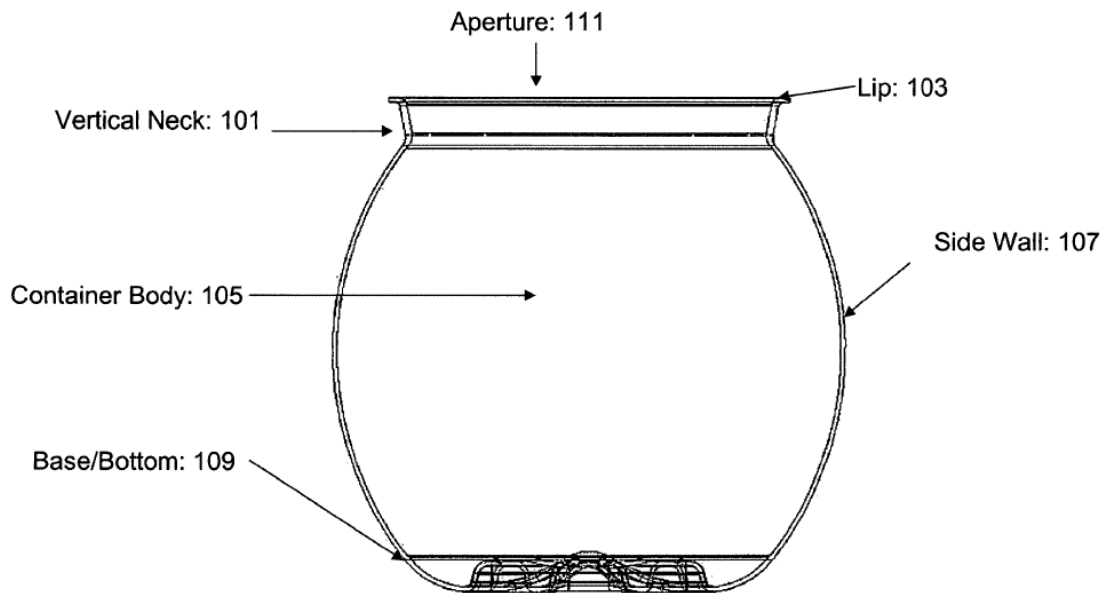


Figure 1

EX1001, Fig. 1

The claims of the '904 Patent require the container to have a particular combination of structural arrangements and features. For example, the claims recite “a cross-sectional diameter of the first opening to the interior...is less than a cross-sectional diameter of a middle portion.” EX1001, 4:21–24. The bottom portion of

the container also has “a diameter that is less than the cross-sectional diameter of the middle portion.” EX1001, 4:25–27. The container body “extends downwardly from the middle portion...to the horizontally-extending portion...rendering the container body stemless.” EX1001, 4:28–34.

The claimed container body includes “a lip” at the end of a “circular neck.” EX1001, 4:44–47. The lip and circular neck are configured such that the metal lid may be placed over the lip, securing the lid to the container, as shown in Figure 5 below.

Side View - Lid & Lip of Container
(Note: The lip and lid are enlarged to show hook)

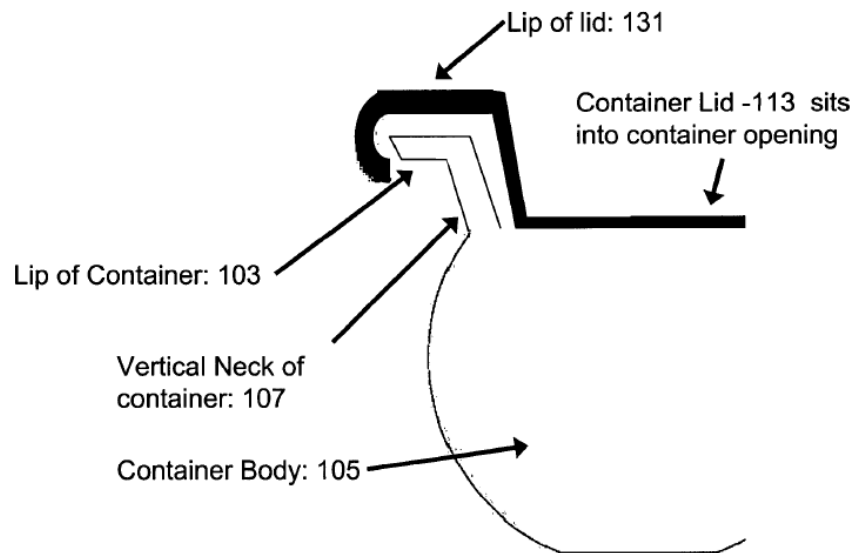


Figure 5

EX1001, Fig. 5

The claims of the '904 Patent further require that “an actual volume of the

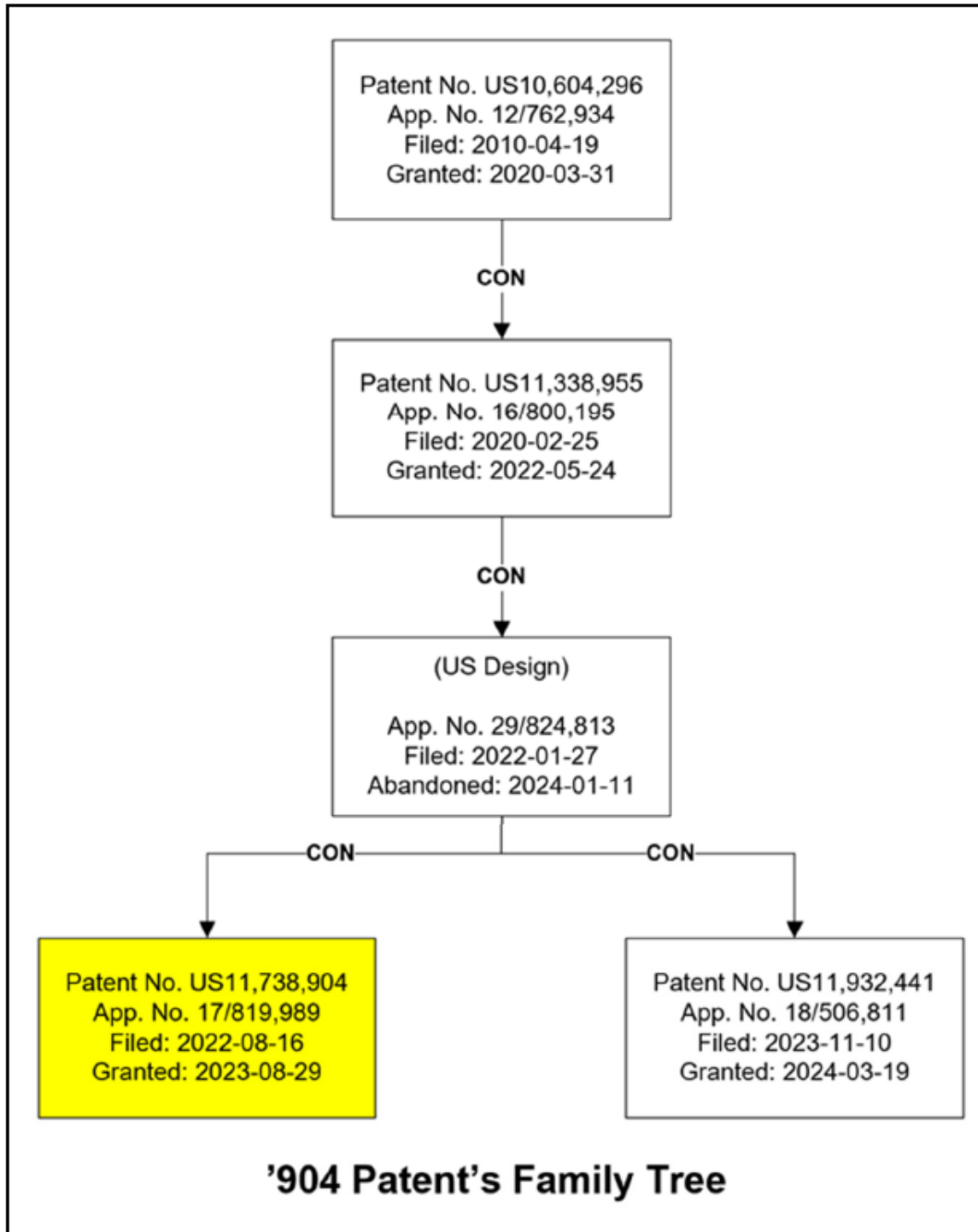
liquid contained in the container is equal to, or less than, 211.5 mL.” EX1001, 5:15–

16. Claim 6 recites that “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.” EX1001, 5:25–28.

B. Priority of the '904 Patent

All the claims of the '904 Patent are entitled to a priority date of April 19, 2010. The '904 Patent is a continuation of U.S. Design Patent Application No. 29/824,813 ('813 Application) filed on January 27, 2022, which is a continuation of U.S. Patent No. 11,338,955 ('955 Patent) filed on February 25, 2020, which is a continuation of U.S. Patent No. 10,604,296 ('296 Patent) filed on April 19, 2010. EX1001, Cover Page. All the claims of the '904 Patent are fully supported by the original disclosure of the '296 Patent (the '934 Application) and continuity was maintained through the '955 Patent and the '813 Application.

This continuity data is illustrated on page 7 of the Petition, in a figure reproduced below.



Pet., 4.

Despite the chain of priority back to the filing of the '934 Application on April 19, 2010, the Petition asserts that the '904 Patent is not entitled to its claimed priority date. *See* Pet., 7–11. As will be discussed in greater detail below, this assertion is

incorrect. All the claims of the '904 Patent are fully supported by the as-filed '934 Application and entitled to the April 19, 2010 priority date. *See infra* § V.A.1.

III. PERSON OF ORDINARY SKILL IN THE ART

For purposes of this Preliminary Response only, Patent Owner applies Petitioner's proposed level of ordinary skill in the art: "a person having...(i) an associate or bachelor's degree in 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." Pet., 15.

IV. CLAIM CONSTRUCTION

For purposes of this Preliminary Response only, Patent Owner agrees that claim construction is unnecessary as no claim terms require construction for the Board to resolve the present controversy at this preliminary stage. *Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999) (only terms in controversy need to be expressly construed, and only to the extent necessary to resolve controversy); *Shenzhen Liown Elects. Co. v. Disney Enters., Inc.*, IPR2015-01656, Papers 7, 10 (Feb. 8, 2016). To the extent necessary, Patent Owner reserves the right to address claim construction at a later stage in this proceeding or in other proceedings.

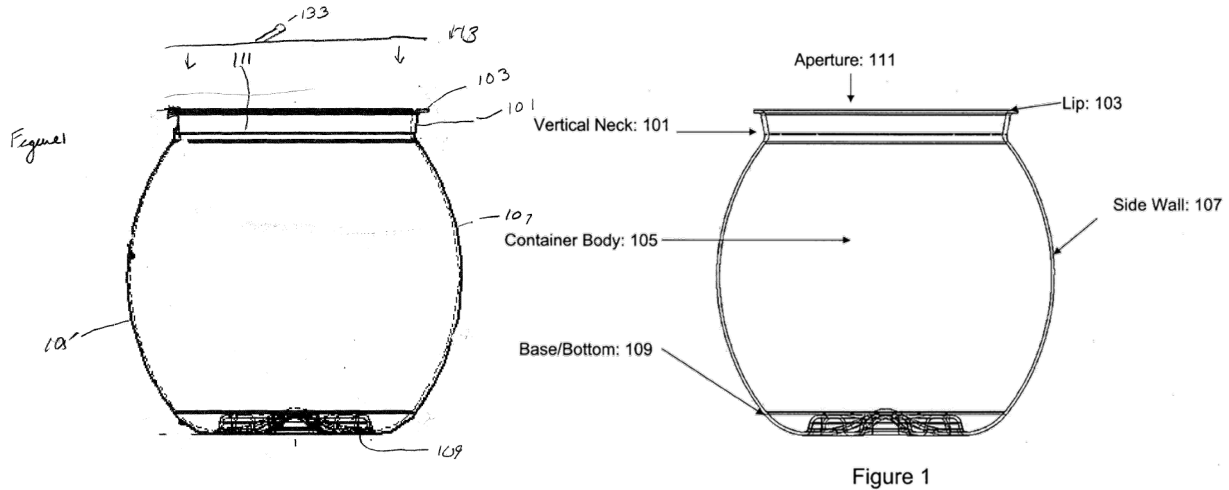
V. PETITIONER HAS NOT SHOWN A REASONABLE LIKELIHOOD OF PREVAILING WITH RESPECT TO ANY OF THE CHALLENGED CLAIMS

A. Ground 1 is deficient.

1. The '904 Patent is entitled to its claimed priority date of April 19, 2010.

For ground 1, Petitioner tries to deprive the '904 Patent of its priority date and then use the '934 Application—which the '904 Patent claims priority to—as prior art. *See* Pet., 16–41. To justify this approach, Petitioner identifies two volume annotations included in the side view of the container shown in replacement Figure 7 as allegedly introducing new matter: a maximum volume value of 211.5 mL and a fill line volume of 200 mL. Pet., 9. However, as established below, a POSITA would have understood that the inventor was in possession of these values as of the claimed April 19, 2010 priority date.

The originally-filed Figure 1 submitted with the '934 Application on April 19, 2010 is shown below beside replacement Figure 1 filed on June 1, 2010. EX1004, 31.



**EX1004, 15 ('934 Application,
Fig. 1, filed April 19, 2010)**

**EX1004, 48 ('934 Application,
Fig. 1, filed June 1, 2010)**

As shown, the replacement Figure 1 on the right shows the same container but cleans up some of the informal aspects of the original drawing and associated labels. For example, the replacement drawing replaces the hand drawn reference numerals with typed ones and removes the hand drawn sketch of the lid from above the container.

Replacement Figure 7, shown below, is another side view of the same container but with annotations indicating associated volume measurements and material thicknesses.

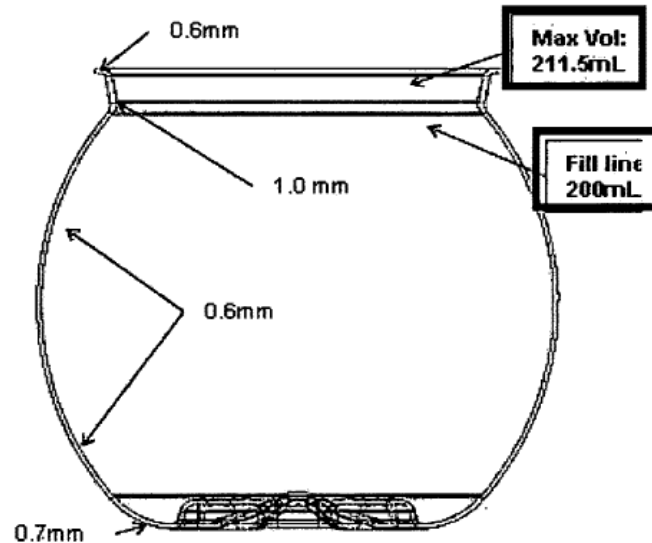


Figure 7

EX1004, 54 ('934 Application, Fig. 7, filed June 1, 2010)

According to Petitioner, the inclusion of the volume measurements in Figure 7 is sufficient to cause a “break in priority chain” such that the '904 Patent cannot claim its original priority date of April 19, 2010 and, therefore, is only entitled to a priority date of “no earlier than February 25, 2020.” Pet., 9, 11. Notably, the updated drawings were filed in response to a request by the Patent Office, and the Patent Office never objected to them as adding new matter or otherwise creating any break in the claimed priority date. *See* EX1004, 31–32, 58–69. In addition, Petitioner’s argument fails because the original disclosure of '934 Application provides direct and clear support for the volume limitations claimed by the '904 Patent.

The standard for written description support depends on *the perspective of a POSITA*. “[T]he test for sufficiency is whether the disclosure of the application

relied upon reasonably conveys *to those skilled in the art* that *the inventor had possession of the claimed subject matter* as of the filing date.” *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (emphasis added).

In addition, the Federal Circuit and PTAB have both consistently held that illustrations of features in drawings can provide support for claimed measurements or proportions. The Federal Circuit has held that “drawings alone may be sufficient to provide the ‘written description of the invention’ required by § 112, first paragraph.” *Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1564 (Fed. Cir. 1991). “As long as a person of skill in the art could derive...claimed dimensions from the patent’s disclosure, there is no additional requirement that the specification must explicitly disclose...precise proportions or particular sizes.” *Cummins-Allison Corp. v. SBM Co.*, 484 F. App’x 499, 507 (Fed. Cir. 2012).

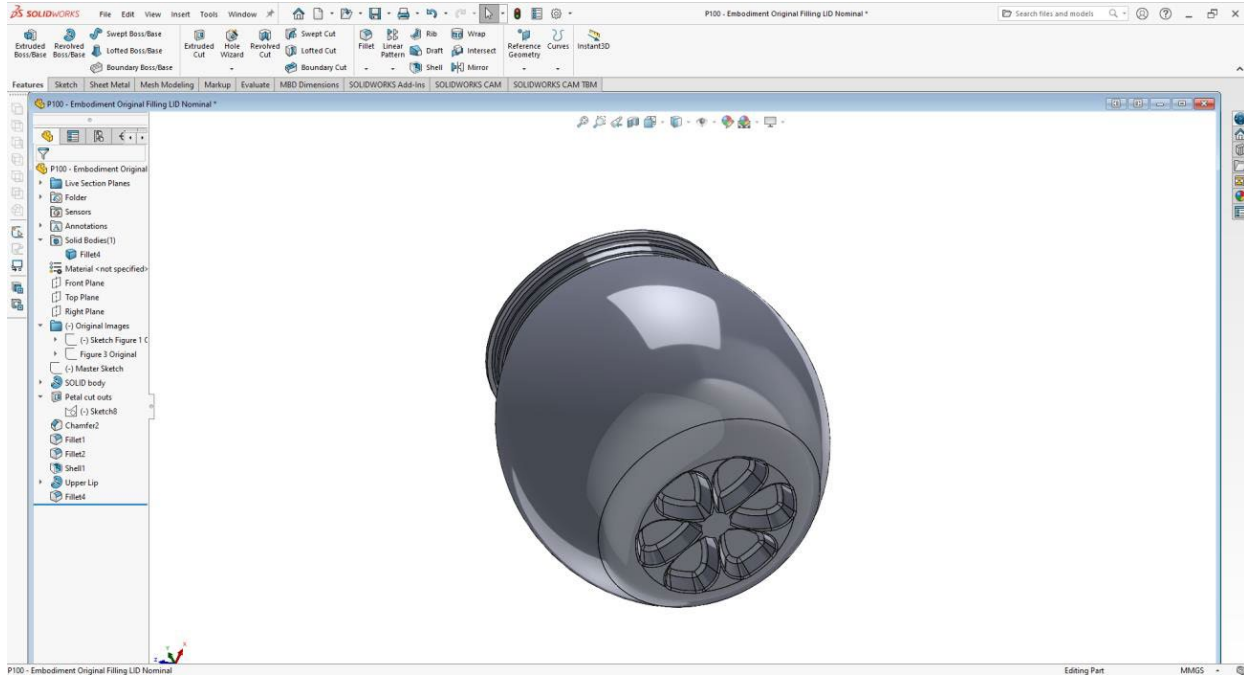
The PTAB has similarly held that claim language is sufficiently supported where a claimed relationship between one size and another is shown in the drawing figures alone. *Ex Parte Albert A. Lucio and Angela Giudice*, No. Appeal 2021-005169, 5–7 (PTAB July 27, 2022). Moreover, the PTAB has subsequently expounded that “drawings [can] provide written-description support for claimed subject matter, including in situations where drawings alone can demonstrate the relative sizes of depicted elements.” *Ex Parte Yuki Shimahara*, No. Appeal 2021-004718, 2022 WL 3644443, at *7 (PTAB Aug. 22, 2022) (citations omitted).

Here, the original detailed description and drawings of the '934 Application show that the inventor was in possession of the claimed dimensions. The detailed description of the '934 Application discloses that the container is shaped to fit with a standard, pop-top lid and the drawings show the dimensions of the container relative to the standard, pop-top lid. *See, e.g.,* EX1004, 2 (“[C]ontainers having an easy-open-end have been used...for a number of years.”). A POSITA would have recognized the dimensions of a standard, pop-top lid were well known and, therefore, the '934 Application disclosed the relative dimensions of the container as a whole. In this regard, as explained by Dr. Rojas, a POSITA would also have recognized that the '934 Application figures were drawn to scale because they are based on a CAD model. EX2014, ¶¶ 12, 43.

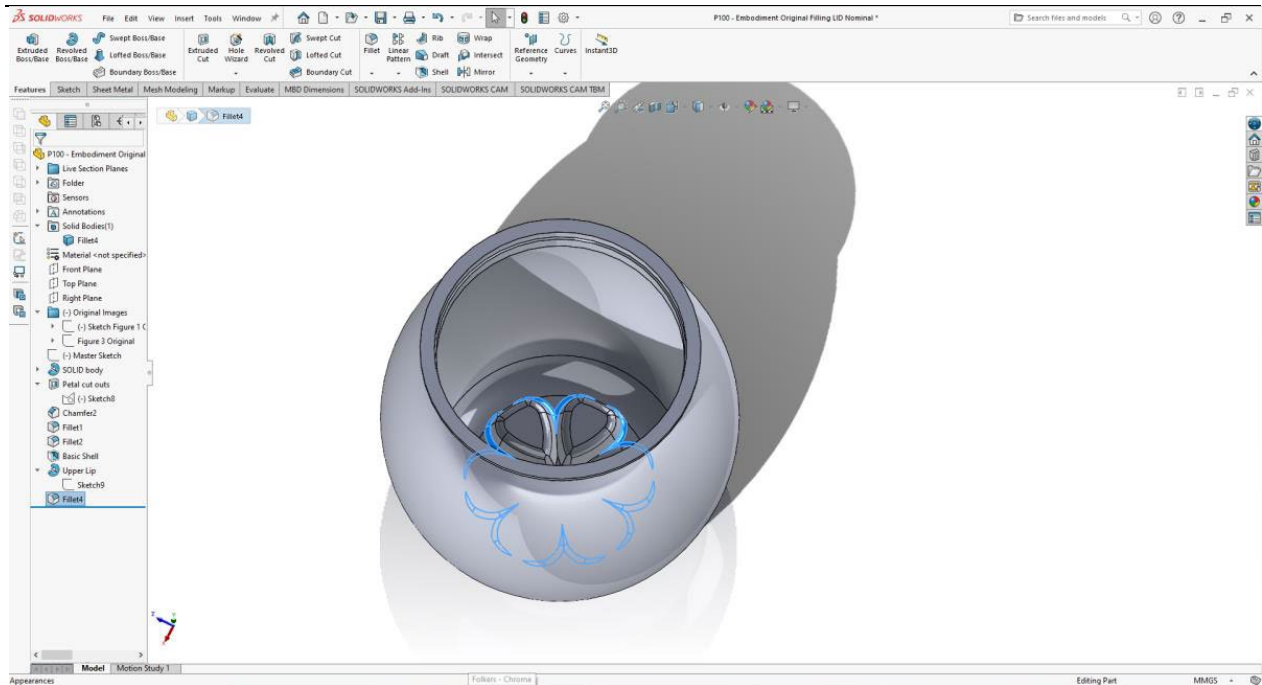
As discussed in detail below, Dr. Rojas testifies that a POSITA would have understood that the originally filed figures of the '934 Application depicted a container having a maximum volume of 211.5 mL and a fill line volume of 200 mL. A POSITA would have understood that the annotations included with Replacement Figure 7 were consistent with the volumes illustrated in the original drawings and detailed description filed with the '934 Application. There were no substantive changes to the dimensions of the container.

To reach this conclusion, Dr. Rojas created a three-dimensional model of the container based on the original figures and the detailed description of the '934

Application. *See, generally*, EX2014, § VI. Screen shots showing perspective views of this model are shown below.



EX2014, ¶ 34 (Fig. L)



EX2014, ¶36 (Fig. N)

In his declaration, Dr. Rojas describes in detail the process used for both determining the dimensions shown in the original figures of the '934 Application as well as calculating the interior volume of the container based on these dimensions. Some aspects of his analysis are summarized below. *See* EX2014, ¶¶ 18–43.

Dr. Rojas first noted that the outer diameter of the upper lip of the container shown in the '934 Application is known because the '934 Application describes that the container is configured to utilize a standard pop-top lid of a 12 oz. soda can. EX2014, ¶¶ 24–25 (Fig. D) (describing dimensions of standard metal lids). Dr. Rojas explained that, to be compatible with a standard pop-top lid, “[t]he nominal outer diameter of the lip should be 56.64 mm.” EX2014, ¶ 25. While Dr. Rojas recognizes

that the disclosure of the '934 Application is not limited to a container having a maximum volume of 211.5 mL, Dr. Rojas explains that a POSITA would understand from the drawings and detailed description that a container with a maximum volume of 211.5 mL was specifically contemplated by the inventor based on the relative dimensions to a standard pop-top lid. EX2014, ¶¶ 24–26.

Using the known diameter of a standard pop-top lid as a reference, Dr. Rojas calculated the dimensions of the container using the three-dimensional model created based on the '934 Application figures. EX2014, ¶ 28. Dr. Rojas determined that “[t]he maximum container volume calculated using the first order CAD model is approximately 211.48 mL.” EX2014, ¶ 43. This volume of 211.48 mL rounds exactly to the annotated max volume of 211.5 mL shown in Figure 7 and matches with the claim language in independent claim 1 of the '904 Patent (“an actual volume of the liquid contained in the container is equal to, or less than, 211.5 mL.”).

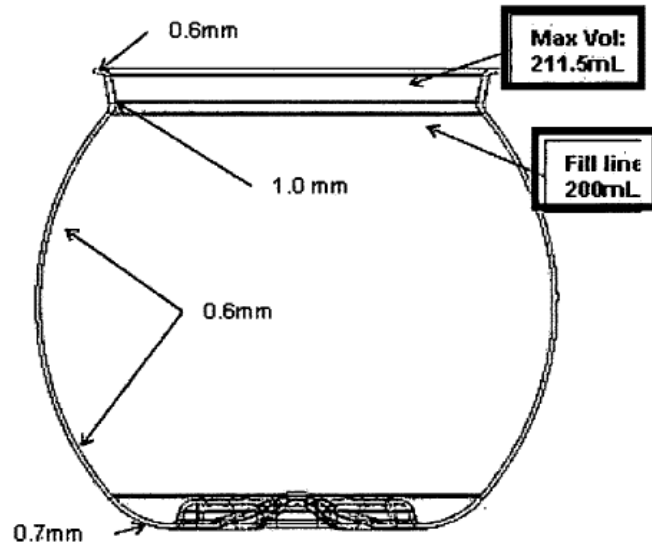


Figure 7

EX1004, 54 ('934 Application, Fig. 7, filed June 1, 2010)

Accordingly, a POSITA would have understood that the specific drawings of the container included in the originally filed '934 Application along with the description to use a standard pop-top lid (having well-known dimensions) shows the inventor was in possession of a container having an actual volume of the liquid contained in the container equal to, or less than, 211.5 mL (i.e., less than or equal to the maximum volume of 211.5 mL), as recited by claim element 1[z]. EX1001, 5:15–16. Dr. Rojas further noted that “[t]he analysis shows that the volume limitations from the originally filed drawings filed April 19, 2010 meet the volume limitations from the updated drawings filed June 1st, 2010,” confirming that the original drawings and the replacement drawings were showing the same container with the same volume characteristics. EX2014, ¶ 43.

In addition, Dr. Rojas testifies that the originally filed figures of the '934 Application include multiple indications that inform a POSITA that the figures were created using a CAD modeling program. EX2014, ¶ 12 (“[I]t is my opinion that Figures 1 and 3 were created using a first order computer aided design (CAD) model.”), (“[I]t is more likely than not that the figure comes from a CAD model.”). In this regard, Dr. Rojas testifies that—consistent with his three-dimensional modeling analysis—a POSITA would have understood that the inventor was necessarily in possession of the claimed volume limitations of 211.5 mL and 200 mL based on the associated CAD file. EX2014, ¶¶ 13, 41, 43. As described by Dr. Rojas, if a CAD model of a container has been created and used as the basis for patent drawings, as was done for the '934 Application, then a POSITA would have understood that the inventor was in possession of the volume characteristics associated with the container at the time of filing the patent application. EX2014, ¶ 43. For these reasons Dr. Rojas concludes “a POSA would have understood, based on the original disclosure of the '934 Application that the inventor was in possession of the container having a maximum volume of 211.5 mL at least as of April 19, 2010 such that the container would contain an actual volume of liquid less than or equal to 211.5 mL.” EX2014, ¶ 43.

Dr. Rojas's analysis further confirms that the '934 Application described “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.” EX1001, 5:25–28 (claim 6); EX2014, ¶ 42. Explaining that the transition line “between the neck 101 and body 107 of the container” is a natural fill line, Dr. Rojas found that the CAD model indicated that filling the container to that point corresponds to the actual volume of liquid contained in the container being 200 mL. EX2014, ¶ 42. For example, Dr. Rojas testifies that a POSITA would have understood that “[f]illing the container to the fill line located at the transition between the neck and the body would be associated with the container being filled with 200 mL of fluid.” EX2014, ¶ 42. In this regard, Dr. Rojas explains that while the specifically calculated volume from his analysis was not *exactly* 200 mL (198.6 mL), it was within less than 1% difference and that “a POS[IT]A would also understand that beverage dispensers are filled with automated fluid dispensers that dispense a known volume” and 200 mL would be the expected known volume used by a POSITA given the 211.5 mL maximum volume of the container and the location of the fill line at the transition between the neck and the body of the container. EX2014, ¶¶ 14, 42.

For all of these reasons, a POSITA would have recognized that the inventor was in possession of a CAD model of the container depicted in the original filing materials of the '934 Application. A POSITA would also have recognized that the disclosed container had a maximum volume of 211.5 mL and a fill line volume of 200 mL. Accordingly, the original disclosure of the '934 Application would convey

to a POSITA that the inventor was in possession of the volume limitations claimed in the '904 Patent as of the April 19, 2010 priority date. Therefore, the '904 Patent is entitled to its claimed priority date and the '934 Application is not prior art. Because the '934 Application is not prior art to the '904 Patent, Petitioner's ground 1 is deficient and institution should be denied.

B. Grounds 2 and 3 are deficient.

1. A POSITA would not have been motivated to combine Ackermann with Kaminski as required by Petitioner's combination for both grounds 2 and 3.

a. *Ackermann teaches away from using Kaminski's lid design.*

Petitioner's proposed combination for grounds 2 and 3 relies on combining a reuseable container described by Ackermann with a single-use lid described by Kaminski. Pet., 43–45. However, a POSITA would not have been motivated to combine Ackermann and Kaminski in the manner Petitioner requires. EX2014, ¶¶ 44–56.

Ackermann teaches away from using Kaminski's lid design because incorporating Kaminski's lid with Ackermann's reuseable container would render Ackermann's container unsatisfactory for its intended purposes. *See In re Gordon*, 733 F.2d 900, 902 (Fed. Cir. 1984) (A reference “teaches away” from a proposed modification if the modification would render it “inoperable for its intended purpose.”). First, Ackermann explains that the “[t]he object of [its] invention is to

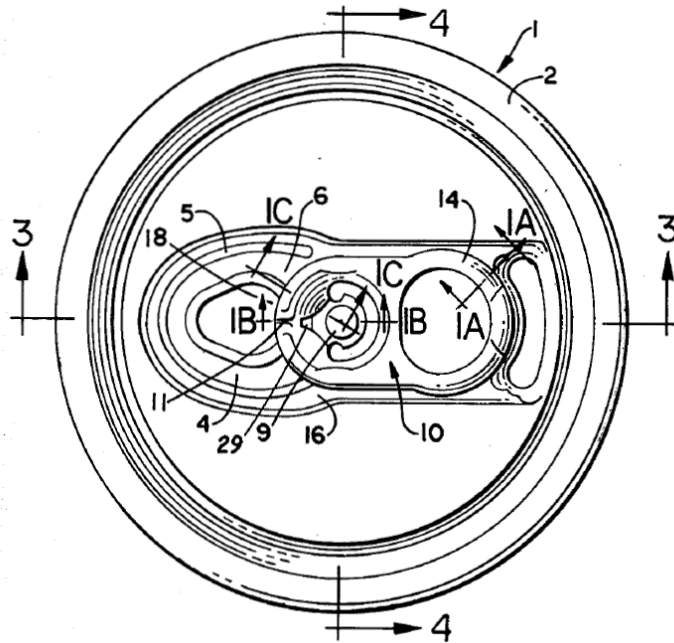
provide a container that...is *usable multiple times*.” EX1008, [0003] (emphasis added). And, relatedly, a second object of Ackermann's invention is “to provide a container that has *a large container opening*,” such that “[t]he container may be *cleaned*.” EX1008, [0003], [0006] (emphasis added). Kaminski's lid is not compatible with either of these stated objectives of Ackermann's reuseable container and would have dissuaded a POSITA from making Petitioner's proposed combination.

i. Kaminski's single-use lid would turn Ackermann's reuseable container into a single-use container.

Regarding Ackermann's first objective of providing “a reusable container,” Ackermann describes “methods for closing the container and for reusing used, opened containers.” EX1008, [0001]. In more detail, “[f]or reuse of the used container, the previously used and broken-open lid is stripped off.” EX1008, [0008]. After use, “the lids 2 are detached from the container,” the container “is easily cleaned,” and then “refilled.” EX1008, [0033].

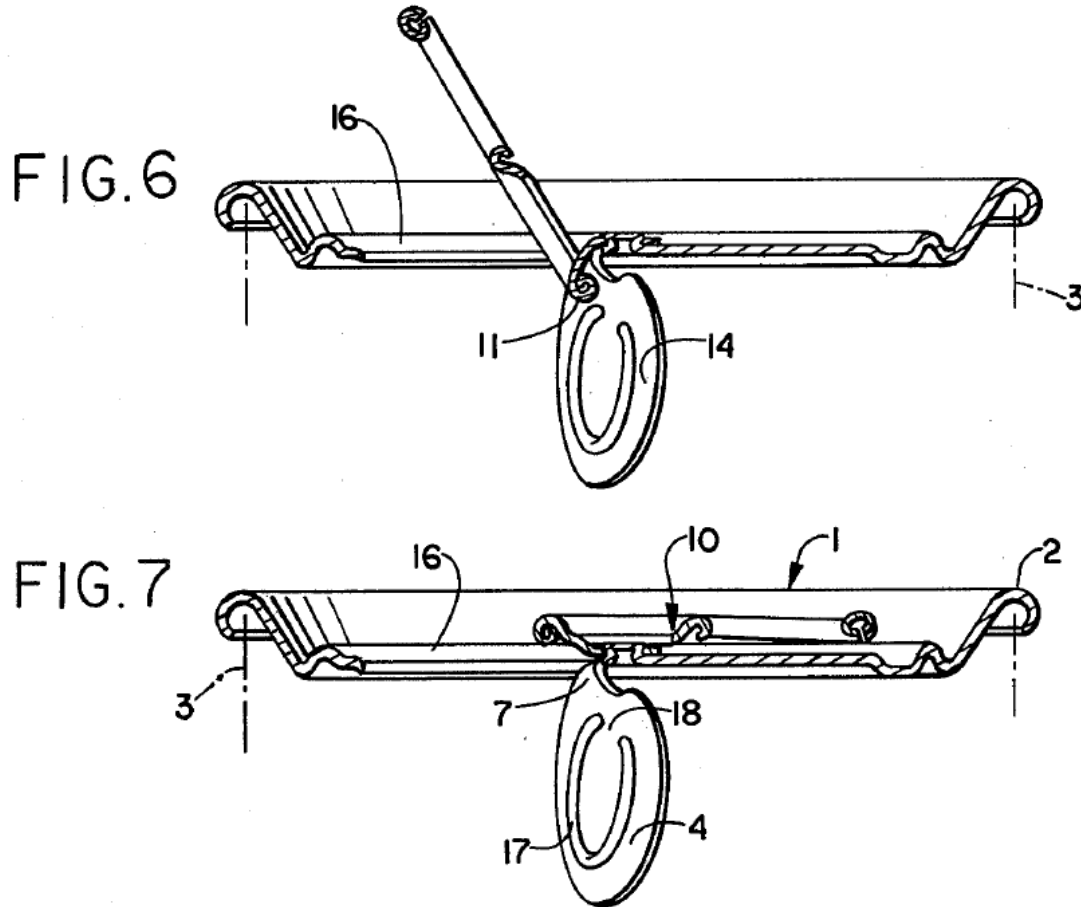
Ackermann explicitly contrasts its reusable container with “standard lid[s],” like Kaminski's. Specifically, Ackermann explains that “*a standard lid* made of aluminum that is joined to the rim of the container opening by seaming” forms “a container” that “is *usable only once*.” EX1008, [0002] (emphasis added). An example of this standard, single-use lid is described by Kaminski and shown below.

See, e.g., EX1009, Fig. 1, 2:65–3:1 (describing Kaminski's can as “a suitable cylindrical beverage can 3” that “is well known in the art.”); EX2014, ¶¶ 51–52 (“Kaminski describes a standard single-use lid.”).



EX1009, Fig. 1

Kaminski's lid is “usable only once.” EX1008, [0002]. After the pull tab punctures the tear strip, as shown in Figure 6 below, the pull tab is folded back “substantially flush” with the lid, shown in Figure 7 below. EX1009, 3:60–64. The tear strip 4 is “retained on the underside” of the lid. EX1009, 3:59–60. Like other containers with standard pop-top lids, after use, the entire container is discarded. EX1008, [0002].



According to the Federal Circuit, “[p]rior art teaches away when ‘a person of ordinary skill, upon reading the reference...would be led in a direction divergent from the path that was taken by the applicant.’” *Arctic Cat Inc. v. Bombardier Recreational Prod. Inc.*, 876 F.3d 1350, 1360 (Fed. Cir. 2017) (quoting *Allergan, Inc. v. Sandoz Inc.*, 796 F.3d 1293, 1305 (Fed. Cir. 2015)). The ’904 patent claims a plastic container with a metal, single-use pop-top lid. *See* EX1001, 4:55–67 (claim 1). A POSITA, upon reading Ackermann, would have been discouraged from using this type of lid because Ackermann explicitly rejects combining its reuseable

container with standard, single-use pop-top openings. *See* EX1008, [0001]–[0003] (encouraging replacing a container with a “standard lid made of aluminum” that “is usable only once” with its proposed “reusable container”); EX2014, ¶ 54 (“A POS[IT]A concerned primarily with ecological improvement would not be motivated to create a single-use plastic container by following the teachings of Kaminski.”). Based on this teaching criticizing containers with standard single-use lids, a POSITA would have been dissuaded from combining Ackermann with Kaminski in the manner required by Petitioner’s combination for grounds 2 and 3. *See* EX2014, ¶¶ 47–53.

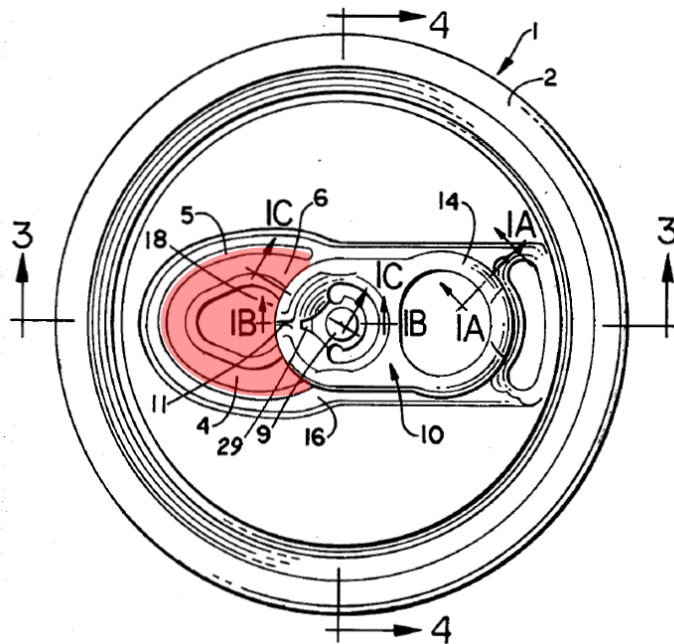
ii. Kaminski’s single-use lid would prevent Ackermann’s reuseable container from being cleaned for reuse.

A POSITA would be further dissuaded from making the proposed combination due to Ackermann’s second objective of providing “a large container opening” that allows cleaning of the container for reuse. EX1008, [0002]; EX2014, ¶¶ 54–56. As one of the advantages of its proposed invention, Ackermann explains that its container design allows for “simple and rapid cleaning due to the large container opening.” EX1008, [0009]. “The container 1 is easily cleaned through the large filling opening” which means “mechanical brushes may be used without much use of chemicals.” EX1008, [0033].

Ackermann contrasts these advantages of its large opening with containers

having a small opening. “Reclosable containers are usually present in the form of glass or plastic bottles with screw caps. Such containers may be *difficult to clean and fill due to the small container opening.*” EX1008, [0002] (emphasis added). The inability to clean a container with a small opening, such as a container having a pop-top lid as described by Kaminski, contributes to the container’s inability to be used multiple times.

Ackermann’s explanations regarding the desire for a large opening directly teach away from using a lid with a small opening, such as Kaminski’s, highlighted below in Figure 1.



EX1009, Fig. 1 (annotated)

Kaminski’s lid is not designed to allow *any cleaning* of the container at all because it is for a single-use container. But even if cleaning were to be attempted,

the opening of Kaminski's lid is exactly the type of opening Ackermann says should be avoided because it is "difficult to clean" due to its small size and also difficult to fill. EX1008, [0002]. A POSITA, upon reading Ackermann, would have been led away from using Kaminski's single-use, small-opening lid with Ackermann's container because Ackermann explicitly rejects combining its container with lids having small openings that prevent easy cleaning (e.g., using mechanical brushes without the need for many chemicals) and make refilling difficult. *See* EX1008, [0002]; EX2014, ¶ 55 ("A POS[IT]A would have recognized that containers with small openings could not be cleaned as Ackermann describes.").

The Petition does not acknowledge, let alone address any of these teachings from Ackermann. Instead, the Petition presents a handful of unsupported and inaccurate reasons a POSITA would have allegedly combined Ackermann and Kaminski. *See infra* § V.B.1.b. But, even if Petitioner had presented valid reasons to combine Ackermann and Kaminski, when one prior art reference expressly teaches away from the other, it weighs strongly against a finding of obviousness. *See, e.g., McGinley v. Franklin Sports, Inc.*, 262 F.3d 1339, 1354 (Fed. Cir. 2001) (citing *In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994)) ("[R]eferences that teach away cannot serve to create a prima facie case of obviousness."); *E.I. DuPont de Nemours & Co. v. Synvina C.V.*, 904 F.3d 996, 1006 (Fed. Cir. 2018) ("[A] patentee may rebut the presumption of obviousness by showing that the prior art taught away from" each

other.); *Tec Air, Inc. v. Denso Mfg. Michigan Inc.*, 192 F.3d 1353, 1360 (Fed. Cir. 1999) (“There is no suggestion to combine, however, if a reference teaches away from its combination with another source.”).

Petitioner's combination of Ackermann and Kaminski is necessary for both grounds 2 and 3. For this reason, Petitioner has not shown a reasonable likelihood of success for either ground and institution should be denied.

b. *The Petition's alleged reasons for combining Ackermann and Kaminski are unsupported and inaccurate.*

Without addressing the teachings from Ackermann that expressly teach away from using a lid like Kaminski's, the Petition provides a number of unsupported and inaccurate reasons to combine Ackermann and Kaminski. *See* Pet., 43–45.

First, the Petition merely argues that a POSITA would have been motivated to combine Kaminski's lid with Ackermann's container because “[b]oth Ackermann and Kaminski described *aluminum lids* for beverage containers.” Pet., 43 (emphasis added). But a mere similarity of the use of aluminum lids between references is not a sufficient motivation to combine them. *See, e.g., William Wesley Carnes, Sr., Inc. v. Seaboard Int'l Inc.*, IPR2019-00133, Paper 10 at 18 (PTAB May 8, 2019) (a “statement of similarity, however, does not constitute an articulated reasoning with rational underpinning as to why a POSITA would combine elements of one reference with another.”) (quoting *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007));

Otsuka Pharm. Co. v. Sandoz, Inc., 678 F.3d 1280, 1292 (Fed. Cir. 2012) (“Absent a reason or motivation based on such prior art evidence, mere structural similarity” is insufficient.).

As explained above, the lids described by Ackermann for use with its reuseable container are not interchangeable with Kaminski's lid because Ackermann teaches that its container should be used with a lid that allows the container to be reused and easily cleaned by providing a large opening. *See supra* § V.B.1.a; EX1008, [0001], [0002], [0008], [0009], [0033] (describing reusable, cleanable containers). Kaminski, on the other hand, describes a single-use lid with a small opening. *See supra* § V.B.1.a; EX1009, Fig. 1, 2:65–3:1 (describing standard single-use pop-top lid). Kaminski's lid is not suitable for use with Ackermann's reusable container because Kaminski's lid would prevent Ackermann's container from being reused and cleaned as intended.

The Petition next argues that a POSITA would be motivated to combine Kaminski with Ackermann because Kaminski's “pop-top tab for opening a can of liquid...was in common use.” Pet., 43–44 (“that lid design was so common”). That a claim element was well known is also an insufficient motivation to combine prior art references. *See, e.g., Virtek Vision Int'l ULC v. Assembly Guidance Sys., Inc.*, 97 F.4th 882, 886 (Fed. Cir. 2024) (“It does not suffice to meet the motivation to combine requirement to recognize that” claim limitations were “known in the art.”).

This is especially true when Ackermann teaches away from using the common lid design. EX1008, [0002] (distinguishing Ackermann's inventive reusable container and lid from "a standard lid made of aluminum" that "is usable only once.").

Finally, the Petition lists a handful of benefits recited by Kaminski that would allegedly motivate the combination including "ecological and safety reasons" and "using less metal." Pet., 44 (citing EX1009, 1:14–16, 1:27–31).

As to the first alleged benefit, Kaminski explains that the "ecological and safety" benefits of its lid design are provided because "the tear strip and attached pull tab" are "retained to the can end after opening." EX1009, 1:14–16. But, as explained previously, the use of this type of unremovable and irreplaceable lid that stays together with the container would destroy the stated benefits and objectives of Ackermann's reusable container that utilizes replaceable lids. *See infra* § V.B.1.a.; *see* EX1008, [0001], [0003].

In any event, a POSITA concerned with ecological benefits would readily recognize the ecological benefits of the reusable containers described by Ackermann far outweigh the benefits of Kaminski's lid that retains the tear strip and pull tab to a single-use container. EX2014, ¶ 53 ("A POS[IT]A concerned primarily with ecological improvement would not be motivated to create a single-use plastic container by following the teachings of Kaminski."). Particularly when plastic containers are used, as described by Ackermann, a POSITA concerned with

ecological and safety benefits would have been aware of the ecological harm of single-use plastics as of the April 19, 2010 priority date. *See* EX2001, 646 (“The single-use plastic carryout bag has become an ever-present item in modern society” which causes “detrimental environmental effects that result from the creation and disposal of such items.”); EX2002, 25 (“Of particular concern are plastics used in single-use disposable packaging and consumer goods.”); EX2003, 1 (“The oceans have become one giant refuse bin for all manner of plastics.”). A POSITA concerned with ecological and safety benefits, and familiar with Ackermann’s objective of providing reusable plastic containers would not have been motivated to combine its teachings with the single-use container lid taught by Kaminski because the proposed combination would result in single-use plastic consumer packaging instead of the desired reusable container. EX2014, ¶ 53.

Petitioner’s second listed benefit is also unsupported. Besides generically arguing that Kaminski’s design uses “less metal,” the Petition does not further argue that Kaminski’s lid uses any less metal than Ackermann’s lid that it would be replacing. In fact, the references themselves show that Kaminski’s lid uses ***more metal*** than Ackermann’s lid. Kaminski describes a “0.014 inch to 0.016 inch thickness range” of the metal used to create the pull tab 10. EX1009, 4:30–34. The thickness of the remaining portion of Kaminski’s metal lid is not specified but is illustrated as being thicker than the pull tab. *See* EX1009, Fig. 3. In contrast,

Ackermann claims a lid with a “thickness in the range of 0.01 mm to 0.3 mm” which, converted to inches, corresponds to a range of 0.0004 inches to 0.012 inches, much thinner than Kaminski’s lid. EX1008, 8 (claim 6).

Because Kaminski’s lid uses more metal than Ackermann’s lid, a POSITA would certainly not be motivated to replace Ackermann’s lid with Kaminski’s lid on the basis of using “less metal,” as the Petition argues. Pet., 44. Replacing Ackermann’s lid with Kaminski’s lid would result in the direct opposite of what Petitioner alleges, the use of *more metal*.

The Federal Circuit has explained that “[a]n inference of nonobviousness is especially strong where the prior art’s teachings undermine the very reason being proffered as to why a person of ordinary skill would have combined the known elements.” *DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 567 F.3d 1314, 1326 (Fed. Cir. 2009). Such is the case here. The teachings of the prior art presented by Petitioner (resuable vs. single-use lids designs, large vs. small openings, and relative thicknesses of both lids) all directly undermine the reasons proffered by Petitioner for combining Ackermann and Kaminski. Contrary to Petitioner’s contentions, Ackermann’s reusable container would be far more ecologically beneficial without Kaminski’s single-use lid and Ackermann’s lid already uses less metal than Kaminski’s. Accordingly, the “inference of nonobviousness” for these features of the ’904 patent “is especially strong.” *Id.*

Because the Petition has not established a sufficient motivation to combine the prior art references for either ground 2 or ground 3, the Board should deny institution.

2. The Petition's analysis of limitation 1[z] for ground 2 is insufficient.

a. *The Petition fails to identify any disclosure for limitation 1[z].*

To show that an issued patent should be retroactively cancelled as anticipated or obvious, an IPR Petitioner bears a high burden of proof. A Petitioner must show that *each* claim limitation was known prior to the priority date of the patent and identify some disclosure of that limitation in the prior art. 37 C.F.R. § 42.104(b)(4) (“The petition must specify where *each element* of the claim *is found in the prior art* patents or printed publications relied upon.”) (emphasis added).

Limitation 1[z] recites “an actual volume of the liquid contained in the container is equal to, or less than, 211.5 mL,” but Petitioner's ground 2 does not identify any prior art patent or printed publication disclosure for this element whatsoever. EX1001, 5:15–16. Instead, Petitioner incorrectly states that “Ackermann does not explicitly describe a volume of its container” and uses this perceived omission to render obvious *any* volume requirement. Pet., 77.

But in fact, Ackermann *does* specifically recite multiple volumes, including “cans from 0.5 liters to 1 liter are considered.” EX1008, [0023]. Later, at claim 3,

Ackermann claims “containers in the range of 0.25 liter to 2 liters.” EX1008, 8 (claim 3). It is not uncommon for other container-related patents to also claim specific ranges of volumes. *See* EX2004, claims 18, 24 (“a carbonated beverage container having a volume of 500 milliliters (ml) or less”); EX2005, claim 7 (“polymeric containers have a filling capacity of not more than about 10 fluid ounces”); EX2006, claims 9–10, 18–19 (“beverage containers contain less than 11 ounces of beverage”); EX2007, claim 12 (“beverage volume of from about 300 ml to about 500 ml”); EX2008, claim 6 (“container has a capacity from about 1 milliliter to about 30 milliliters”); EX2009, claims 16, 31 (“the container has a capacity of 10-40 litres”); EX2010, claims 6, 17 (“the beverage container is a twelve ounce sealed container.”).

Yet, for ground 2, Petitioner does not identify *any* disclosure in *any* prior art reference that teaches a volume *equal to, or less than, 211.5 mL* as claimed. Rather, Petitioner simply argues that “[i]t would have been obvious to a POSITA that the beverage container could be any preferred size.” Pet., 77. This argument is rebutted by Dr. Rojas’s testimony. *See* EX2014, ¶ 58 (“A POS[IT]A would not have found any volume obvious merely because no prior art references described any volume.”).

Petitioner then generally cites to a 40-year-old case, *Gardner v. TEC Sys., Inc.*, without any pin cite or discussion of the holding whatsoever, to argue that “relative dimensions of a claimed device” should not be given patentable weight.

Pet., 77 (citing 725 F.2d 1338 (Fed. Cir. 1984)). This approach is errant for multiple reasons.

First, even if Petitioner's interpretation of *Gardner* were correct, the '904 patent does not recite "***relative*** dimensions." Pet., 77 (emphasis added). The '904 patent recites explicit dimensions of a volume *equal to, or less than, 211.5 mL*. The court in *Gardner* ultimately held that it was "indisputable" that specific "nozzle size, nozzle direction, and plenum pressure" did have an effect on the performance and purpose of the invention/product and these specific dimensions were not given patentable weight simply because the claim at issue was "not limited to any of these variables." *Id.* at 1349. In contrast, the claims at issue here specifically define the required volume of the container.

Second, an overwhelming number of cases since *Gardner* have repeatedly given patentable weight to claims including specific dimensions. For example, in *Plastipak Packaging, Inc. v. Premium Waters, Inc.*, the Federal Circuit reviewed a number of patents directed to "plastic containers." 55 F.4th 1332, 1335 (Fed. Cir. 2022). The central limitation at issue was a claim limitation "reciting neck portions with an X dimension of 0.580 inches or less." *Id.* at 1336. The court gave patentable weight to this limitation, holding that an alleged inventor's model of "approximately 0.563 inches...[met] the claim limitation." *Id.* at 1341.

Multiple other cases demonstrate that dimensions recited in a claim must be

given patentable weight. *See, e.g., In re NuVasive, Inc.*, 841 F.3d 966, 972 (Fed. Cir. 2016) (giving patentable weight to a claim reciting implants that are “longer than wide”); *Lazare Kaplan Int’l, Inc. v. Photoscribe Techs., Inc.*, 628 F.3d 1359, 1375 (Fed. Cir. 2010) (holding that a product actually infringed claims reciting “specified width and depth ranges” of diamonds); *Engel Indus., Inc. v. Lockformer Co.*, 96 F.3d 1398, 1406 (Fed. Cir. 1996) (giving patentable weight to a “claim limitation that requires the distance between the second portion and end portion to substantially correspond to the width of an arm of a corner connector”); *Tech. Consumer Prods., Inc. v. Lighting Sci. Grp. Corp.*, 955 F.3d 16, 18 (Fed. Cir. 2020) (giving patentable weight to a claim directed to a light fixture requiring “an overall height H and an overall outside dimension D such that the ratio of H/D is equal to or less than 0.25”).

Petitioner’s proposed ground 2 does not meet its burden to show “where each element of the claim is found in the prior art patents or printed publications relied upon.” 37 C.F.R. § 42.104(b)(4). A POSITA would not have recognized that the combination of Ackermann and Kaminski discloses the specific volume limitation of 211.5 mL or less recited in independent claim 1. *See* EX2014, ¶¶ 57–59.

b. *The Petition improperly shifts the burden to Patent Owner for limitation 1[z].*

To justify its lack of any prior art disclosure disclosing the volume requirement of limitation 1[z], the Petition argues that “[t]here is nothing special about that size.” Pet., 77. Petitioner further argues that the volume limitation would

not “provide any unexpected results, such that the size would be non-obvious to a POSITA.” Pet., 77. This argument is a thinly-veiled attempt to shift the burden of proof from Petitioner to Patent Owner.

“In an *inter partes* review, the burden of persuasion is on ***the petitioner*** to prove ‘***unpatentability*** by a preponderance of the evidence,’ 35 U.S.C. § 316(e), and that burden ***never shifts to the patentee.***” *Dynamic Drinkware, LLC v. Nat’l Graphics, Inc.*, 800 F.3d 1375, 1378 (Fed. Cir. 2015) (emphasis added). For limitation 1[z], the Petition attempts to do just that. It is not incumbent upon ***the Patent Owner*** to show why the recited volume limitation “would be ***non-obvious***,” in Petitioner’s words. Pet., 77 (emphasis added). It is incumbent “on ***the petitioner*** to prove ***unpatentability***” of the volume limitation. *Dynamic Drinkware*, 800 F.3d at 1378 (emphasis added). The Federal Circuit continued that “[f]ailure to prove the matter as required by the applicable standard means that the party with the burden of persuasion loses on that point—thus, if the fact trier of the issue is left uncertain, the party with the burden loses.” *Dynamic Drinkware*, 800 F.3d at 1378 (quoting *Tech. Licensing Corp. v. Videotek, Inc.*, 545 F.3d 1316, 1326–27 (Fed. Cir. 2008)).

It should be undisputed that Petitioner’s proposed ground 2 does not cite any prior art disclosure for the volume limitation of 1[z]. In fact, all of the volumes disclosed in the cited references exceed 211.5 mL, including volumes of 0.25 liters, 0.5 liters, 1 liter, and 2 liters described by Ackermann. Accordingly, Petitioner has

not met its burden to show that limitation 1[z] is unpatentable for ground 2.

3. The Petition fails to identify any motivation to combine Ackermann and Kaminski with Hutchinson for ground 3.

Petitioner's ground 3 requires combining an additional reference, Hutchinson, with Ackermann and Kaminski. However, the Petition fails to set forth any reason for combining Hutchinson with Ackermann and Kaminski other than a hindsight analysis, using the claims of the '904 Patent as a roadmap. Also, the addition of Hutchinson cannot cure the lack of a motivation to combine Ackermann and Kaminski, including the teaching away of such a combination, as established above.

At ground 3, Petitioner again incorrectly asserts that "Ackermann does not disclose the size of its container." Pet., 82. Petitioner then asserts that Ackermann "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." Pet., 82. This is also not true. The volumes disclosed by Ackermann are linked to "the radius of the torus cross section," and changes in volume must be compensated for to ensure that the lid operates as intended. EX1008, [0023]; EX2014, ¶ 61. For example, specific ranges of the torus cross section radius may be "preferably 0.75 mm to 0.82 mm" or "approximately 0.6 mm to 1 mm when cans from 0.5 liter to 1 liter are considered." EX1008, [0023]. Later, at claim 3, Ackermann claims "the toroidal ridge (12) has a circular cross section with a radius in the range of 0.6 mm to 7 mm for containers in the range of 0.25 liter to 2 liters."

EX1008, 8 (claim 3). All of the disclosed ranges of container volumes in Ackermann (0.25 liters, 0.5 liters, 1 liter, 2 liters) are greater than the 211.5 mL claimed. Petitioner has not presented any reasoning for why decreasing these stated volume ranges from Ackermann would be successful or provided any motivation for doing so. *See* EX2014, ¶¶ 60–62.

In addition, while Kaminski does not explicitly mention a container volume, Kaminski illustrates a conventional beverage can, which a POSITA would have recognized contained a common volume of 12 oz. *See* EX1009, 2:65–3:1 (lid designed for “a suitable cylindrical beverage can 3 or the like as is well known in the art.”); EX2011, [0007] (“a standard 12 oz. beverage can 10”); EX2012, [0003] (“standard 12 oz beverage can”); EX2013, 1:9–12 (“a standard 12 oz. beverage can”); EX2014, ¶ 58. A standard can volume of 12 oz. corresponds to approximately 355 mL, again greater than the claimed 211.5 mL.

Besides the incorrect assertion that “Ackermann does not disclose the size of its container” and “does not place any restrictions on the size,” the Petition offers ***no reason*** to change Ackermann’s stated container volumes of .25–2L or Kaminski’s container volume of 12 oz (355 mL) to the “approximately 200 mL” disclosed by Hutchinson. Pet., 82. At pages 81–82 of the Petition, Petitioner simply recites a number of conclusory statements regarding a POSITA’s motivations.

For example, the Petition first states, without providing any reason, that “[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.” Pet., 81. The Petition then argues that “a POSITA would have found it obvious to look to other references for beverage containers, such as Hutchinson, which explained suitable sizes for containers for storing beverages,” again because, according to Petitioner, Ackermann does not provide any volumes. Pet., 81. And, finally, the Petition states that the “Ackermann-Kaminski-Hutchinson combination...would have been a simple combination of known elements by known methods, yielding predictable results, and therefore would have been obvious to a POSITA,” but does not state what any of those known elements, methods, or predictable results would be, and, again, does not provide any reason for the combination. Pet., 81–82.

In short, Petitioner's only reason for combining Hutchinson with Ackermann and Kaminski is that a POSITA would look to another reference (Hutchinson) for disclosures of a volume because Ackermann “did not identify possible volumes.” Pet., 81. However, as shown above, that is not true as Ackermann explicitly identifies particular volumes for its reusable containers. *See* EX1008, [0023] (describing volumes of 0.5 liters and 1 liter), claim 3 (claiming volumes ranging from 0.25 liters to 2 liters). The Petition provides no other rationale for combining Hutchinson with Ackermann and Kaminski. *See* Pet., 81–82 (“The Combination of

Ackermann, Kaminski, and Hutchinson”), 82–83 (limitation 1[z]). Accordingly, Petitioner’s entire basis for combining Hutchinson with Ackermann and Kaminski is based on a false premise.

It is well settled that the mere presence of claim limitations in the prior art is not enough. *See Virtek*, 97 F.4th at 886 (“It does not suffice to meet the motivation to combine requirement to recognize that” claim limitations were “known in the art.”). When a Petition relies on multiple references to render a claim obvious, Petitioner must provide some reasoning or rationale that would motivate a POSITA to make the combination. Petitioner has failed to do so for ground 3. Accordingly, for this additional reason Patent Owner respectfully requests that institution be denied.

VI. CONCLUSION

The Board should deny institution of the Petition for the reasons presented above.

Respectfully submitted,

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VII. CERTIFICATE OF WORD COUNT

Under 37 C.F.R. § 42.24(b)(1), the undersigned attorney for the Patent Owner declares that the argument section of this Patent Owner's Preliminary Response (Sections I–VI) has 7,744 words, according to the word count tool in Microsoft Word™.

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PATENT OWNER'S EXHIBIT LIST

EX2001	Bridget M. Warner, Sacking the Culture of Convenience: Regulating Plastic Shopping Bags to Prevent Further Environmental Harm, 40 U. MEM. L. REV. 645 (Spring 2010) ("Warner")
EX2002	Ramani Narayan et al., Drivers for Biodegradable/Compostable Plastics & Role of Composting in Waste Management & Sustainable Agriculture, Symposium on Biological Waste Treatment, (February 15, 2007) ("Narayan")
EX2003	Collette Wabnitz et al., Plastic Pollution: An Ocean Emergency, Marine Turtle Newsletter No. 129, 2010 ("Wabnitz")
EX2004	U.S. Patent Publication No. US2008/0257855 to Patel ("Patel")
EX2005	U.S. Patent Publication No. US2004/0131735 to Korengel et al. ("Korengel")
EX2006	U.S. Patent Publication No. US 2006/0043846 to Kamp et al. ("Kamp")
EX2007	U.S. Patent Publication No. US 2009/0000312 to Smith et al. ("Smith")
EX2008	U.S. Patent Publication No. US 2006/0201968 to Degroff ("Degroff")
EX2009	U.S. Patent Publication No. US 2009/0194561 to Quasters ("Quasters")
EX2010	U.S. Patent Publication No. US 2006/0053826 to Drabkin ("Drabkin")
EX2011	U.S. Patent Publication No. US 2004/0163986 to Pinyot ("Pinyot")
EX2012	U.S. Patent Publication No. US 2007/0131638 to Thadani ("Thadani")

IPR2024-01098 / U.S. Patent No. 11,738,904
Patent Owner's Preliminary Response

EX2013	U.S. Patent No. 4,747,486 to Benno (“Benno”)
EX2014	Declaration of Folkers Eduardo Rojas Ph.D. in Support of Patent Owner Preliminary Response

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BuzzBallz, LLC,
Patent Owner

§ Patent Owner's Preliminary Response

§

§ U.S. Patent No. 11,738,904

§

CERTIFICATE OF SERVICE

The undersigned certifies, under 37 C.F.R. § 42.6, that service was made on
Petitioner's counsel as detailed below.

Date of service October 30, 2024

Manner of service Electronic Service:
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Documents served **Patent Owner's Preliminary Response**

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