

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT AND APPEAL BOARD

A&A GLOBAL IMPORTS, INC.,

Petitioner

v.

LERMAN CONTAINER CORPORATION,
Patent Owner

U.S. Patent No. D781,151
March 14, 2017

Entitled: JAR

Inter Partes Review No.: Unassigned

**DECLARATION OF TIMOTHY P. FLETCHER IN SUPPORT OF
PETITIONER'S *INTER PARTES* REVIEW PETITION**

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I, Timothy P. Fletcher, hereby declare under penalty of perjury under the laws of the United States of America:

I. INTRODUCTION

1. I have been retained by counsel for A&A Global Imports, Inc. (“Petitioner” or “A&A”) to serve as an expert witness in support of Petitioner’s *inter partes* review (“IPR”) petition of Lerman Container Corporation’s (“Lerman” or Patent Owner”) U.S. Patent D781,151 (“’151 Patent”)(Exhibit 1001). In particular, I have been asked to consider and provide an opinion on the validity of the claim of the ’151 Patent.

2. I understand that this declaration will be submitted in support of Petitioner’s IPR.

3. I have personal knowledge of the facts and opinions set forth in this declaration and believe them to be true. If called upon to do so, I would testify competently thereto.

4. I am being compensated for my time at my standard consulting rate of \$350 per hour. I am also being reimbursed for expenses incurred during the course of this work. My compensation is not contingent upon the substance of my opinions or the outcome of this proceeding. Furthermore, I have no financial interest in the outcome of this matter.

5. Appendix A, attached hereto, contains a list of exhibits referenced herein. I have reviewed each document identified on the list of exhibits or cited herein in preparing my opinions herein.

II. Background and Qualifications

6. I am providing my opinions on behalf of Petitioner, including the understanding of a person (or designer) of ordinary skill in the art (“DOSA”) as it relates to the ’151 Patent. Exhibit 1020 is a true and correct copy of my Curriculum Vitae describing my background and experience.

7. For more than 30 years, I have worked, *inter alia*, as an industrial designer, product designer and developer, professor of industrial design courses, speaker, and consulting industrial designer.

8. I am an industrial designer and President of One BusinessDesign, LLC in Pittsburgh, Pennsylvania. Generally, industrial designers are graduates of schools of design either from a fine arts orientation or a product development orientation. Of those two opportunities, my experience originates from the product development orientation side of design. Generally, I would consider industrial design as the professional service of creating and developing concepts and specifications that optimize the function, value and appearance of products and/or systems for the mutual benefit of the user, manufacturer, and/or seller.

9. I obtained a Bachelor of Environmental Design Degree in Product Design from North Carolina State University in 1989 and a Master of Design Degree (“MDes”) in Advanced Strategies at the Hong Kong Polytechnic University in 2008.

10. I am the named inventor on 17 design and utility patents in the United States as well as corresponding foreign patents. A listing of my patent publications as well as the courses I have taught is included as Exhibit 1021.

11. Throughout my career, I have been employed as an industrial designer, including designing new products, and/or a product development management, including developing products and improving the process of product development and creation, for, among others, the following companies: Performance Bike; Stahlwood Manufacturing Co.; DAKA Designs; Gerber Products Company; Elumens; DP; and Evenflo Company, Inc. In my positions, I have designed or have overseen the design of over 150 products and product lines, including with respect to the design of commercial electronics, toys, safety products, cups, jars, containers, bottles, pacifiers, teethingers, strollers (including other products for infants and toddlers), exercise equipment and storage solutions, and various other consumer products. Moreover, as a consultant in this field, I have designed consumer products or new product strategies for the following design firms: Gamil Design, Daedalus, and One Business Design. In the field of product development manager, I sourced and inspected manufacturing plants in the United States and internationally, and I

have also been engaged in resolving and troubleshooting manufacturing issues in the development of consumer products.

12. In addition, I have taught industrial design courses at The Hong Kong Polytechnic University, North Carolina State University, and Carnegie Mellon University. A non-extensive list of the courses includes, Manufacturing Materials and Processes, Professional Practice and Industrial Design Studio Courses. Some of the course I taught related to the form and preparation of design drawings. The Manufacturing materials and Processes class teaches future designers about a wide array of materials used for manufacturing and the myriad of manufacturing methods to produce products. These classes included glass as a material and manufacturing process.

13. Throughout my career, I have worked with attorneys to prepare drawings for U.S. design patents. For example, at both Gamil Design and Elumens, I have been involved in the preparation of drawings and text for multiple U.S. and WIPO utility patent applications. In addition, I have developed and assisted in developing design patent drawings for clients. Based on my experience, I have an understanding of the representations included in design patent drawings.

14. Professionally, I was inducted into the Industrial Designers Society of America (“IDSA”) Academy of Fellows in 2009. The identified criteria for induction include a two-thirds majority vote of the Board of Directors to confer the

fellowship membership to a member of IDSA in good standing who has earned the special respect and affection of the membership through distinguished service to the industrial design profession.

Specific Experience with Containers

15. Particularly relevant to the design claimed in the '151 Patent, I have significant design experience in the creation and development of containers.

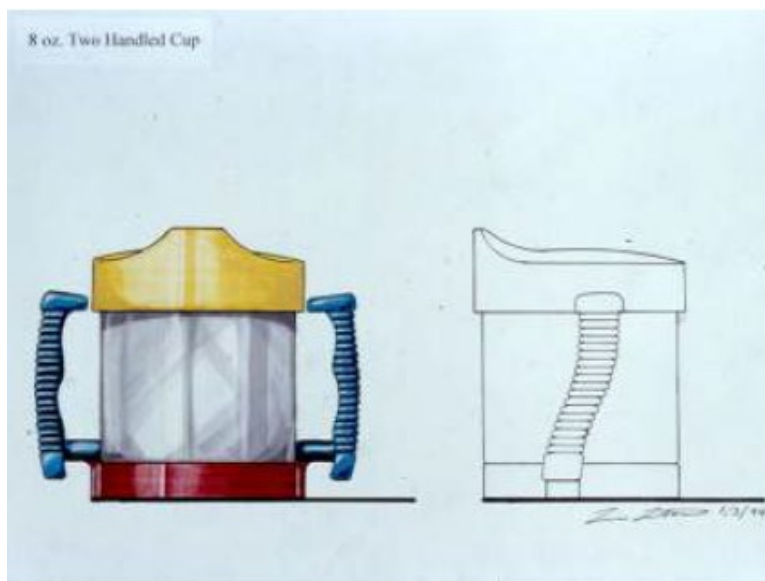
16. At Stahlwood Manufacturing Company, I designed the following wide base travel nurser:



17. At Gerber Products Company, I designed the following ergonomic nurser bottle:



18. Also at Gerber, I designed a two handled cup for toddlers. A photo of this cup is depicted below:



19. Also at Gerber, I designed a juice box holder. A photo of this juice box holder is depicted below:



20. At Evenflo I designed and worked with engineers to develop a non-spill cup. I was named as Inventor on the U.S. Design Patent for this cup, D407,269. A photo of the commercial product is depicted below:



21. Also, at Evenflo, I designed a Canteen that included a closeable spout to prevent spilling. I was named as Inventor on the U.S. Design Patent for this cup, D408,622. A photo of the commercial product is depicted below:



22. Also, at Evenflo, I designed Straw Cups. Photos of these cups are depicted below:



23. At Gamil Design, I designed a two-piece non-spill cup for Wee Care Baby Products, Inc. This product was designed to be a low-cost alternative for the U.S. Government's WIC (Women Infants and Children) program. I was named as inventor on U.S. Patent Pub. No.: US 2005/0145636 A1 and WIPO Patent Pub. Number WO 03/070150 A1. A photo of the commercial product is depicted below:

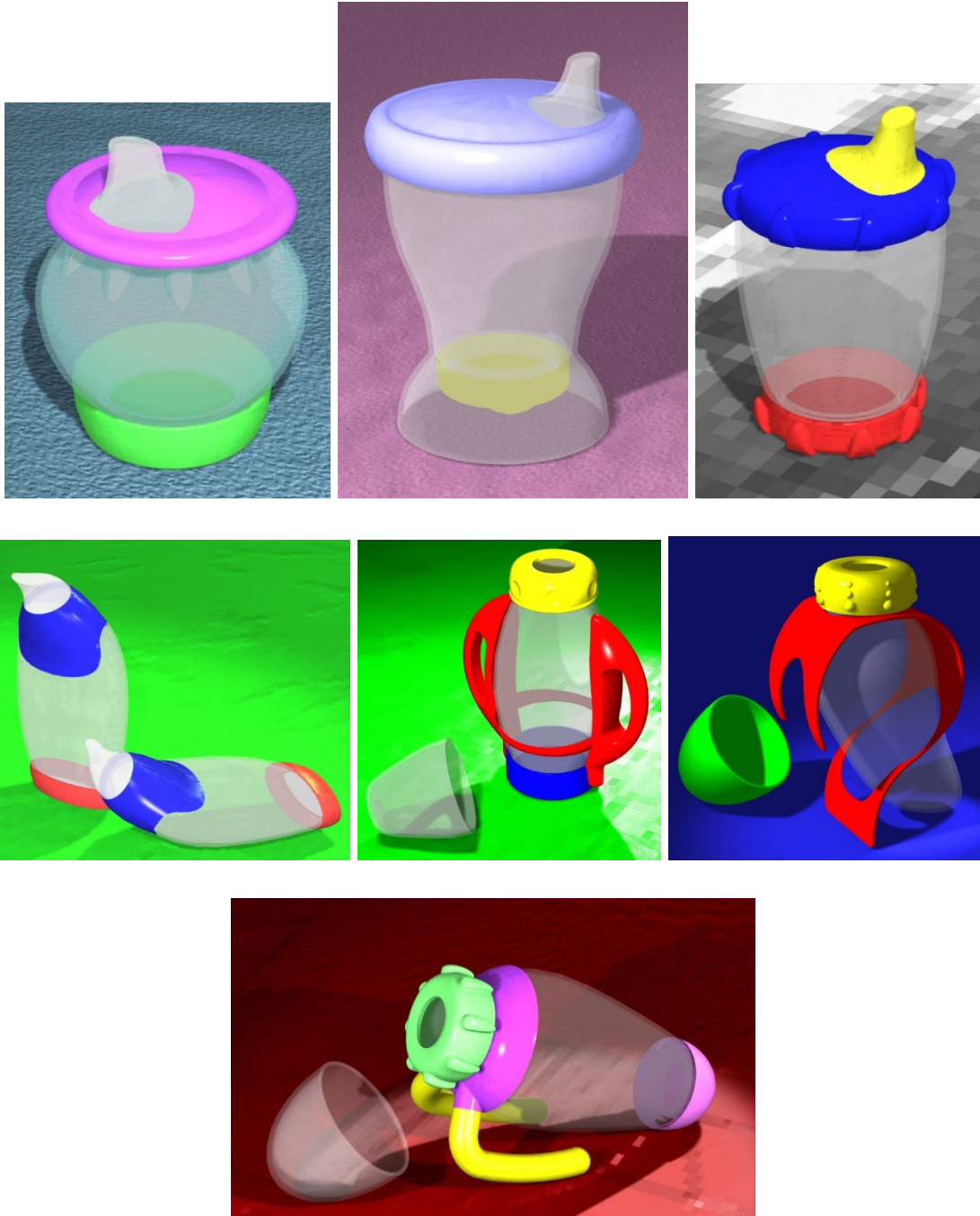


24. Also at Gamil Design, I designed a new and innovative nipple and nurser system that received the following utility patents: US 6,253,935 B1 and EP 1 093 785 A2. An image of the commercial product is depicted below:



25. Also at Gamil Design, I designed the visual appearance of several non-spill cups and nursers, as concepts for Rex Holdings, Ltd. (Thailand) for use in

proposing them to U.S. and European infant products brands. Several images of the concepts are depicted below:



26. As described above and set out further in Curriculum Vitae (Exhibit 1020) and list of publications (Exhibit 1021), and further based upon my education

and experience, I believe I am qualified to render the opinions included in this declaration.

27. The opinions presented in this declaration are based on my judgment, training, education, experience, and expertise in designing, developing, and using consumer products as well as the documents and materials cited and/or described herein, as discussed below.

III. Materials Relied Upon

28. In reaching the opinions and conclusions described in this declaration, I have relied on the documents and material cited herein as well as my judgment, training, education, experience, and expertise in designing, developing, and using consumer products. These materials comprise patents, related documents, and printed publications. Each of these materials is a type of document that experts in my field would reasonably rely upon when forming their opinions.

29. Indeed, the documents and materials cited herein are the type of materials that further demonstrate the level of skill and knowledge in my field, and in particular, pertaining to the subject matter shown and the figures provided in the '151 Patent.

IV. U.S. Design Patents

30. Generally, industrial designers, and general designers, communicate using drawings. Such drawings utilize a “vocabulary” of lines that have definite and

specific meanings that are well known in the industry and within the design and manufacturing communities. One example is design patent drawings that are governed by their own set of rules defined by the laws of the United States of American and the rules and regulations of the United States Patent and Trademark Office (“USPTO”). The USPTO has defined its own rules and regulations concerning the “vocabulary” of lines, which designers also understand and use. As I have fourteen U.S. design patents of my own, and I have assisted in preparing, and have prepared for others, drawings for use in obtaining U.S. design patents, I am familiar with the vocabular associated with design drawings before the USPTO and included in U.S. design patents.

31. U.S. federal regulations further assist in understanding the vocabulary and provide specific requirements for design patent drawings (37 C.F.R. 1.152—Design Drawings), which states (in part):

The design must be represented by a drawing that complies with the requirements of § 1.84 and must contain a sufficient number of views to constitute a complete disclosure of the appearance of the design. Appropriate and adequate surface shading should be used to show the character or contour of the surfaces represented. Solid black surface shading is not permitted except when used to represent the color black as well as color contrast. Broken lines may be used to show visible environmental structure, but may not be used to show hidden planes and surfaces that cannot be seen through opaque materials. Alternate

positions of a design component, illustrated by full and broken lines in the same view are not permitted in a design drawing.

32. As applicable to the '151 Patent, special attention must be given to the use of broken lines in patent drawings. The USPTO Design Patent Application Guide states:

A broken line disclosure is understood to be for illustrative purposes only and forms no part of the claimed design. Structure that is not part of the claimed design, but is considered necessary to show the environment in which the design is used, may be represented in the drawings by broken lines. This includes any portion of an article in which the design is embodied or applied that is not considered part of the claimed design. When the claim is directed to just surface ornamentation for an article, the article in which it is embodied must be shown in broken lines.

V. The '151 Patent and its History Before the USPTO

33. The '151 Patent is entitled "JAR." The design patent application resulting in the '151 Patent was filed on June 8, 2016 and the '151 Patent issued on March 14, 2017. *See* EX1001. As I understand, the '151 Patent does not claim an earlier priority date to any other patent application. And therefore, for the purposes of my analysis, I have considered the priority date of the '151 Patent as June 8, 2016.

34. The '151 Patent claims "[t]he ornamental design for a jar, as shown and described." *Id.* As I, and a designer of ordinary skill in the art would understand,

the design of a jar includes substantial overlap in subject matter with designs for containers, bottles, or similar articles.

35. The claim of the '151 Patent is shown by seven Figures, reproduced below with the corresponding description.

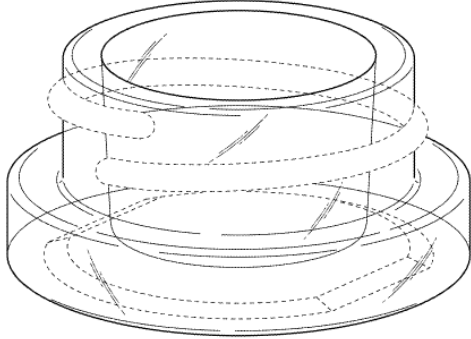
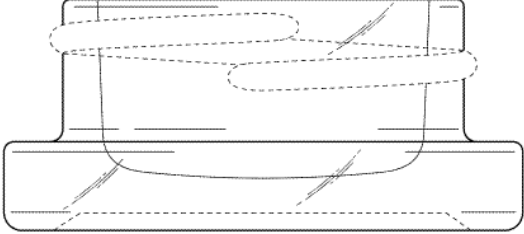
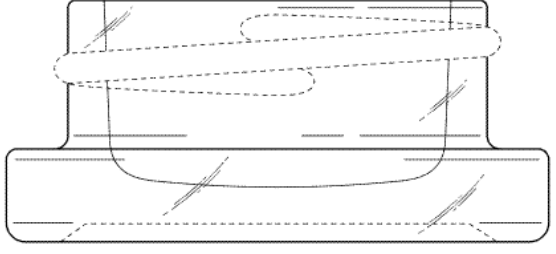
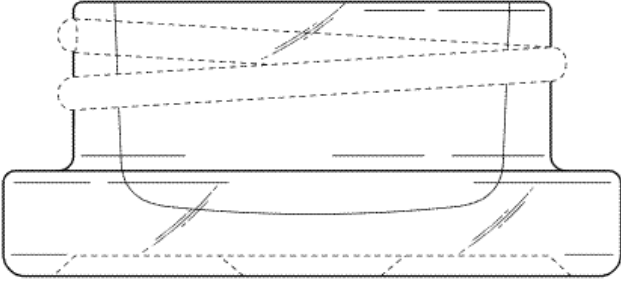
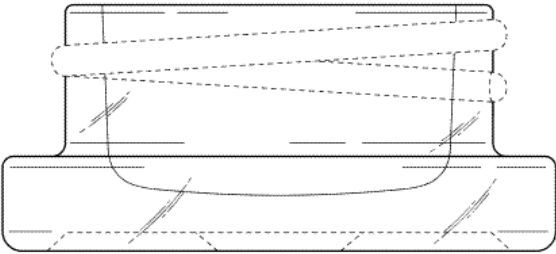
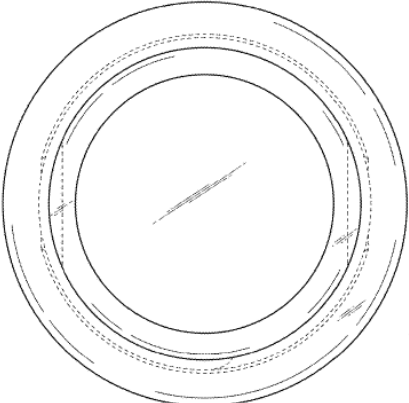
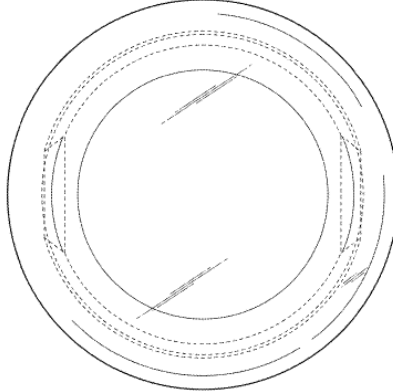
Description	Figure
Figure 1 – Top, Front, Right side Perspective View	 A perspective view of a jar. The jar has a wide, flat base and a slightly tapered body. A decorative band, consisting of a series of overlapping loops, is wrapped around the body. The band is shown in a perspective view, with some parts in front of the jar and some behind, indicated by dashed lines.
Figure 2 – Front elevation View	 A front elevation view of the jar. It shows the jar's profile, including the base and the body. The decorative band is shown as a series of overlapping loops, with some parts in front of the jar and some behind, indicated by dashed lines.
Figure 3 – Rear Elevation View	 A rear elevation view of the jar. It shows the jar's profile from the opposite side of Figure 2. The decorative band is shown as a series of overlapping loops, with some parts in front of the jar and some behind, indicated by dashed lines.

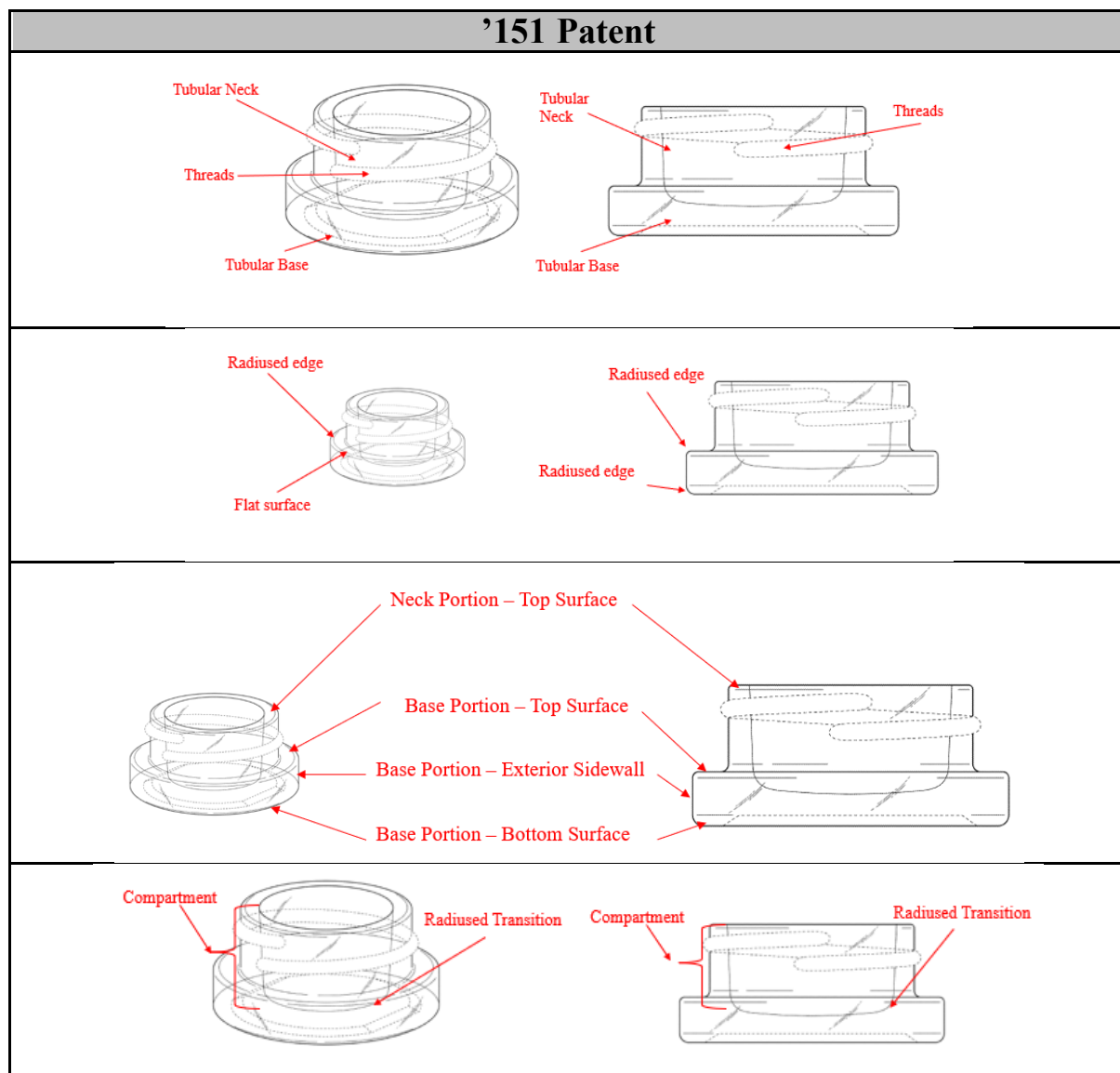
Figure 4 – Right Side Elevation View	
Figure 5 – Left Side Elevation View	
Figure 6 – Top Plan View	
Figure 7 – Bottom Plan View	

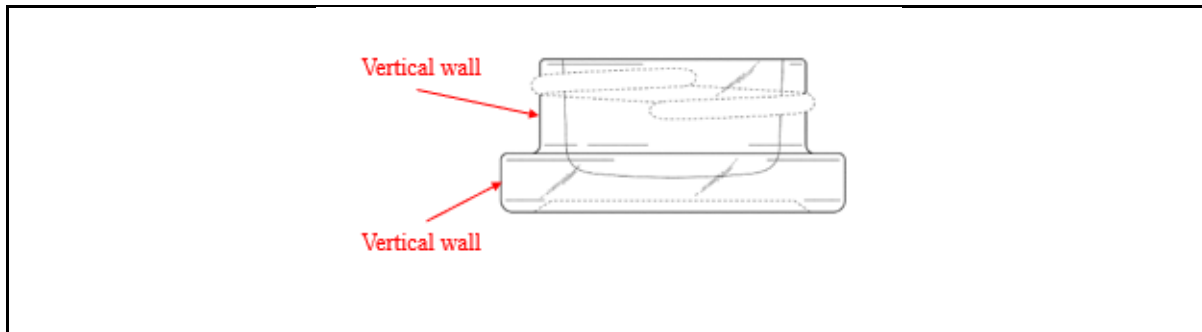
36. As discussed above, the '151 Patent includes a single claim directed to the ornamental design for a jar as shown by the figures. Reflecting the USPTO

design patent vocabulary, the description of the '151 patent states “[t]he broken lines shown in the drawings are included for the purpose of illustrating portions of the article that form no part of the claimed design.” *Id.* Thus, in my analysis I did not consider the features denoted by the broken lines as claimed elements, but only optional features.

37. For the purposes of my analysis, I include the below annotated figures of the '151 Patent. The '151 Patent claims a transparent jar that has a transparent tubular base portion, a transparent tubular neck portion that is concentrically positioned on the top flat horizontal surface of the tubular base portion, and a compartment located within the jar. The tubular neck and base portion are formed of a single material with the tubular neck portion extending upwards from the tubular base portion. The diameter (width) of the base portion is wider than the diameter of the neck portion. The base portion includes a top surface and a bottom surface (the bottommost section of the base portion forms an interior surface which defines the lower end / surface of the compartment). The base portion further includes a vertical sidewall that provides an exterior wall surface of the base portion. The transition between the exterior wall surface of the base portion and its respective horizontal top and bottom surfaces is a radiused transition. The height of the tubular base portion (as shown below) appears to be vertically shorter than the vertical height of the neck portion. As shown, the claimed jar further includes an open-topped

compartment disposed concentrically in the interior of the tubular neck portion and extending into the tubular base portion. The bottom surface of the compartment is connected to the essentially vertical interior side walls through a radiused transition. The bottom surface of the compartment in the tubular base portion appears to be slightly concave. The compartment is essentially a negative space in the interior of the claimed jar that is accessible from the top of the jar.





38. As I noted above, the tubular neck portion is located above the tubular base portion and forms a single piece with the tubular base portion. The neck portion of the claimed jar further illustrates, but is not claimed, that threads can be included on the external surface to, for example, screw on a cap or lid to seal the compartment. The top surface of the tubular neck portion, the portion between the internal and external vertical side walls, is flat, horizontal, and essentially perpendicular to its vertical side walls. The top surface defines a cylindrical opening (circular from the Top Plan View) of the compartment, which is the only opening to the compartment shown in the figures. The claimed design includes a radiused edge transition between both the external vertical sidewalls and the horizontal top surface of the neck portion as well as between the vertical sidewalls of the neck portion to the flat horizontal top surface of the base portion. As would be understood by a designer skilled in the art, a radiused edged transition is common in the design of jars and one defined by a degree of curvature transitioning from one surface to another. The degree of curvature can be chosen or optimized based upon design and intended

application but is still a known feature to be adjusted in designing these types of articles. For example, it can be adjusted to obtain a more rapid or slower transition and/or based upon the size of the article and relative dimensions of the transition surfaces. As would be understood, the radiused transition forms a smooth (physical and visual) transition.

39. The claimed jar further provides for the above-referenced and shown internal compartment. As shown in the drawings, the compartment is an open area, e.g., negative space, within the jar that is defined by interior sidewalls and an interior surface at the bottom of the interior sidewalls in the neck and base portions of the claimed jar. For the purposes of this report, I refer to this negative space illustrated in the drawings as the compartment. This compartment is open only at the top end of the tubular neck portion through its defined circular opening. It extends from the top of the tubular neck portion, through the entirety of the neck portion, and into the tubular base portion as defined by the sidewalls and the bottom surface of the compartment. Within the base portion, the essentially vertical sidewalls transition to the slightly concave base surface through a radiused transition. As the entirety of the claimed jar is shown to be transparent, the contours of the compartment can be seen through the article and/or through the opening at the top of the compartment.

Ex Partes Reexamination

40. As I have been informed, and subsequently reviewed, the '151 Patent was resubmitted before the USPTO for an *ex partes* reexamination proceeding (the "Reexamination"). In forming my opinions, I have reviewed the history of the *ex parte* reexamination proceeding. EX1003.

41. The Reexamination included discussions of several prior art references and the '151 Patent, but primarily focused on the Examiner's sole obviousness rejection based on a combination of a primary reference of McKernan 7mL Frosted Jar ("McKernan") (Exhibit 1003 at 402-03, 408, 435-39) (images reproduced below) in view of secondary reference U.S. Patent D634,202 ("Zamberlan") (Exhibit 1013) (reproduced below). While Zamberlan is listed on the cover of the '151 Patent as a considered reference cited during original prosecution, McKernan was not considered during initial examination of the application resulting in the '151 Patent. In addition, I did notice that the Petition for the Reexamination did not include any expert opinion testimony to support or provide additional context for the assertions in the Petition or the understandings of a designer of ordinary skill in the art concerning the prior art or '151 Patent.

container that was similar to McKernan and lacked a frosted finish, which would result in a body and neck that were fully transparent. *See id.*

43. Lerman was unsuccessful in convincing the Examiner to withdraw the rejection, even though it asserted that McKernan was an improper primary reference for failing to create the same visual appearance as the '151 Patent since McKernan was frosted and an ordinary observer would not be able to view the inside of the jar, unlike the '151 Patent. *See id.* at 261. As Lerman more simply asserted, the '151 Patent conveyed an overall visual impression of openness and clarity to allow an observer to see into an interior while McKernan created a masked visual impression because it was opaque. *Id.* at 263. In addition, Lerman asserted that Zamberlan was an improper secondary reference, and even if a DOSA would combine McKernan and Zamberlan, such a designer would not have selected the elements of Zamberlan to incorporate to McKernan to achieve the claimed design. *Id.* at 265-70. This argument was unsuccessful before the Examiner. *Id.* at 236-42.

44. Lerman appealed the Examiner's determination to the USPTO Patent Trial and Appeal Board ("PTAB" or "Board"), which issued a Decision on Appeal ("Decision") reversing the Examiner's rejection of the '151 Patent. *Id.* at 28.

45. The Decision stated that the specific reference McKernan was an improper primary reference in the context of an obviousness assessment of the '151 Patent because it did not create an overall visual impression that was basically the

same² as the claimed jar. *Id.* at 18-24. Moreover, the Decision determined that because small jars is a crowded field, the difference between a frosted jar of McKernan that did not adequately show the interior of the chamber either from a top perspective or horizontal perspective was too great to present the same overall visual appearance to function as a primary reference. *Id.* The Decision found that McKernan discloses a jar having a frosted base and a very limited view of the interior of its jar in the materials provided by the petitioner and referenced by the Examiner. *See id.* at 18-19. The Decision further found that the prior art proposed combination of McKernan and Zamberlan lacked any particular reason for the inclusion by a skilled designer of certain features of Zamberlan into McKernan, such as modifying the frosted features of McKernan with the transparency of Zamberlan or the specific ornamental design of the interior of Zamberlan, and therefore did not invalidate the '151 Patent. *See id.* at 26. I did notice that the Decision's finding was limited to deficiencies in the specific references of McKernan and Zamberlan and the Examiner's arguments that were presented without expert opinion or background knowledge as to motivations to combine.

VI. Claim Construction

46. As recited on the cover of the '151 Patent, the claimed design is an ornamental design for a jar. Lerman explicitly disclaimed portions of the illustrated

² Pre-LKQ.

designs by stating: “The broken lines shown in the drawings are included for the purpose of illustrating portions of the article that form no part of the claimed design.”

EX1001. It is my opinion that for the purposes of this *inter partes* review proceeding and the issues before the USPTO, no explicit construction is required for the claims.

47. The Decision described the ’151 Patent as having a wide and thick circular base, a tall narrow circular neck extending upwardly from the base, wherein the base and neck are concentric and the base encompasses about 40% of the total height of the jar. EX1003 at 16. Additionally, the Decision noted that the internal chamber extended through the neck and into the base portion of the design. *See id.* at 17. The PTAB’s description does not contradict my general understanding of the claim.

VII. Designer of Ordinary Skill in the Art

48. For purposes of this proceeding, it is my opinion that a designer of ordinary skill in the art that designs jars, the same as or similar to the jar shown and claimed in the ’151 Patent, would be someone who would have had a minimum of a bachelor’s degree in Industrial Design, Mechanical Engineering, or related field and approximately 5 years of professional experience in the field of plastic or glass consumer products design and manufacturing (“DOSA” or “POSITA”). However, additional graduate education could substitute for professional experience, or significant experience in the field could substitute for formal education. Thus, the

more experience one has in a relevant field, the less formal education that may be required in order to attain the level of ordinary skill in the art, and vice versa. I consider myself at least as qualified as a DOSA for the purposes of this proceeding.

VIII. LEGAL STANDARDS FOR INVALIDITY

49. I am not a practicing attorney or an expert in design patent law. I have been informed of the following considerations relating to invalidity in the context of U.S. design patents. In my professional experience, I have also assisted attorneys in the prosecution to obtain design patents.

50. I have been informed that the ultimate inquiry as to whether a claimed design is obvious is whether the claimed design would have been obvious to a DOSITA who designs articles of the type involved. *See LKQ Corp. v. GM Glob. Tech. Operations, LLC*, 2024 U.S. App. LEXIS 12139 at *33 (Fed. Cir. May 21, 2024). I understand that prior art references must be analogous art, which “includes art from the same field of endeavor as the article of manufacture of the claimed design.” *Id.* at *29. I have been informed that a primary reference must be identified and, although the reference need no longer be “basically the same” as the claimed design, the “more visually similar the primary reference design is to the claimed design, the better positioned the patent challenger will be to prove” obviousness. *Id.* at *30-31. I have been informed that a primary reference may be modified by using secondary references. *Id.* at *34. With respect to secondary references, I further

understand that there must be some “reason (without hindsight) that an ordinary designer in the field of the article of manufacture would have modified the primary reference with the feature(s) from the secondary reference(s) to create the same overall appearance as the claimed design,” but “the motivation to combine these references need not come from the references themselves.” *Id.* at *35I further understand that the *LKQ* decision (*id.* at *19) indicates that standards for addressing obviousness should align with the more flexible approaches described in *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 86 S. Ct. 684, 15 L. Ed. 2d 545 (1966); *Smith v. Whitman Saddle Co.*, 148 U.S. 674, 680, 13 S. Ct. 768, 37 L. Ed. 606, 1893 Dec. Comm’rPat. 324 (1893); and *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398, 127 S. Ct. 1727, 167 L. Ed. 2d 705 (2007).

51. I understand that KSR provided several examples of rationales that may support a conclusion of obviousness, including:

- the “combination of familiar elements according to known methods” that “does no more than yield predictable results,” *id.* at 416;
- “a structure already known in the prior art that is altered by the mere substitution of one element for another known in the field,” requiring more than “a predictable result” for patentability, *id.*;

- “simply arrang[ing] old elements with each performing the same function it had been known to perform,’ and yield[ing] no more than one would expect from such an arrangement,” *id.* at 417;
- “a technique [that] has been used to improve one device,” where “a person of ordinary skill in the art would recognize that it would improve similar devices in the same way” and that application is not beyond the ordinary skilled artisan’s skill, *id.*;
- “the simple substitution of one known element for another or the mere application of a known technique to a piece of prior art ready for the improvement,” *id.*; and
- circumstances in which “there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions” and “the known options [are] within [an ordinary skilled artisan’s] technical grasp” and pursuing those options “leads to the anticipated success,” in which case the options are “obvious to try” and “might” be obvious, *id.* at 421.

52. I likewise understand that LKQ provided several examples of rationales that may support a conclusion of obviousness, including:

- a. an “ordinarily skilled designer’s experience, creativity,’ as well as ‘what market demands and industry customs exist’ in the relevant field and, ‘which

ornamental features are commonplace in the relevant field.” *LKQ Corp.*, 2024 U.S. App. LEXIS 12139 at *35 (citing *Amicus United States Br.*).

- b. “combining the front half of the [one] saddle with the back half of the [other] saddle was not inventive because it was ‘customary for saddlers’ to make such combinations” and “in the exercise of the ordinary skill of workmen of the trade, and in the way and manner ordinarily done.” *Id.* at *16-17, 20-21 (discussing *Whitman Saddle*).

53. I further understand that obviousness is determined by evaluating “whether an ordinary designer in the field to which the claimed design pertains would have been motivated to modify the prior art design to create the same overall visual appearance as the claimed design.” *LKQ Corp.*, 2024 U.S. App. LEXIS 12139, at *34 (quoting *Campbell Soup, Co. v. Gamon Plus, Inc.*, 10 F.4th 1268, 1275 (Fed. Cir. 2021)). The inquiry continues to “focus[] on the visual impression of the claimed design as a whole and not on selected individual features.” *Id.*

54. Once the prior art references are identified and the hypothetical reference is created, then the hypothetical reference is compared through the eyes of a designer of ordinary skill in the art who designs the types of articles claimed to determine if the design is invalid as obvious over the cited prior art. In this context, small differences are immaterial and will not necessarily preclude a finding of obviousness.

IX. Prior Art

55. As I have been informed, in an inter partes review proceeding, only printed publications are allowed to be relied upon as prior art supporting invalidity. Among others, I have considered the following references in the context of obviousness of the '151 Patent. I have been informed that the following references constitute printed publications that can serve as prior art.

a. Neutrogena

56. As shown below, I believe the Neutrogena product to be analogous art.

57. Neutrogena Corporation has been selling and advertising skin products in its branded jars/containers since at least 2006.³ For example, the Neutrogena Corporation sold and advertised its product family, Hydro Boost, including in blue tinted transparent jars. *See, e.g.*, EX1014 at 4; EX1015 (copyright 2011); EX1022; EX1023 at 33-39. Based upon the documents and the time stamp, by July 29, 2014, Neutrogena Corporation also advertised Hydro Boost Range. EX1016. I have been informed that Exhibits 1015 and 1017 were documents reflecting promotions and advertisements available to the public before the earliest filing date of the '151 Patent, which I agree based upon the trade show displays and the statements on the

³ As used herein, the terms “jars” and “containers” for Neutrogena Corporation’s products are used interchangeably.

documents. *See* EX1015; EX1017. This is also supported by additional evidence I have reviewed. *See* EX1022; EX1023 at 2-13, 33-39. The advertising materials clearly show all relevant angles of the design of the containers/jars that these products are sold in, including their transparent, tinted blue jars. Below are some reproductions of the advertising materials, which I designate as “Neutrogena” prior art.



Exhibit 1015

July 29, 2014



Exhibit 1016



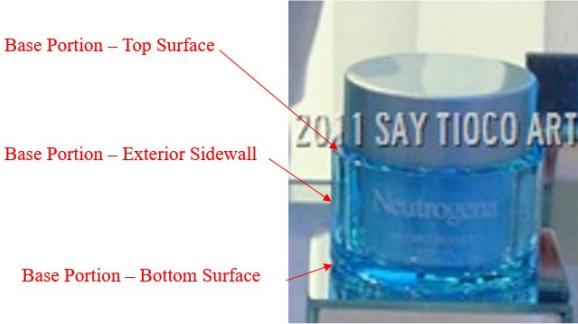
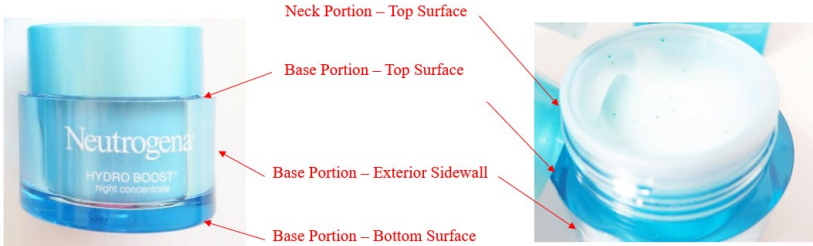
Exhibit 1017

The document I reviewed from the Internet Archive showing a time stamped visual representation of the domains of Exhibits 1015 and 1017 include a image split between two pages in Exhibit 1017. EX1017; EX1022; EX1023 at 3-4, 9-10. After studying the images of the Neutrogena jar without a lid, my review detects no differences between the images, except potentially in pixel quality, which is likely attributed to the image being obtained separately, e.g., one from Internet Archive Storage and one from the current domain. Therefore, based upon my review of the documents, and as demonstrated by the Affidavit provided in Exhibits 1022 and 1023, it is my opinion that these websites and corresponding pdf print out of the websites were available online respectively as early as 2011 and as late as 2015. *See* EX1015; EX1017; EX1022; EX1023 at 2-13, 33-39; *see also* EX1014 (dated July 2014); EX1016 (timeline showing 2006-2011). Moreover, all these images, and at least Exhibits 1015 and 1017 reflect images of the same jar. In other words, the images of Exhibit 1015 and Exhibit 1017 both reflect the same Neutrogena jar and are referred to show different angles and aspects of the jar. For simplicity, I identify the images showing the same jar in Exhibits 1015 and 1017 as “Neutrogena.”

58. The images shown in the documents referenced above show the Neutrogena transparent (blue tinted) jars/containers that Neutrogena Corporation sold and advertised its products in as reduced to printed documents illustrating the advertisements. I have been informed that the webpages these images are found on

constitute prior art for this proceeding and therefore my opinions may rely on the images of the products. My opinions concerning the Neutrogena products are limited to the visual images provided above, the marking/commenting material associated with the images, and the understanding of a designer of ordinary skill in the art as of the relevant time. For the purposes of my opinion, below are annotated figures of Neutrogena. Images from Exhibit 1016 are consistent with the below images of Exhibits 1015 and 1017 and shown below as well.

Exhibit	Annotated Drawing
EX1015	 Tubular Neck (within cap) Tubular Base
EX1017	 Tubular Neck (within cap) Tubular Base Tubular Neck Threads Tubular Base

EX1015	 Base Portion – Top Surface Base Portion – Exterior Sidewall Base Portion – Bottom Surface
EX1017	 Neck Portion – Top Surface Base Portion – Top Surface Base Portion – Exterior Sidewall Base Portion – Bottom Surface
EX1015	 Radiused edge Flat surface Radiused edge
EX1017	 Radiused edge Flat surface Radiused edge Radiused edge Flat surface
EX1015	 Compartment (within neck) Radiused Transition

EX1017	 Compartment (within neck) Radiused Transition  Compartment
EX1017	 Vertical wall (within cap) Vertical wall  Vertical wall Vertical wall

Exhibit	Annotated Drawing
EX1016	 Tubular Neck (within cap) Tubular Base
EX1016	 Base Portion - Top Surface Base Portion - Exterior Sidewall Base Portion - Bottom Surface
EX1016	 Flat surface Radiused edge Radiused edge
EX1016	 Compartment (within neck) Radiused Transition

59. As shown above, Neutrogena is a transparent blue tinted jar. The above images are from different sources, and although the jars appear to potentially have

different caps and lids, in my opinion, based on reviewing the container structure, relative dimensions, and respective visual cues, the images are all of the same container, potentially with different text and/or designs printed on the exterior and associated with different caps/lids. Images above show the different elements and features of the container both with the cap and without the cap allowing an essentially complete view of all relevant perspectives of the container. As can be seen, in all images, Neutrogena shows a transparent tinted blue jar having a tubular base and neck portion, where the neck portion is located concentrically above the base portion and extends upwards from a horizontal top surface of the base portion. It can be seen that the base portion has a greater diameter than the neck portion based on the relative widths and the neck (with and without the cap) objectively appearing narrower than the base. A DOSA would further recognize that the base portion includes horizontal top and bottom circular surfaces and an exterior vertical sidewall, with the interior vertical surface defining a lower end and bottom surface of the compartment (discussed below). The neck portion in some images is contained within a cap in certain images, but in all images appears to be slightly shorter than the base portion – which can be presumed because the neck portion is within the cap and the cap itself is slightly shorter than the base portion. The cap is attached to the neck portion by means of the threads shown on the neck portion. The tubular neck portion together with the tubular base portion define the open compartment space

that is only accessible through the circular opening at the top of the compartment/neck portion. As can be seen, the transition between the exterior vertical side wall of the base portion and the respective top and bottom surfaces of the base portion is a radiused edge, which means a smooth transition edge with a degree of curvature.

60. The neck portion includes an external sidewall, an internal sidewall, and a flat top surface defining a circular opening, which is the entrance to the compartment. Although the neck portion is distinct from the base portion, it is of unitary material with the base portion. The external surface of the neck portion includes threads that allows the attachment of the lid/cap, which is including in a number of the images, to the container. The transition between the interior and exterior sidewalls of the neck portion and the top horizontal surface are radiused edges. Finally, the top of the tubular sidewall of the neck portion defines a circular opening for the compartment, which allows visibility of the contents and contours of the compartment.

61. As referenced above, the negative space contained within the container can be considered a compartment. The compartment is located within both the base and neck portions and is lined by a (apparently) removable liner, as shown above. Based upon my experience in the field, and the visual appearance of the white liner in Exhibit 1017, the white liner appears to be a removable plastic or polymer that is

designed to conform to the compartment dimensions. As can be seen, the entire container is transparent and a person viewing the product, or an ordinary observer, can see through the container to the contours of the compartment and its liner. Alternatively, without the cap, a person viewing the product can see into the compartment from the top. The opening to the compartment is located at the top end of the neck portion, which is circular. The compartment, as can be seen through the sidewall, extends from the opening at the top, through the neck portion, and into the base portion. Within the base portion, the sidewalls of the compartment transition to a concave bottom surface (in the upwards direction) through radiused edge transitions, as can be seen through the sidewall shown in Exhibits 1015 and 1017. A designer skilled in the art would understand from the horizontal perspective visual of the transparent jar that the bottom surface of the compartment is slightly concaved in an upwards direction and contains a small radius of curvature. The section of the base portion below the bottom surface of the compartment is a solid transparent portion, which demonstrates that the compartment does not extend fully through the base portion. Any color differential between that section and the base portion in general is simply due to light refraction within the base portion and the thickness of material across the entire diameter of the base portion.

b. **D795,705**

62. U.S. Patent D795,705 (the “’705 Patent”) is entitled “COMPARTMENTALIZED CONTAINER” and recites a claim for the “ornamental design for a compartmentalized container....” EX1007. I have been informed that the ’705 Patent is prior art to the ’151 Patent.

63. The ’705 Patent includes seven figures that illustrate the container it claims, which I have reproduced below.

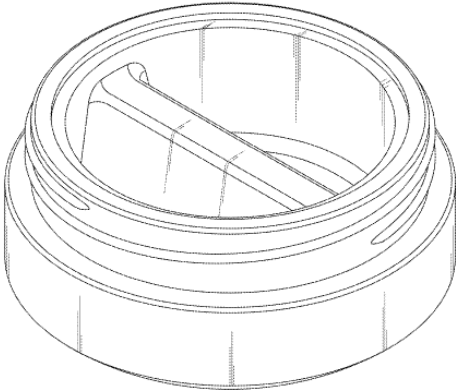
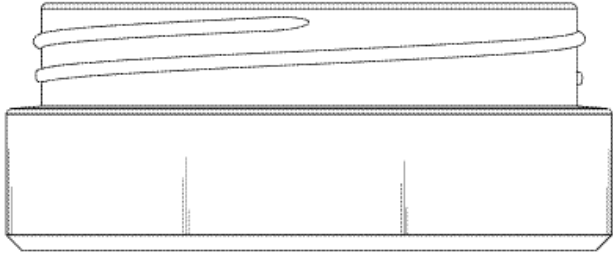
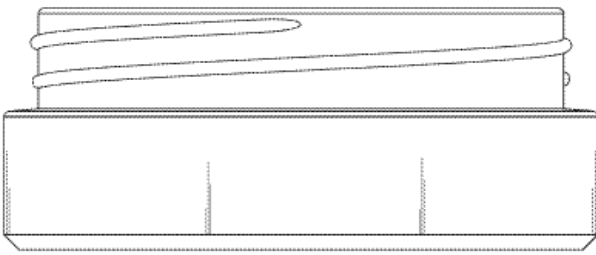
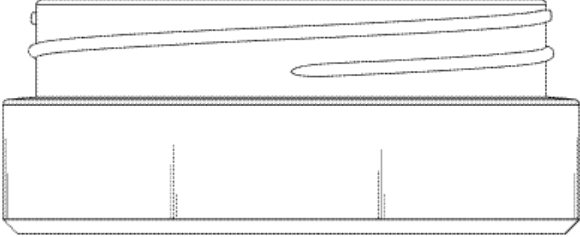
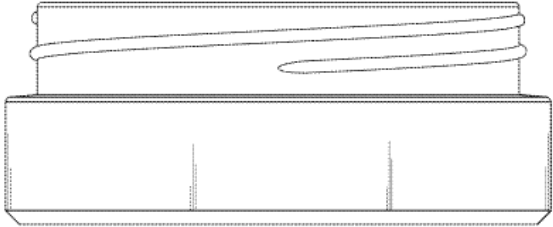
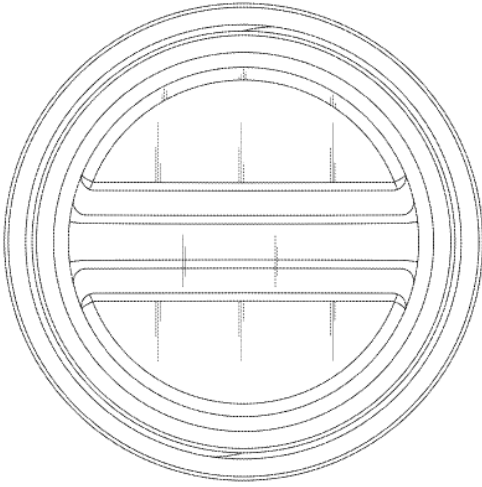
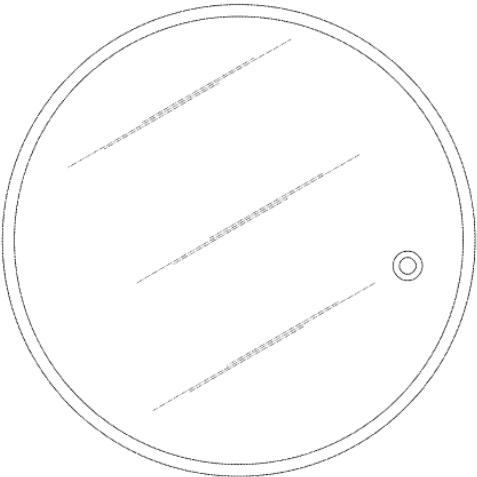
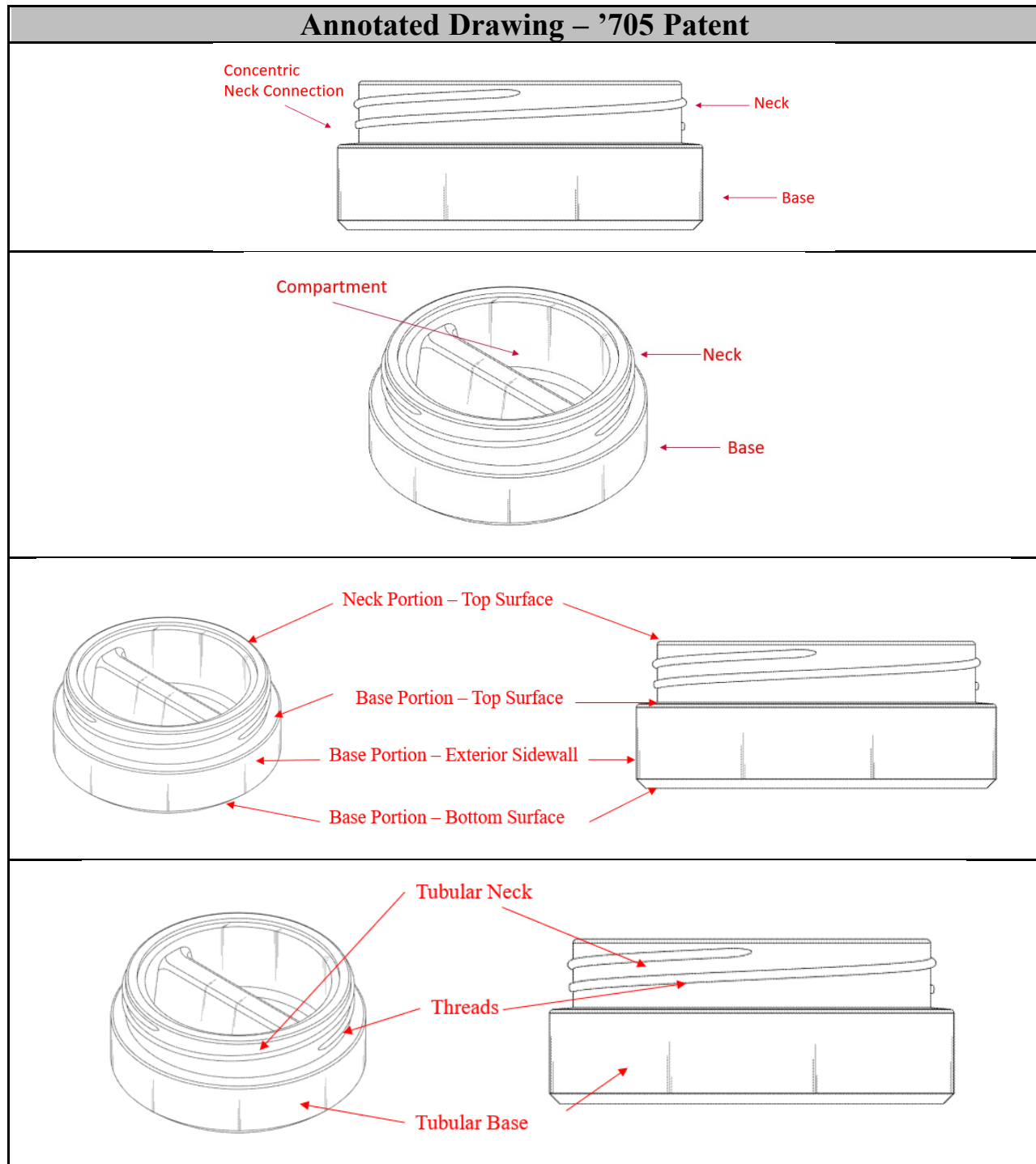
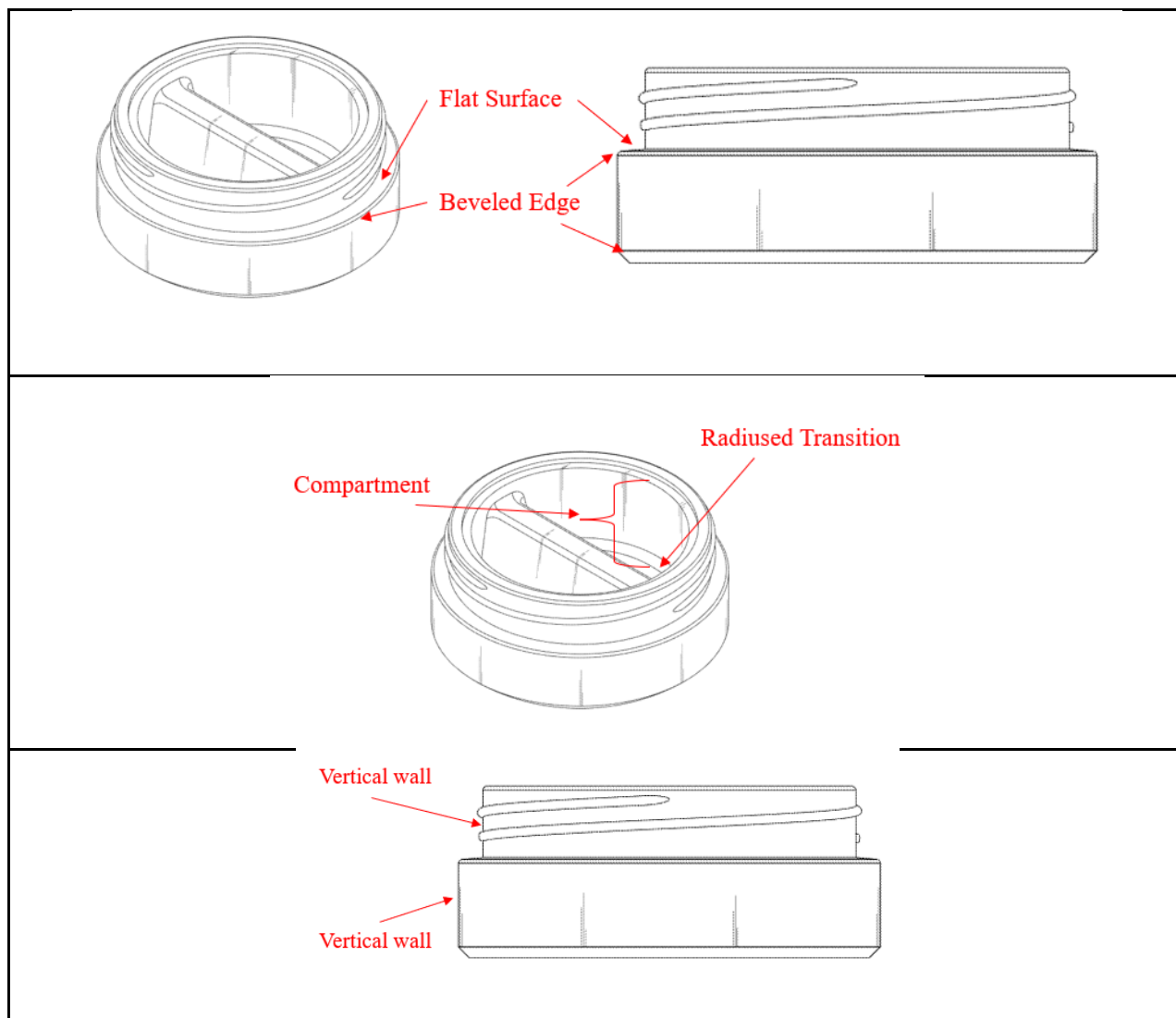
Description	Drawing
Fig. 1: Perspective View	
Fig. 2: Front Elevational View	
Fig. 3: Rear Elevational View	

Fig. 4: Left Side Elevational View	
Fig. 5: Right Side Elevational View	
Fig. 6: Top View	
Fig. 7: Bottom View	

64. In order to more clearly illustrate the design of the '705 Patent, below are annotated figures of certain of the above drawings.





65. As shown above in the original and annotated figures, the '705 Patent illustrates a container having a tubular base portion, a tubular neck portion, and a compartment space disposed within the tubular base and neck portions. The neck portion is concentrically located atop the horizontal top surface of the tubular base portion. The neck portion includes a circular opening at its top providing access to the concentrically located compartment. The width (diameter) of the tubular base

portion is wider than the width (diameter) of the tubular neck portion, as shown in the drawings. The neck and base portions each appear to have essentially the same or the same height. Furthermore, the tubular base portion includes external vertical side walls and perpendicular horizontal top and bottom surfaces. As discussed in further detail below with the compartment, the base portion further contains internal side walls and a surface defining the compartment. The corner transition between the external vertical side walls of the base portion and the respective top and bottom surfaces is a beveled transition. The beveled transition limits the extent of a rigid 90° corner, but still includes distinct edges. As illustrated by the figures, the '705 patent is opaque.

66. The tubular neck portion is located concentrically above the tubular base portion and the neck and base portions are one material. The external surface of the neck portion includes threads which would allow the addition of a cap or lid. As shown in the image from above, the top surface of the neck portion includes a horizontal flat surface that is perpendicular to the internal and external vertical tubular side walls. The top flat surface of the tubular neck portions defines a circle that is the opening of the compartment. The transition from the vertical side walls of the tubular neck portion to the top surface of the tubular neck section is a beveled edge as demonstrated in the perspective and overhead views above. A person would

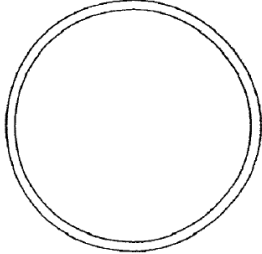
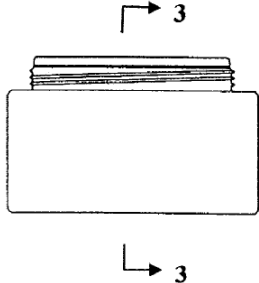
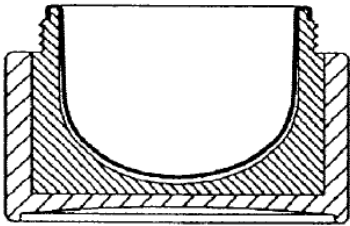
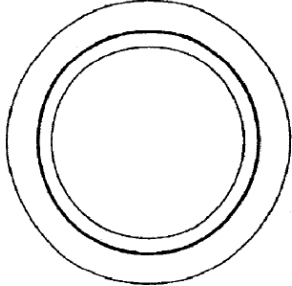
recognize the beveled nature, in part, because of the distinctive straight line shown in the figures as part of the transition.

67. The '705 Patent further also includes a negative space within the claimed article that is its compartment. The compartment space is disposed within both the neck and base portions of the container and is open at the top end of the neck portion. As shown in the figures, the compartment extends from its concentrically located opening at the top of the neck portion, through the neck portion, and into the base portion where the vertical sidewalls transition into the base surface of the compartment. The transition to the base surface is beveled and occurs within the base portion of the container. The compartment further includes a wall that extends partially through the compartment and bifurcates the compartment into two chambers. As the wall does not extend fully up the sidewalls of the compartment, the wall would not be expected to create a complete seal between the chambers.

c. **D578,891 S**

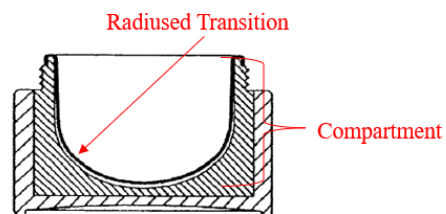
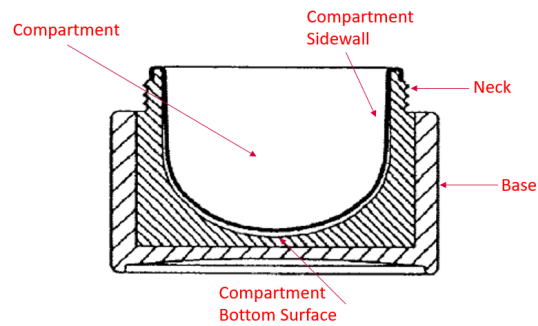
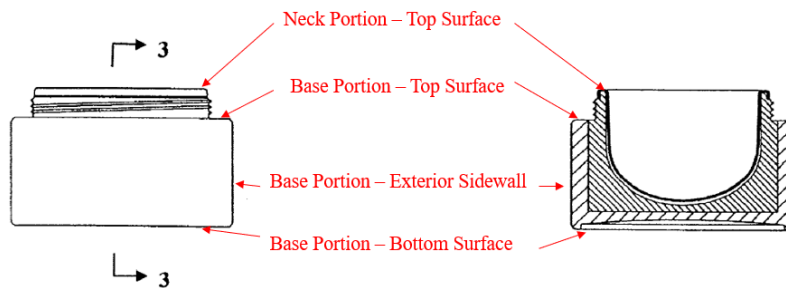
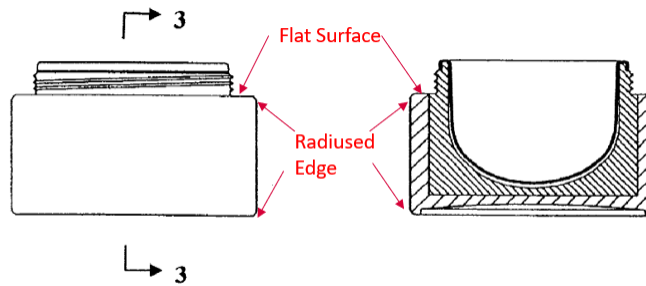
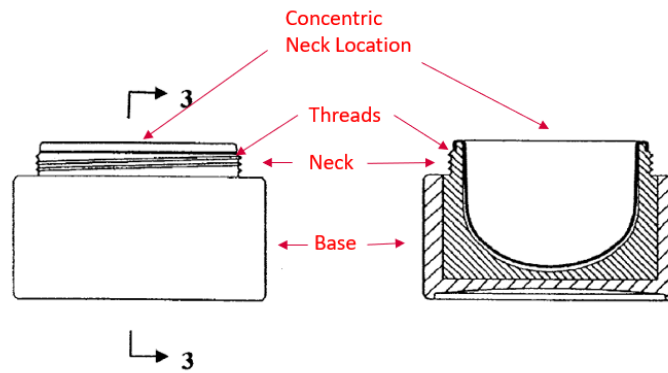
68. U.S. Patent D578,891 S (the "'891 Patent") is entitled "BOTTLE" and recites a claim for the "ornamental design for a bottle." EX1008. I have been informed that the '891 Patent is prior art to the '151 Patent.

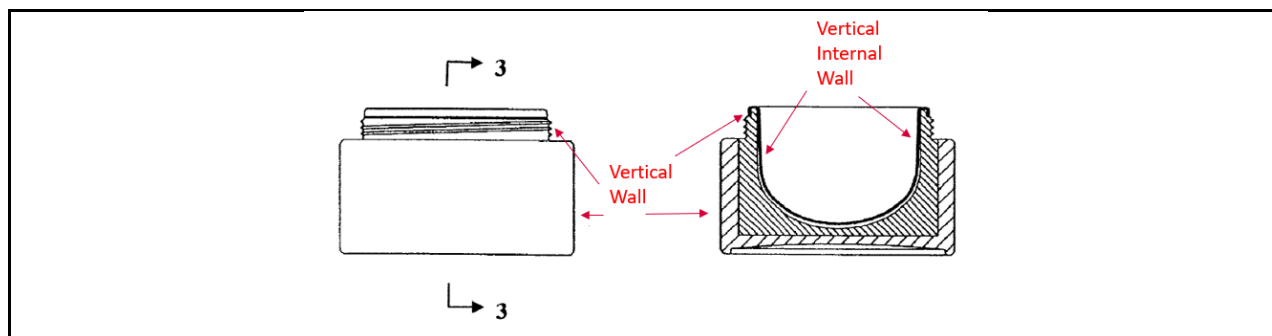
69. The '891 Patent includes four drawings (reproduced below) that illustrate its claimed ornamental design of its bottle.

Description	Drawing
Fig. 1: Bottom Plan View	
Fig. 2: Front Elevation View (rear elevation view is identical)	
Fig. 3: Cross-section view	
Fig. 4: Top Plan View	

70. In order to more clearly illustrate the design of the '891 Patent, below are annotated figures of certain of the above drawings.

Annotated Drawing – 'D891





71. The '891 Patent discloses a bottle having a tubular base portion, a concentrically located tubular neck portion located above the tubular base portion, and an internal negative space that defines a compartment disposed within the base and neck portions and accessible through a circular opening at the top of the neck portion. The neck portion is located concentrically with respect to the tubular base portion and is formed through a single material with an internal portion of the tubular base. The tubular base portion further includes a second material the surrounds the internal portion of the tubular base internal material. In other words, there is a single piece that forms the tubular base and tubular neck portions, as well as a second piece that is external to the base portion of the single piece which further forms a portion of the tubular base. Although there are two pieces, for the purposes of description, I limit my references to the base portion (both pieces) and the neck portion (single piece).

72. The tubular base portion has a greater diameter than the tubular neck portion. As shown in the above drawings, the tubular base portion includes external

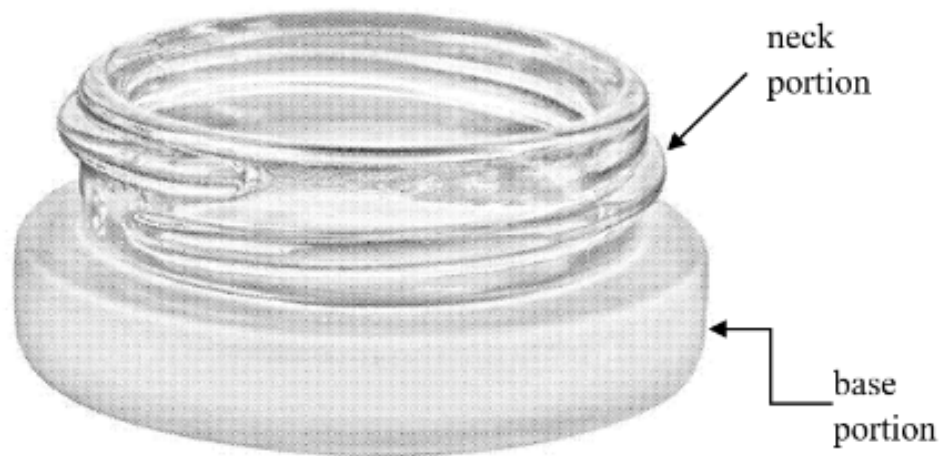
and internal vertical sidewalls and flat horizontal top and bottom surfaces. The '891 Patent teaches that the corner transition from the external sidewall to the respective flat top and bottom surfaces is a radiused transition. As part of the single piece forming a portion of the top flat surface of the tubular base portion, the tubular neck portion extends upwards from the tubular base portion surface. Even though the '891 Patent shows two different materials forming the tubular base portion and tubular neck portion, both materials include cross-hatching that would identify the materials as being opaque.

73. With respect to the tubular neck portion, the drawings of the '891 Patent show that the external sidewall further includes threads which would permit, for example, the screw attachment of a lid or cap. However, similar to the '151 Patent, the '891 Patent does not explicitly claim a cap, but a designer skilled in the art would recognize that the threads would be utilized for a cap or lid. Moreover, similar to its base portion corner transitions, the transition from the sidewall of the tubular neck to the top surface of the tubular neck portion is radiused. The top surface of the tubular neck portion is shown to be horizontal and perpendicular to both the internal and external vertical sidewalls of the tubular neck portion. The circular opening at the top of the tubular neck portion defines the opening of the negative space within the container, i.e., the compartment.

74. Finally, as noted above and shown in the figures of the '891 Patent, the '891 Patent includes a negative space disposed within the container article that constitutes a compartment. The compartment contains a single chamber and is defined by the essentially vertical internal sidewalls of the tubular neck portion and base portion, as well as the radiused transition between sidewall and concave bottom surface of the compartment located within the base portion of the container. The negative space or compartment therefore extends from the top of the neck portion, through the entirety of the neck portion, and into the base portion where it forms the bottom surface of the compartment.

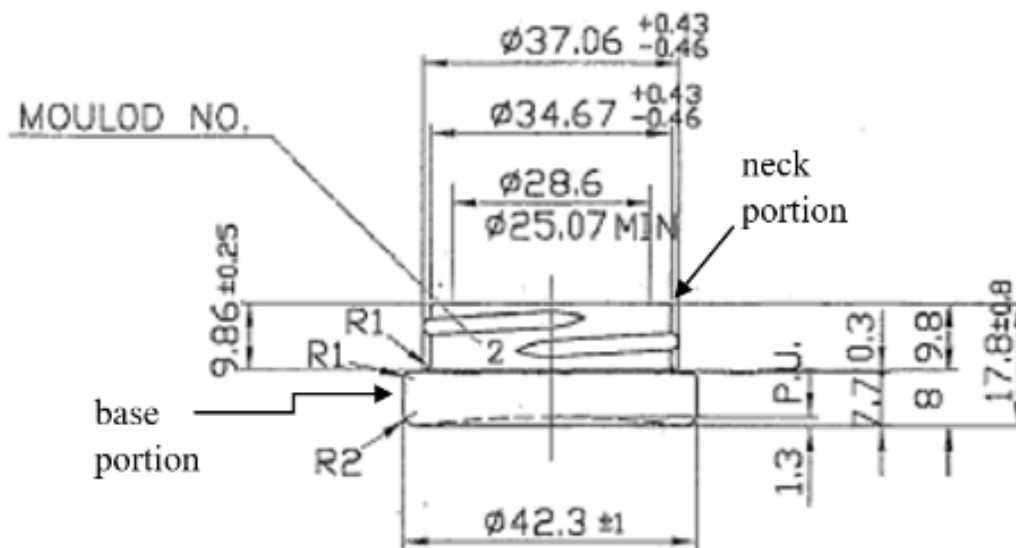
d. **McKernan Jar**

75. The McKernan Jar is a glass jar with a frosted base portion and a neck portion that includes threading, as seen below. EX1003 at pg. 436. The base portion is wide and truncated while the neck portion is narrower and taller than the base portion. *Id.*

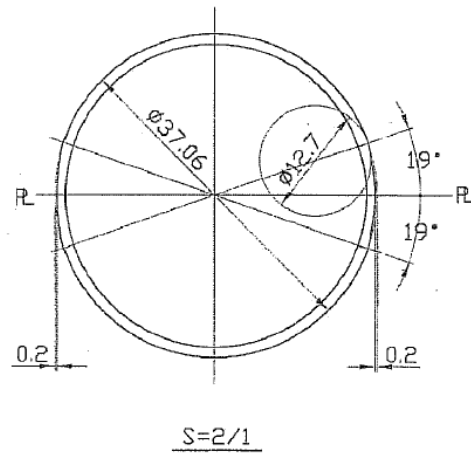


Picture from catalog published in 2012

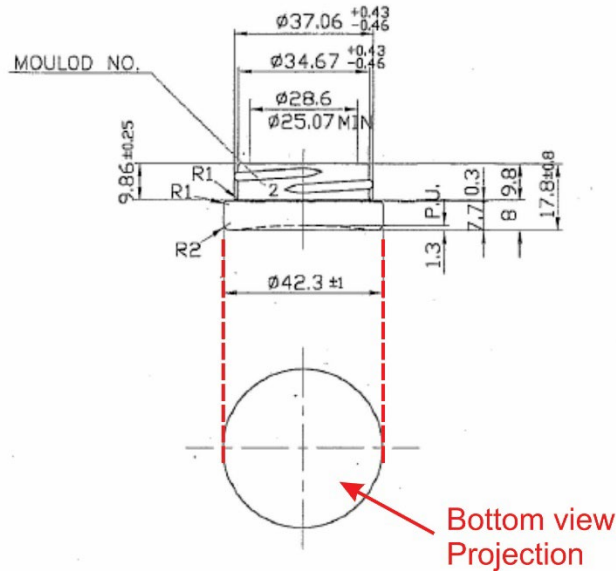
76. Below is a part drawing of the McKernan Jar (shown with annotations). *Id.* at pg. 438. This part drawing, dated March 2011, corresponds to the product identified in the catalog published in 2013 (*compare* EX1003 at 435-46, EX1025 (identifying “EL-28595” as the product in the URL) *with* EX1003 at 438 (identifying “EL-28595” as the DWG NO.)) shows that the base portion has a width 42.3mm as compared to the narrower width of 34.67mm of the neck portion; and shows the height of the base portion of 7.7mm as compared to the taller neck portion which has a height of 9.8mm. *Id.*



77. Below is a part drawing of the McKernan Jar showing a top view of the neck portion of the jar. *Id.* at pg. 439.



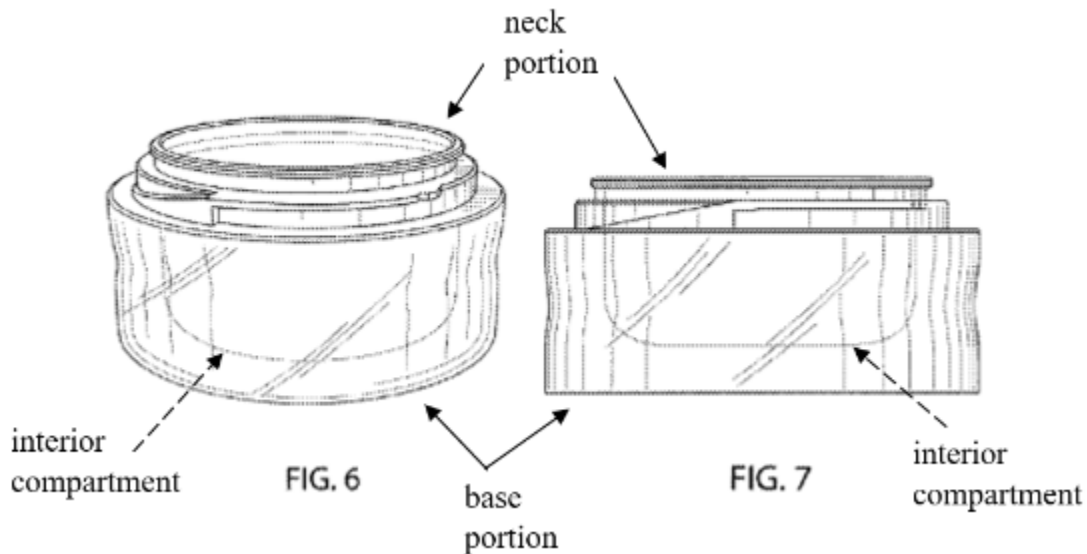
78. Although the above view shows only the neck portion and does not include the base portion of the McKernan Jar, a skilled designer would recognize that the base portion (shown below), which has a tubular shape, would present as an outermost circle from a top view of the jar that is concentric with the innermost circle (seen in the view above) that is presented by the neck portion. That is supported by the above picture and side view of the McKernan Jar which show that the base portion has a tubular shape and is wider than the neck portion, and that the neck portion is concentric with the base portion. *Id.*



e. **D634,202 to Zamberlan et al.**

79. U.S. Patent D634,202 S to Zamberlan et al. (“Zamberlan”) is entitled “FLASK, CAP AND REFILL” and recites a claim for the “ornamental design for a flask, cap, and refill.” EX1013 at (54) and (57). Zamberlan includes 26 drawings, of which Figs. 6 and 7 (reproduced below with annotations) are representative of the design of the flask taught by Zamberlan.

80. The flask of Zamberlan includes a base portion and a narrower threaded neck portion. *Id.* at Figs. 6 and 7. Figs. 6 and 7 of Zamberlan are top perspective and front elevation views, respectively, of the flask. *Id.* at [Description] and Figs. 6 and 7.



81. As seen in Figs. 6 and 7, the flask is transparent thereby revealing an interior bowl-shaped compartment. *Id.* at Figs. 6 and 7.

X. Opinion on Obviousness of the '151 Patent

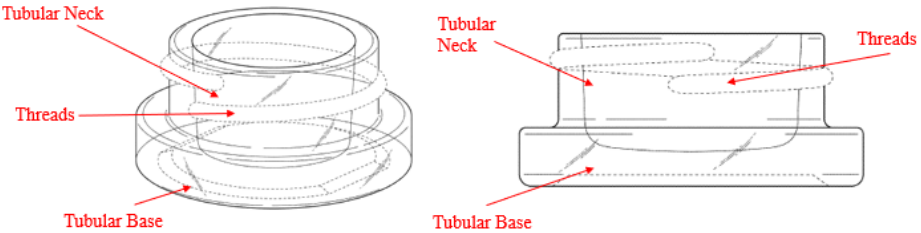
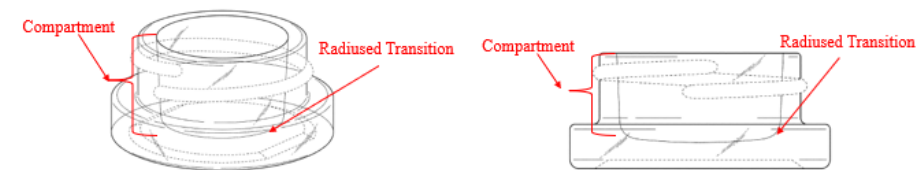
82. Based on my review of the prior art discussed in further detail below, the '151 Patent would have been obvious to a designer of ordinary skill in the art as of the priority date of the '151 Patent.

a. Ground 1: The '151 Patent is Obvious in view of Neutrogena and the '891 Patent

83. More visually similar In my opinion, the overall visual appearance of Neutrogena is more visually similar as the '151 Patent, and would also have been considered more visually similar by a designer of ordinary skill in the art.

84. As demonstrated by the below respective figures, the overall visual appearance between Neutrogena (without the cap) and the '151 Patent is essentially

the same. First, at a high level, both designs include what I have defined as a concentrically positioned tubular neck portion disposed above a generally tubular base portion, with a negative space, e.g., compartment, disposed within the container/jar and extending from the top of the neck portion into the base portion. EX1001; EX1017. As can be seen in the below images, the transitions between perpendicular surface, for example, such as the base portion's vertical sidewalls and top and bottom surfaces, the top portion's vertical sidewalls and the top surface of the base portion, and the interior vertical sidewalls and the bottom surface of the compartment are all radiused corners. *See id.* To the extent that Neutrogena includes an interior liner disposed in its compartment, the liner is not relevant to my analysis as its presence is not disclaimed by the '151 Patent. Further, as can be seen from the below images, the liner does not prevent visualization of the top surface of the neck portion as the liner is also partially transparent. *See* EX1017.

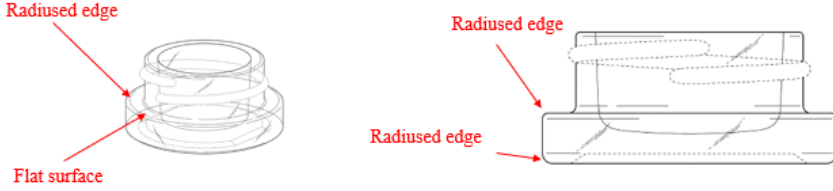
Reference	Image
'151 Patent	 The image shows two perspective views of a container. The left view is a perspective view showing the tubular neck, threads, and tubular base. The right view is a perspective view showing the tubular neck, threads, and tubular base.
'151 Patent	 The image shows two perspective views of a container. The left view is a perspective view showing the compartment and radiused transition. The right view is a perspective view showing the compartment and radiused transition.

Neutrogena	
Neutrogena	

85. The above images support my conclusion that the two references are more visually similar. The containers have a transparent wide and thick tubular (or with respect to the bottom section of the base portion, circular) base and a transparent narrower tubular neck portion extending upwardly from the base portion. The neck portion is located concentrically with respect to the base portion. As can be clearly seen through the transparent sidewalls, the references both include exteriorly visible negative space, e.g., storage chamber / compartment, extending downwardly from the top of the neck portion and partially through the base portion. The tubular base portion of each reference, as oriented upon a surface below the bottom portion, includes a lower section that forms a solid disc (below the compartment) as the compartment does not extend through the entirety of the bottom portion of the container. The respective internal tubular vertical sidewalls of the neck portion and

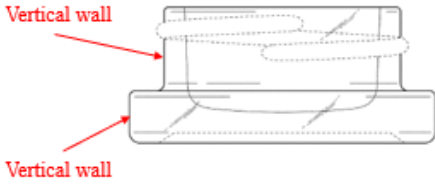
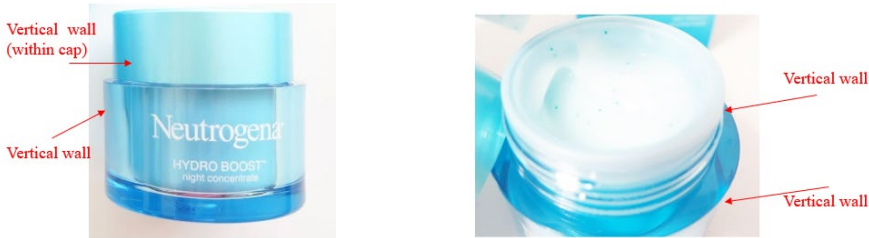
base portion each define the compartment and its transition through a radiused edge to a slightly concave bottom surface of the compartment located in the base portion of the container. A designer of ordinary skill in the art can visually see the concave nature of each the '151 Patent and Neutrogena through the above images, and further recognize that radiused edge transitions would naturally yield to a certain extent concave bottom surfaces.

86. A DOSA would recognize that these containers present the same overall visual impression. Beginning at the bottom (in reference to the end that sits upon a table), Neutrogena teaches radiused edges at the external surface transitions from the sidewall to the horizontal top and bottom surfaces, just like the '151 Patent. Moreover, the diameter of the base portion is wider than the diameter of the top portion of each reference. Finally, the same overall visual impression is further confirmed by the entirety of the containers being transparent, although Neutrogena is tinted blue, which is not precluded by the claim of the '151 Patent. I recognize that the bottom section of the base portion of Neutrogena appears darker in its images, but in my opinion, and based on my experience, that is solely a reflection of the lighting and the thickness of the solid transparent disc and the images still teach a transparent solid blue tinted portion of the container. Additional images of the references are illustrated below to illustrate the similarities and confirm my analysis.

Reference	Image
'151 Patent	
Neutrogena	

87. Although only one image of Neutrogena does not include the cap, a person/designer of ordinary skill in the art would readily understand that the design elements of the neck portion of Neutrogena are essentially the same as the '151 Patent. For instance, the transition between the tubular base portion and the tubular neck portion (top surface of base portion and vertical sidewall of neck portion) is a radiused transition. First, one would be able to ascertain based on the image on the right (above) that the transition is radiused, but also, given that all other visible transitions are obvious radiused edge, this visual appearance would also be confirmed by expected design choices. The vertical external sidewalls are parallel to the base portion's external sidewalls, and the entire container of each reference is transparent, as mentioned above. Further, as demonstrated by the optional threads on the neck portion of the '151 Patent and the actual threads of Neutrogena, both

references teach a design to be incorporated with a lid, which is actually shown in the Neutrogena product. The threads are specifically both disposed on the exterior of the neck portion's vertical sidewalls, as shown below.

Reference	Image
'151 Patent	
Neutrogena	

88. The negative space, or as described herein, the compartment, is shown in both references and is disposed concentrically with respect to and within both the neck and base portions. The compartment is defined by the interior vertical sidewalls of the neck and base portions. In the base portion, the vertical sidewalls transition into the bottom surface of the compartment through radiused edges, as demonstrated by the images. The opening of the compartment, as demonstrated by the above images, is defined by a circular opening at the top of the neck portion. This opening defines the compartment by extending down into the neck portion as

defined by the interior sidewall surfaces into the base portion. In the base portion, the bottom surface of the compartment has a slightly concave curvature, which is located within the base portion, and includes a radiused transition between the interior sidewall surface and the bottom surface of the compartment. The contours of the compartment can be seen through the top opening or the transparent sidewalls. The interior liner shown in Neutrogena is disposed within the compartment but does not affect the design elements of its container. First, the '151 Patent does not disclaim the inclusion of an interior liner if the remaining design elements are present, and second, the actual container of Neutrogena displays the same overall visual appearance as the '151 Patent including transparency. In other words, if the liner was removed, Neutrogena would look like the design claimed in the '151 Patent, and therefore, possess the same visual appearance.

89. Although above I've generally described the individual elements, taken as a whole, the two references in total also illustrate the same overall visual appearance with the same design elements arranged in the same manner and generally in the same proportions. Both references teach transparent contains having an internal compartment accessible through a top opening that is capable of permitting an ordinary observer to see the entire contour of the compartment. To the extent that Neutrogena is tinted blue and contains print words on the exterior, a person/designer would understand that blue tinting and external letters do not detract

from the overall visual impression of a transparent container, as also shown in the '151 Patent.

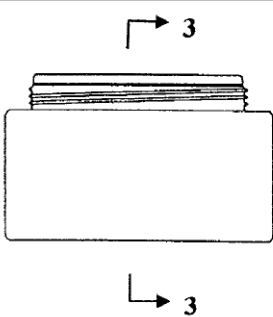
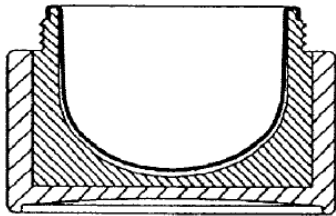
90. Any differences between the '151 Patent and Neutrogena would be considered slight by a DOSA. The '151 Patent shows a jar having a neck portion slightly taller than the base portion, but the relative height of the neck portion of Neutrogena is slightly shorter than its base portion. It is my opinion, however, that a person/designer skilled in the art would have recognized this difference as minimal or an obvious design variant to known designs in the field based upon known design considerations. Both references disclose threads for the inclusion of cap that can cover the neck portion (as explicitly shown in Neutrogena). A DOSA would have recognized the volume of the compartment as a functional design aspect of the container which can be optimized through extending the height of the neck. That would permit, for example, increased volume without occupying additional shelf space. Alternatively, a taller neck would allow for the extension of the compartment and the appearance of potential additional product stored within the neck portion located under an opaque cap. An ordinary observer would not be able to easily therefore ascertain the amount of product within the compartment, which may permit inclusion of less valuable product in the compartment, or an ornamental benefit of enticing ordinary observers to view the container and its contents. Finally, an elongated neck portion would further permit a tool, such as has been included in nail

polish bottles for years. As such, it would have been nothing more than a functional design choice to optimize the height and diameter of the neck portion to correspond to the cap/lid intended for use with the neck/cap. Similarly, the height of the neck would directly affect the volume of the compartment. The volume of the compartment is directly connected to the height of the neck portion as the neck portion partially defines the interior negative space that forms the compartment. An additional consideration to the functional design of the neck would be to incorporate a tool to access the material within the compartment into the cap/lid or along with the cap/lid, for example, as has been done for years with nail polish containers/jars and their respective caps. Simply, the relative height of the neck is a function associated with the volume/utility/access of the compartment within the container. To the extent that it is not simply a functional element, the relative height of the neck was a known variable in the field and would not have detracted a designer skilled in the art from finding Neutrogena to have the same overall visual appearance and therefore be more visually similar as the '151 Patent.

Obviousness of the '151 Patent

91. The '891 Patent, described in detail above, discloses a bottle very similar to the design of Neutrogena. EX1008. In my opinion, a person/designer skilled in the art that makes relevant products, would have been motivated to incorporate certain features of the '891 Patent into the design of Neutrogena, at least

because a designer would recognize that the features were appropriate, could be used in the similar design of Neutrogena, and would be no more than utilizing design elements in a similar design for their intended purpose. Simply, as shown below, because the designs are so similar, a designer skilled in the art would recognize the applicability of design features from one to the other. Below, for ease of reference, are images of the two references side-by-side demonstrating their similar appearance.

Neutrogena	'891 Patent
	
	

92. Neutrogena and the '891 Patents illustrate the same overall configuration that include the same tubular base portion, tubular neck portion, and concentrically located compartment disposed within the tubular neck portion and

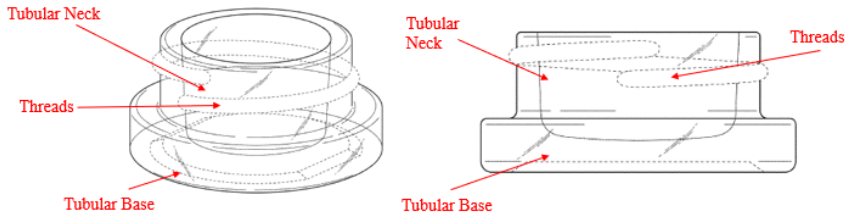
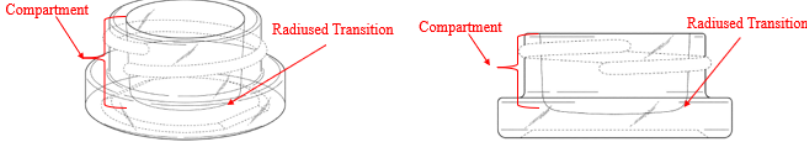
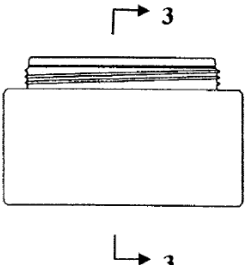
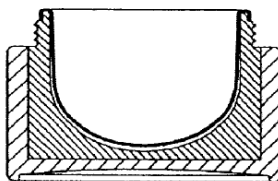
extending downwardly from the neck portion and particularly into the tubular base portion, as described above with respect to Neutrogena. Notably, both articles include and disclose radiused edged transitions throughout their respective designs, including at the external transitions of the base portion (sidewall to bottom and top surfaces), the top and bottom transitions of the neck portion (including top surface to internal and external tubular vertical sidewalls), and the internal transition from the vertical sidewalls to the bottom surface of the compartment. The bottom surface is concave with respect to the container opening. Further, in both designs the tubular neck portion has a smaller diameter than the tubular base portion. Based upon my experience, due to the overall similarity, a DOSA would have been motivated to apply features of the '891 Patent to Neutrogena because it would have been an obvious substitution of ornamental features for their intended purpose.

93. The '891 Patent disclosing an opaque bottle unlike Neutrogena's transparent container, however, would not dissuade a person/designer of ordinary skill in the art from finding the designs sufficiently related to apply design features from one design to the other, at least because such a difference is known and trivial given the respective designs, as described above. The person/designer of ordinary skill in the art has the ability to view the entirety of the object/design (internal and external) due to the opening of the compartment and the design of the compartment to be fully viewable from the circular opening, in part because the compartment is

defined by vertical sidewalls extending downward from the circular opening. Indeed, the '891 Patent explicitly does not claim a cap, thereby permitting an observer the ability to view the interior of the compartment. Moreover, the choice of a transparent design was well known in the industry as of the relevant time, and the simple difference between two objects having the same overall design configuration with one being opaque instead of transparent, would have only been a minimal difference that would not detract from a finding that the articles are similar. Moreover, both references explicitly disclose the inclusion of threads on an exterior surface of their respective neck portions, for use of a cap or lid, which may be transparent or opaque, thereby rendering additional aspects of the overall product opaque or transparent to end users, which was known in the field. Thus, any issues due to opacity of the sidewalls of the '891 Patent could be solved by transparent lids or caps together with the circular opening of the compartment that allows full visualization of the interior and exterior contours and product contained within the compartment of the '891 Patent, similar to Neutrogena. Thus, although the transparent means are somewhat different, the intended effect would have been known to be similar.

94. For at least the reasons explained above, a person/designer of ordinary skill in the art would have sought to incorporate teachings and/or design elements of the '891 Patent into the container of Neutrogena. First, the similarities between the

designs, functions, and presentations would suggest that design elements of one would be applicable to the other. In addition, different functional intentions would suggest a person/designer skilled in the art to incorporate features of one design into the other, for example, optimization of intentional volume in the compartment, ease of access to the compartment, and optimal display of contents of the compartment, are each individual reasons a designer skilled in the art would incorporate design elements. Therefore, in my opinion a designer skilled in the art would be motivated to combine Neutrogena and the '891 Patent. Such a combination would disclose or render obvious each element of the '151 Patent. Below are annotated images to assist in conveying my opinion.

Reference	Image	
'151 Patent		
'151 Patent		
Neutrogena		
Neutrogena		
'891 Patent		

95. Neutrogena, as explained above, already discloses design elements and an article that is very similar to the claim of the '151 Patent, for example, Neutrogena

discloses the same overall shape and configuration as claimed in the '151 Patent. As shown in the above images, both Neutrogena and the '151 Patent include articles having a tubular bottom portion, a tubular neck portion, and a compartment located internal to the tubular base and neck portions. The transitions between different perpendicular planes are also shown to be radiused edge transitions, both relating to internal transitions, e.g., compartment sidewall to bottom, as well as external transitions, e.g., base portion sidewall to top and bottom horizontal surfaces, which is demonstrated in figures throughout this report. And, both Neutrogena and the '151 Patent further explicitly disclose a concentrically located tubular neck portion that has a smaller diameter than the corresponding tubular base portion, with a concentrically located circular opening at the top of the neck portion to provide access to the internal compartment. Each internal compartment contains transparent essentially vertical walls defining the negative space of the compartment, and a radiused transition to a bottom surface located in the base portion of the article, with the bottom surface having a slightly concave curvature.

96. Although the images shown above display the Neutrogena container from multiple angles, and the container is cylindrical which would reflect a single viewpoint being able to provide information corresponding to all sides of the article, the Neutrogena images do not explicitly show the top surface of its tubular neck portion due to the overlapping whiteish interior lining shown in the images. In my

opinion, a person/designer skilled in the art would recognize that the top horizontal surface of the tubular neck portion is flat and contains radiused transition edges because it would have conformed with the remainder of the design. Absent specific reasons, of which I do not understand to apply to these containers, a person/designer of ordinary skill would not have deviated from the remainder of the design in these transitions. Moreover, radiused transitions provide for smoother hand feel for end users, fewer sharp points to propagate damage, and are easy to mold for plastics. Further, such a transition would allow application of the interior liner to easily coincide with the surface topography of the container of Neutrogena. Also, practical considerations, such as comfort, safety, and leak-prevention would have motivated a DOSITA to have incorporated a flat top surface having radiused edges to the internal and external vertical sidewalls. Having a flat surface would serve to properly seal the contents with a cap during travel and storage. And sharp edges could lead to inadvertent injuries especially for use of the Neutrogena contents that appear to be targeting use with a finger.

97. In addition, to the extent radiused edge transitions are not explicitly disclosed or obvious in view of Neutrogena, the '891 Patent explicitly discloses a related and similar container having a tubular neck portion transitioning to a horizontal flat top surface, as shown in the above images. The '891 Patent discloses that its transition between interior and exterior vertical sidewalls and the top surface

is a radiused edge transition. The similarity in design between Neutrogena and the '891 Patent would have motivated a person/designer skilled in the art to apply the flat horizontal top surface and radiused edges of the '891 Patent to the top of the tubular neck portion of Neutrogena, to the extent it was not already present, because both references include essentially the same design and it would have been using known design features for their intended purpose. Moreover, as mentioned above, a design of ordinary skill in the art would have recognized the improvements through the use of radiused transition edges. And, to the extent necessary, it was understood that the degree of curvature for a radiused edge transition can be optimized and sized to obtain more rapid or slower transitions based upon the desired design. It was a known variable that a designer of ordinary skill would have known to adjust.

98. Neutrogena further illustrates internal sidewalls defining its compartment and transitioning to a bottom concave surface of its compartment to form the compartment, but based on the images, the degree of curvature of the concave bottom surface is not readily apparent. From the image of Neutrogena on the left displayed in this section, a person/designer of ordinary skill in the art can determine visually that the bottom surface is concave. However, to the extent it is not explicitly shown, based on the illustrated radiused transition from the internal sidewalls to the bottom surface of the compartment, a person/designer of ordinary skill in the art would have been motivated to incorporate a slightly concaved surface.

First, the radiused edge transition naturally lends itself to a slightly concave bottom as the corners are curved and thus begin at a higher point than the center. Second, as a functional matter a concave bottom would allow better accessibility to the material contained within the compartment either through pooling of the material or allowing a person using the container to pool the material into the center, e.g., lowest point, of the concave surface. Or third, a designer of ordinary skill in the art would understand that under certain circumstances, such as here where there is a bottom section that is a solid disc below the compartment, providing the compartment with a concave bottom would be more aesthetically pleasing so that it mirrored the tubular design of Neutrogena's container and better refract the lighting. Finally, to the extent necessary, the '891 Patent explicitly discloses a concave bottom surface in an article having more visually similar design, which would provide ample motivation to incorporate the feature. Indeed, as referenced above with respect to curved transitions, a person/designer of ordinary skill in the art would be capable to modify and adjust the degree of curvature of the bottom surface to optimize its design as it is a known design and functional aspect of containers.

99. The '151 Patent illustrates an embodiment that includes a functional design of incorporating a neck having a greater vertical height than the height of the base portion. I designate this feature as a functional design element because the height of the neck, and the disclosure of the '151 Patent directly ties this element to

the function it performs. First, as shown in the drawings of the '151 Patent, its external surface of its neck portion is threaded and thus intended to be utilized/covered by a lid/cap. Thus, the height of the neck portion must correspond to having sufficient thread space to connect the cap, but to also corresponding to an interior dimension of the cap. This could be utilized to include, for example, nail gel brushes deposited in the cap and making the material internal to the compartment accessible. Moreover, as explained above with respect to Neutrogena, the height of the neck portion is directly related to the functional volume of the compartment. In other words, a longer neck would provide for more volume in the compartment (given the thickness of the sidewalls remains the same and the diameter of the neck portion remains the same), and vice versa, a shorter neck would provide less volume to the compartment.

100. However, to the extent that the relative height of the neck portion of the article is not solely a functional design element, it would have been obvious to modify the combined Neutrogena and '891 Patent article to incorporate a neck portion that is taller than the height of the base portion. The relative dimensions of the neck portion are known design element that has included taller neck portions than base portions, in for example, nail polish bottles. Moreover, not only would it have been an obvious modification to a person/designer skilled in the art, said designer would have been motivated to do so for the functional reasons described

above. *See supra* ¶88. Adjusting the height of the neck portion and thus the volume of the compartment can have desired aesthetic benefits such as illustrating that the article includes additional product within the compartment without actually including additional product in the compartment through design of thicker sidewalls and a corresponding reduction of volume or corresponding to the cap/lid dimensions such that the cap/lid can be opaque and mask the amount of product in the bottle. Quite simply, a longer neck portion allows for additional manipulation of display for the product within the compartment either through adjustments to make it appear as if there is more product than actually included, or to provide more product in an article having a smaller shelf footprint. All of these factors and considerations would have been known to a designer of ordinary skill in the art, which would have been motivated to optimize the container and achieve a neck portion longer than the base portion of the combined Neutrogena and '891 Patent. Such a modification would have been considered minor by a designer of ordinary skill in the art and would not have resulted in any further modifications to the totality of the Neutrogena/'891 Patent article.

101. For the above reasons, it is my opinion that a combination of Neutrogena and the '891 Patent together with the knowledge and considerations of a designer of ordinary skill in the art as of the relevant time, would have arrived at the design of an article that was essentially or exactly the same as the claim of the

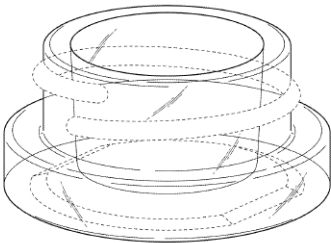
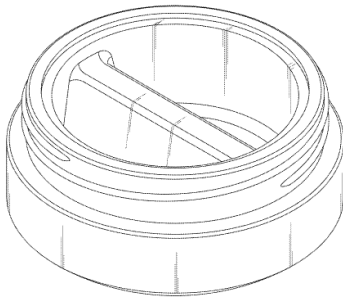
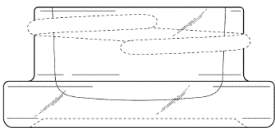
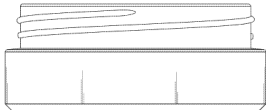
'151 Patent. Any minor remaining differences would have been obvious to a designer skilled in the art.

b. Ground 2: The '151 Patent is Obvious in view of the '705 Patent and the '891 Patent

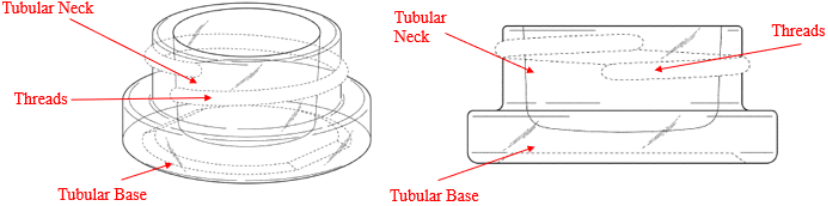
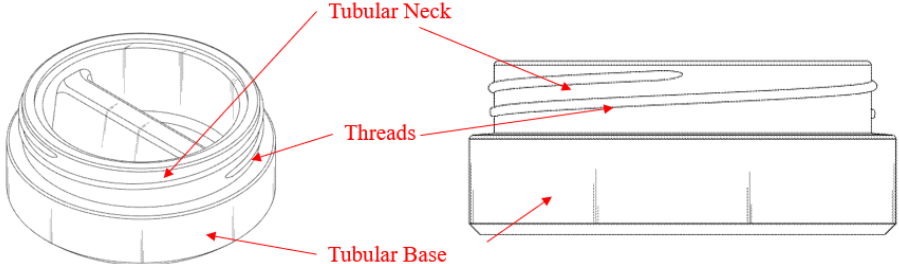
More visually similar

102. After reviewing the claims of the '151 Patent and the disclosure of the '705 Patent, it is my opinion that the overall visual appearance of the '705 Patent is more visually similar as the '151 Patent, as would have been considered by a person of ordinary skill in the art.

103. As shown by the below respective figures, the overall visual appearance between the '151 Patent and the '705 patent is essentially the same. Generally, both include what I have defined as neck portions, bottom portions, and a negative space disposed within the respective container/jar. EX1001; EX1007. Moreover, both references include the same overall design that positions the neck portion concentric with respect to the base portion and the compartment concentric with respect to the neck portion. The transitions between perpendicular surfaces, e.g., base portion's vertical sidewall and top horizontal surface, are all non-cornered. Although the difference is minor in that the '151 Patent includes radiused corners and the '705 patent includes beveled corners, such a minor difference of the type of transition would not detract from the overall appearance of the devices.

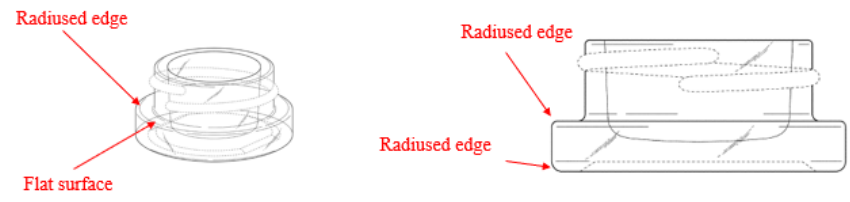
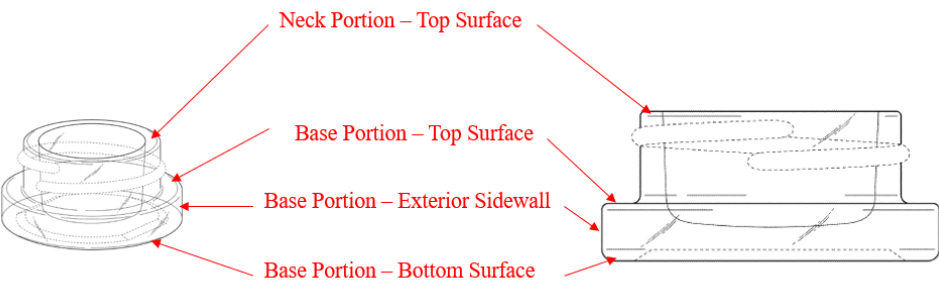
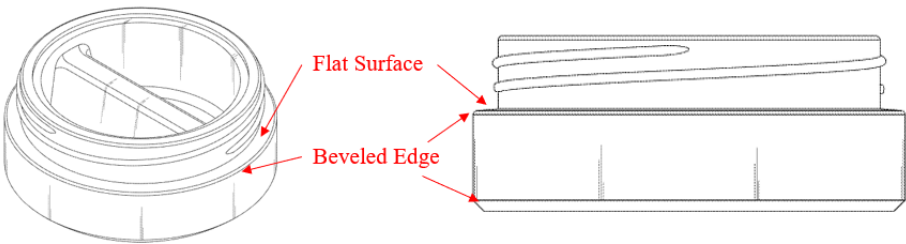
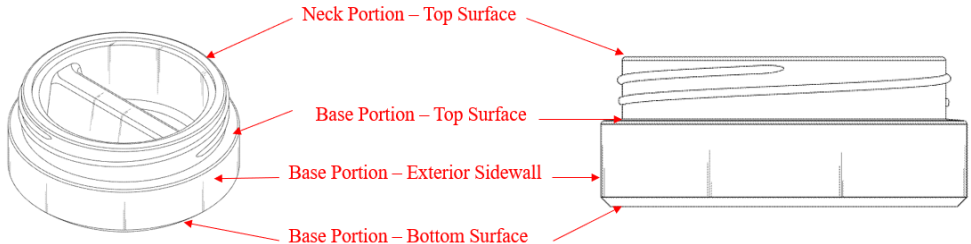
Figure #	'151 Patent	'705 Patent
1		
2		

104. In addition, the same overall visual appearance is further conveyed to a designer of ordinary skill in the art through the base portion being wider than the neck portion. Moreover, similar in both references, the neck portion projects upwards from the top of the base portion creating a container having the same overall external appearance and configuration. For comparison, below are top-to-bottom comparisons of the previously presented annotated figures of the respective references. These annotated figures demonstrate that the same tubular base, tubular neck portion and external threads are included in both designs. *See also* EX1001; EX1007.

Reference	Annotated Figures
'151 Patent	 The '151 Patent figures show two views of a container. The left view is a perspective view of a cylindrical container with a flared top. The right view is a cross-sectional view of the same container. Both views are annotated with red arrows pointing to the 'Tubular Neck', 'Threads', and 'Tubular Base'.
'705 Patent	 The '705 Patent figures show two views of a container. The left view is a perspective view of a cylindrical container with a flared top. The right view is a cross-sectional view of the same container. Both views are annotated with red arrows pointing to the 'Tubular Neck', 'Threads', and 'Tubular Base'.

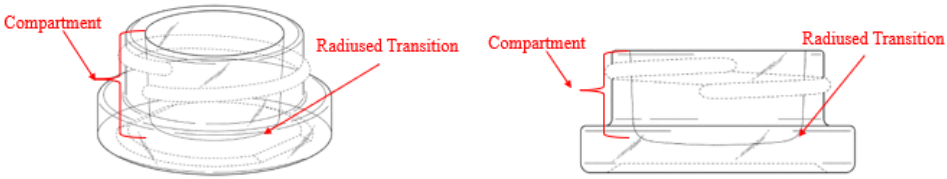
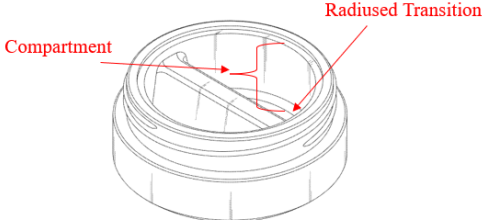
105. As noted above, the similarities extend from not only the overall general appearance, but also include the specific corner transitions and surface orientations, such as vertical internal and external sidewalls and perpendicular horizontal flat top and bottom surfaces, as seen from the included drawings. In addition, as shown in the above, the corner transitions are similarly either beveled or radiused, which were both known means to avoid 90° corners and improve aesthetic look and feel of transitions in these types of containers, while also improving strength and avoiding hard and sharp edges. As such, any minor difference in degree of curvature or beveled versus radiused edges in small corner transitions as presently considered would not have reduced the similarity in overall visual appearance

between the references. Annotated comparisons between the radiused and beveled edges are demonstrated below.

Reference	Annotated Figures
'151 Patent	 The figure shows two perspective views of a container. The left view is a top-down perspective of a cylindrical container with a flat base and a radiused edge at the top. Red arrows point to the 'Radiused edge' and the 'Flat surface'. The right view is a side perspective of a rectangular container with a radiused edge at the top and a flat base. Red arrows point to the 'Radiused edge' and the 'Flat surface'.
'151 Patent	 The figure shows two perspective views of a container. The left view is a top-down perspective of a cylindrical container with a neck portion and a base portion. Red arrows point to the 'Neck Portion – Top Surface', 'Base Portion – Top Surface', 'Base Portion – Exterior Sidewall', and 'Base Portion – Bottom Surface'. The right view is a side perspective of a rectangular container with a neck portion and a base portion. Red arrows point to the 'Neck Portion – Top Surface', 'Base Portion – Top Surface', 'Base Portion – Exterior Sidewall', and 'Base Portion – Bottom Surface'.
'705 Patent	 The figure shows two perspective views of a container. The left view is a top-down perspective of a cylindrical container with a flat base and a beveled edge at the top. Red arrows point to the 'Flat Surface' and the 'Beveled Edge'. The right view is a side perspective of a rectangular container with a flat base and a beveled edge at the top. Red arrows point to the 'Flat Surface' and the 'Beveled Edge'.
'705 Patent	 The figure shows two perspective views of a container. The left view is a top-down perspective of a cylindrical container with a neck portion and a base portion. Red arrows point to the 'Neck Portion – Top Surface', 'Base Portion – Top Surface', 'Base Portion – Exterior Sidewall', and 'Base Portion – Bottom Surface'. The right view is a side perspective of a rectangular container with a neck portion and a base portion. Red arrows point to the 'Neck Portion – Top Surface', 'Base Portion – Top Surface', 'Base Portion – Exterior Sidewall', and 'Base Portion – Bottom Surface'.

106. In my opinion, although the compartments reflect a difference in being a dual chamber compartment (the '705 Patent) and a single chamber compartment (the '151 Patent), a designer skilled in the art would not find a substantial difference

that would diminish the overall visual similarity between the two designs. Both designs include a negative space, e.g., compartment, positing internal to the article having a circular opening at the top end of the tubular neck portion, as shown below in the comparison annotated figures, and would allow an ordinary observer to view the interior contours of the compartments. Each compartment extends from the top end of the neck portion, through the entirety of the neck portion and into the base portion, whereby the bottom surface of the compartment is positioned. Both designs include vertical flat wall surfaces that traverse and define the internal space in both the neck and base portions of the respectful containers. Finally, at the external interface between the sidewall and the bottom surface of the compartment, which results in a cornered transition, both references, as discussed above, include a muted corner transition that is respectively a radiused edge and a beveled edge.

Reference	Annotated Figures
'151 Patent	 The figure shows two perspective views of a container. The left view is a top-down perspective showing a cylindrical container with a central compartment. Red arrows point to the 'Compartment' and the 'Radiused Transition' at the bottom of the compartment. The right view is a side perspective showing the container's profile. Red arrows point to the 'Compartment' and the 'Radiused Transition' at the bottom of the compartment.
'705 Patent	 The figure shows a perspective view of a container. Red arrows point to the 'Compartment' and the 'Radiused Transition' at the bottom of the compartment.

107. The differences between the dual chamber compartment and single chamber compartment are minor in comparison to the overall visual impression created by the respective compartments in consideration with the designs as a whole. As can be seen from the above annotated figure in the '705 Patent, the dual chamber compartment is created by depositing a wall spanning the diameter of the compartment. The figure shows space located on the sidewalls above the wall, and therefore a designer of ordinary skill in the art would recognize that the dividing wall does not extend the full height of the compartment. Hence, although there are two chambers disposed in the same compartment, a designer skilled in the art would understand them to not be fully divided. Furthermore, removal of the divider from the '705 Patent would result in a compartment having the same overall visual impression of the '151 Patent, and would importantly not require any modification to the design or functionality of the remainder of the container shown in the '705 Patent. Finally, a designer skilled in the art would be able to view the compartment through the opening in the top and determine that the compartment itself (as opposed to the chambers) possesses the same overall visual appearance based on sidewall, non-cornered transition, dimensions, and disposition within the container, including both containers having compartments extending into the base portion. Hence, the fact that the '705 Patent includes two chambers while the '151 Patent only includes

one chamber, would simply be a design and functional choice and not affect the similarity in overall visual appearance of the container.

108. Due at least to the overall design, including the opening of the compartment at the top of the respective articles, the difference between the '151 Patent describing a transparent article and the '705 Patent describing an opaque article, would not detract from the references possessing essentially the same overall visual appearance. The overall shape, dimensions, design, and openness (at least through the open top of the compartment) would result in a designer of ordinary skill in the art being able to see each aspect of a physical embodiment of the claimed design, and as shown in the figures of the respective references, the overhead view also shows the interior of the compartment. Hence, a designer skilled in the art would find all the features of the design visually accessible, even though one is opaque and one is transparent. Transparency is also a functional feature to permit a purchaser to see and identify the quality and quantity of the materials within the composition. Of note, the '151 Patent does not claim a cap or lid to seal or obscure the view of the compartment, nor does the '705 Patent explicitly show a cap or lid. Therefore, in comparing the claimed article of the '151 Patent to the disclosure of the '705 Patent, a designer skilled in the art would recognize that each of the claimed features were readily visible and the '705 Patent being opaque would not substantially impact the overall visual similarities between the articles.

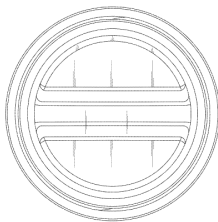
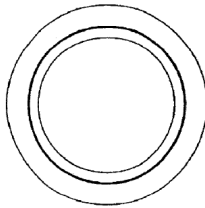
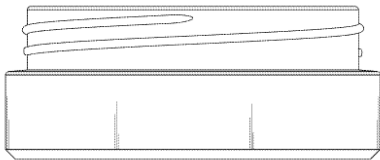
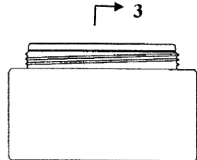
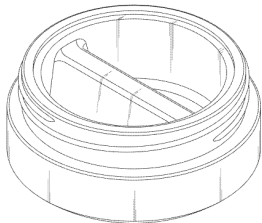
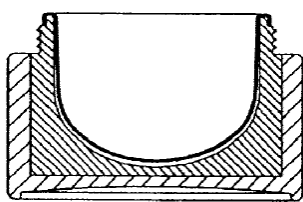
109. A final difference to be weighed in comparing overall visual appearance between the references is the relative length of the neck portion. In the '151 Patent, the neck portion has a greater height than the base portion, while in the '705 Patent, the relative heights are essentially equal. The choice of the height of the neck portion has a significant functional aspect with respect to the volume of the chamber. In other words, an increase in neck height allows an increase in volume without adjusting the relative diameters of the neck and base portions. In addition, as shown by the threads in both the '151 and '705 Patents, the container is intended to be used with a cap or lid, which would likely obscure the dimensions of the neck in the end use of the product and allow a designer skilled in the art to modify the dimensions of the neck. And because it is a functional limitation, a designer skilled in the art would not find that this difference would diminish the similarity in overall visual appearance between the references. However, to the extent that it is not solely a functional limitation, a designer skilled in the art would still not find that it diminished the similarity in overall visual appearance between the references. A designer skilled in the art would recognize that neck length can be adjusted for aesthetic/functional purposes to display the desired volume within the compartment while still maintaining the desired concentric location and diameter of the neck portion. In addition, the overall similarities in corner transition, external surface threads, internal and external vertical sidewalls, flat top, and concentric location of

the neck portion would outweigh any minor difference due to the height of the neck portion in comparing the overall visual appearance. And because the weighing of similarities outweighs any minor difference in neck height, a designer skilled in the art would not find any potential difference substantial.

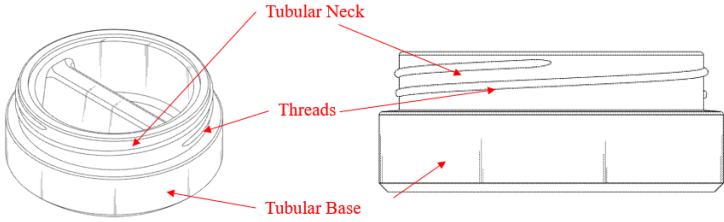
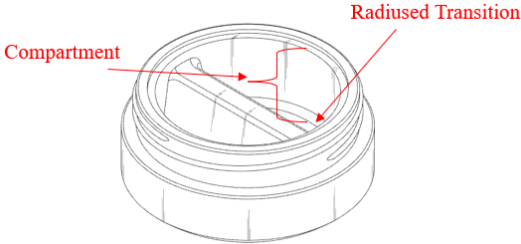
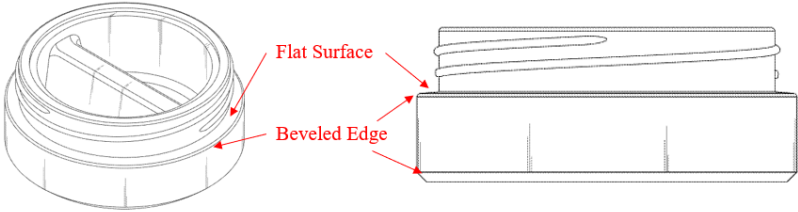
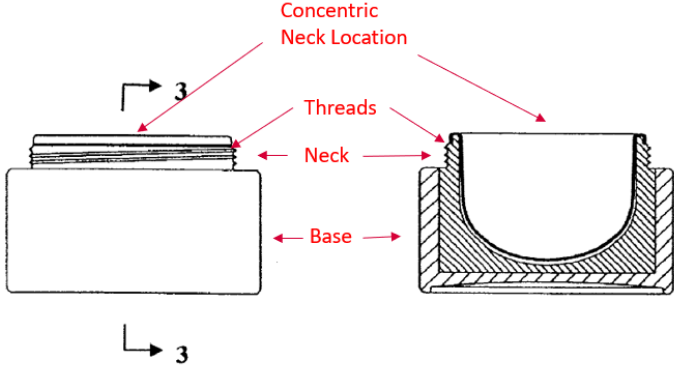
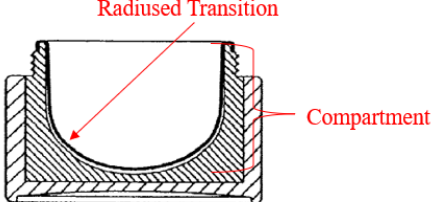
110. In view of the above weighing of the similarities and differences in overall visual appearance between the '151 Patent and the '705 Patent, a designer skilled in the art would recognize that there are significant more similarities and therefore consider the references to have essentially the same overall visual appearance.

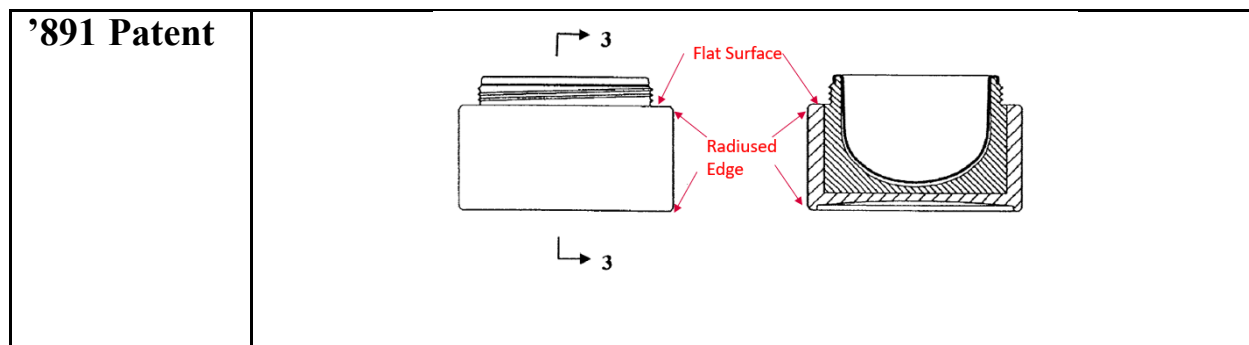
Obviousness of the '151 Patent

111. The '891 Patent, described above, is very similar to the '705 Patent. For example, both are in the same Locarno Classification of 09-01 and the same U.S. Patent Classification of D9/500. EX1007; EX1008. As described in further detail below, based on the similarities between the respective designs, a designer of ordinary skill in the art would have been motivated to incorporate features of the '891 Patent into the design of the '705 Patent because such a person would recognize that the features are appropriate and could be used in the similar design of the '705 Patent. For ease of comparison, below is a side-by-side chart of the two references.

Figure	'705 Patent	'891 Patent
Top View		
Front Elevation View		
Compartment View		

112. As demonstrated above, the '705 and '891 Patents illustrate the same overall configuration of having a tubular base portion, a concentrically located tubular neck portion disposed on top of the tubular base portion, and a concentrically positioned negative space or chamber disposed internal to the article with an opening at the top of the tubular neck portion. Moreover, as further illustrated by the below annotated figures, both further include tubular shapes, non-cornered transitions for internal and external surface corners, e.g., beveled and radiused transitions, vertical interior and exterior walls, and flat top and bottom surfaces for both the neck and base portions.

Reference	Annotated Figures
'705 Patent	 This figure set includes a perspective view of a cylindrical container with a lid and a side cross-sectional view. Red arrows point to the following components: 'Tubular Neck' (the upper part of the container), 'Threads' (the screw threads on the neck), and 'Tubular Base' (the lower part of the container).
'705 Patent	 This figure is a perspective view of the container with the lid removed. Red arrows point to the 'Compartment' (the interior space) and the 'Radiused Transition' (the curved inner surface of the neck).
'705 Patent	 This figure set includes a perspective view of the container with the lid removed and a side cross-sectional view. Red arrows point to the 'Flat Surface' (the top of the neck) and the 'Beveled Edge' (the angled edge where the neck meets the base).
'891 Patent	 This figure set includes a side cross-sectional view of the container and a perspective view of the lid. Red arrows point to the 'Concentric Neck Location' (the alignment of the neck), 'Threads' (on the neck), 'Neck' (the upper part), 'Base' (the lower part), and a cross-section view of the lid. Section lines '3-3' are shown on both views.
'891 Patent	 This figure is a cross-sectional view of the container. Red arrows point to the 'Radiused Transition' (the curved inner surface) and the 'Compartment' (the interior space).



113. In addition to the physical dimension similarities, both the '705 and '891 Patents disclose essentially the same article, as demonstrated by the identical classification numbers, and further both disclose the article as opaque. As demonstrated by the hatch marks on the drawings, all of the materials disclosed in both references are opaque, and therefore would likely preclude an end user from viewing the compartment through the sidewalls. However, as noted above with respect to each reference, the top of the compartment is open and would therefore allow a designer skilled in the art to view the entirety of the compartments. Such overall similarities would suggest to a designer of ordinary skill the applicability of features of the '891 Patent to the '705 Patent, at least with respect to the design of the compartment.

114. As discussed above with respect to the similarity between the '151 Patent and the '705 Patent, the difference between a single chamber and multi-chamber compartment in the context of these articles. Moreover, because removing the divider of the '705 patent would not affect the overall dimensions or

configuration of its compartment, a designer of ordinary skill in the art would find applicable the teachings of the single chamber compartment of the '891 Patent. This is because both compartments share the same configuration, location, position, and general shape of having a circular opening, vertical side walls defined by the inner tubular neck and base portions, and a curved transition from the sidewalls to the base surface. In addition, as demonstrated by the threads disposed on the exterior surface of the neck portion, a designer of ordinary skill in the art would further recognize that a cap or lid is intended for use to cover the compartment. Further, based on the inclusion of a cap or lid, a designer skilled in the art would recognize that the length and configuration of the neck can be tied to the cap or lid configuration and thus is a result effective variable to be modified in the design of the compartment and neck portion. For these additional reasons, a designer skilled in the art would find applicable the features of the '891 Patent to the '705 Patent.

115. As described above, the '891 Patent discloses a substantially the same design as in the '705 Patent, which would have motivated a designer of ordinary skill in the art to modify the 705 Patent to incorporate features of the '891 Patent.

116. For example, as noted above, due to the similarities in design between the compartment of the '705 Patent and the compartment of the '891 Patent (as arranged within their respective article), it would have been obvious to substitute the dual chamber compartment of the '705 Patent with the single chamber of the '891

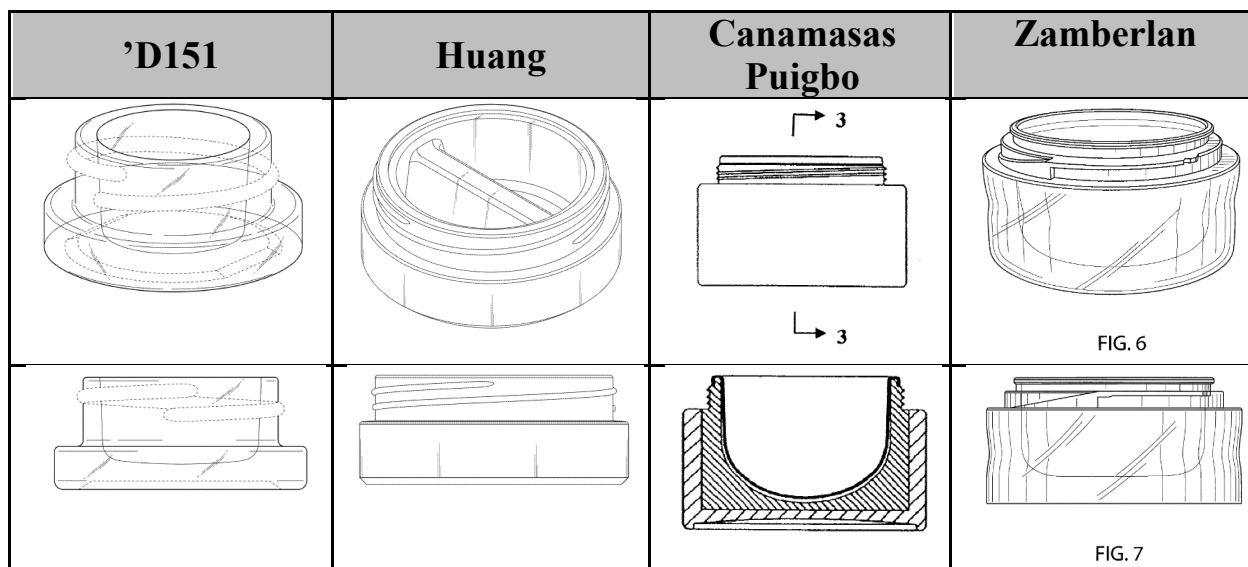
Patent. The result of such a substitution would be the article of the '705 Patent having a single chamber compartment with vertical tubular sidewalls defined by the inner surface of the tubular neck portion and extending from the opening at the top of the tubular neck portion to the radiused transition to a concaved bottom surface of the compartment located within the base portion of the article. The degree of curvature of the radiused corner and bottom surface were known in the art and would have been obvious to modify to obtain the designed functional volume and aesthetic appearance. Such a modification would not have required any additional modifications to the remainder of the article disclosed in the '705 Patent.

117. In addition, a designer skilled in the art would be further motivated to make such a substitution to achieve a desirable container. It would have been known that a single chamber would possess a larger volume and permit the storage of a larger object as the diameter would be greater than a dual chamber compartment. In addition, a radiused transition and slightly concave bottom surface would allow for the storage of more material within the compartment, a smoother visual transition to the base of the compartment, and better accessibility of a liquid or gel product in the compartment due to the pooling of the material. As it was known to adjust the degree of curvature for a bottom surface and a radiused edge, it would have been obvious to modify the concave bottom surface to achieve a preferred degree of curvature and optimal aesthetic properties, for example, providing a parallelism between the

bottom surface of the compartment (with the radiused edge) and the external sidewall and bottom surface of the base portion.

118. Furthermore, for many of the same reasons discussed above with respect to the compartment, it would also have been obvious to substitute all of the beveled transitions of the '705 Patent with radiused transitions shown in the '891 Patent, as shown below. This would include not only the above discussed internal compartment transition, but also the corner transitions between the sidewalls and top and bottom surfaces of the bottom portion, the transition between the bottom portion and the tubular neck portion, and the transition between the flat top of the tubular neck portion and the respective vertical internal and external sidewalls. Not only does the similarity in design and the fact that it was a known and common feature inform a designer of ordinary skill to be motivated to make such a substitution, but further a radiused transition would have a more comfortable hand feel for an end user because it does not include sharp edges while also providing better structural integrity since there is no fracture initiation point. Moreover, optimization of the degree of curvature would also have been known and obvious. Zamberlan also suggests the application of its transparent feature to the Huang to reveal the contents of the jar. A DOSA with knowledge of the Zamberlan flask design would have found it obvious to incorporate the transparency of Zamberlan into Huang based on the similarity of the two containers and also to reveal the contents within the interior

compartment. Additional known motivations also existed to modify containers of this type to be transparent. For example, a skilled artisan would be motivated to modify the combination to be transparent to improve aesthetic appeal of the design, permit a consumer to view the product within the compartment through the sidewalls, tint the hue to color of the product, and provide a general overall improved visual appeal of the bottle/container.



119. It would have further been obvious to modify the proposed combination of the '705 and '891 Patents having radiused edges and a single chamber to have the base portion and neck portion surrounding the negative space, e.g., compartment, be transparent while otherwise retaining its configuration. The difference between a transparent container and an opaque container is not substantial in the present field. Both transparent and opaque containers were known and readily used as of the priority date of the '151 Patent. The ability to design and have manufactured a

transparent article would have easily been within the skill of an ordinary designer at the relevant time, at least because it was commonly done. As shown in the below figures, containers of these kinds having a neck portion, a base portion, and a negative space were commonly known and designed to be transparent. To the extent a designer did not intend for the product located within the compartment to be readily visible, it was known to include an opaque liner disposed within the compartment, as shown below (and discussed above) in the Neutrogena product. Further, U.S. Patent D563,221 (Exhibit 1018) demonstrates that transparent containers with interior compartments and/or negative spaces were widely known and available to ordinary designers. Thus, it would have been obvious to a designer of ordinary skill in the art to modify the combination of the '705 Patent and '891 Patent to result in a transparent article. Not only was it known, but a designer skilled in the art would recognize that a transparent article would have improved aesthetic appearance utilizing, for example, glass or plastic, the ability to display the interior product, the ability to tint the hue of the internal product, and the ability to display the amount of internal product contained within the container, among other benefits.



Exhibit 1017

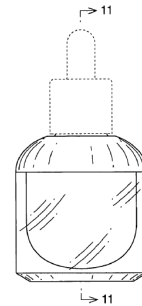


Fig. 8

Exhibit 1018

120. Finally, it would have been obvious to a designer of ordinary skill in the art to further modify known result effective variables as discussed above, such as radius of curvature for a concave bottom surface, radius of curvature for a radiused transition edge, and relative height of a tubular neck portion. First, as described above, the '705 Patent and the '891 Patent both disclose threads located on the outer surface of the tubular neck portion, which a designer of ordinary skill in the art would have recognized to be used to screw on a lid or cap. The neck portion, therefore, would resultingly be located within the lid or cap and its dimensions would be a result effective variable in designing and arranging the lid or cap for use with the tubular neck portion of the article and a designer of ordinary skill in the art would be motivated to modify the proportions of the neck.

121. In addition, a designer skilled in the art would further recognize that the length of the neck directly impacts the volume of the compartment. As such, a designer of ordinary skill in the art would have been motivated to modify the length

of the neck to achieve the desired amount and/or visual appearance within the compartment (proposed combination being transparent). A relatively longer neck would allow the bottle's design to control the display of the interior composition to provide a container illustrating either a greater or smaller volume of material, further the neck can be designed with a specific length intended if, for example, the lid/cap also includes something inserted into the container such as a nail polish brush. A modification of this type to the cap would not have materially affected any other design feature of the combination of the '705 and '891 Patents.

122. Therefore, in view of the above discussion, the design claimed in the '151 Patent would have been obvious to a designer of ordinary skill in the art as of the priority date of the '151 Patent in view of the '705 and '891 Patents and the knowledge and experience of a designer of ordinary skill in the art. To the extent that the above-described combination of prior art does not explicitly disclose each limitation of the '151 Patent, any remaining difference would have been an obvious modification to the combination based on my opinions herein and the background knowledge of a designer of ordinary skill in the art.

c. **Ground 3: The '151 Patent is Obvious in View of the '705 Patent and Neutrogena**

More visually similar

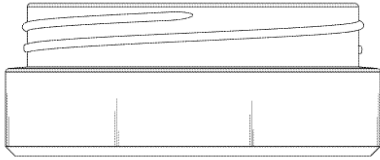
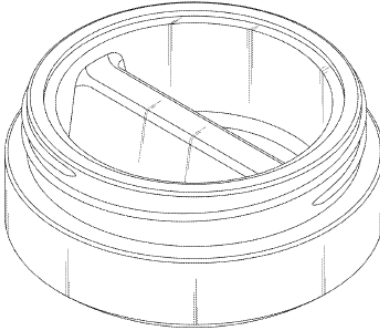
123. As I discussed above with respect to Ground 1, in my opinion a designer of ordinary skill in the art would find the '705 Patent to have essentially the same visual appearance as the '151 Patent and therefore be considered more visually similar. *See supra* ¶¶91-99. As the references are more visually similar, as I understand, the '705 Patent is an appropriate primary reference to consider whether the '151 Patent is obvious to a designer of ordinary skill in the art.

Obviousness of the '151 Patent

124. Neutrogena is a tinted blue transparent container, as shown by the relevant marketing materials discussed herein. The Neutrogena container is used to sell skin care products, such as Neutrogena's® Hydro Boost Water Gel product. As noted above, based upon my review of the Neutrogena marketing materials the relevant container is the same, with the potential of an adjustment made to the design of the opaque cap/lid. Although the lid of the container has changed, the design of the container itself has not changed, as discussed above.

125. As shown in the below images, and as discussed above, Neutrogena is a blue tinted transparent container having a negative space, i.e., a compartment, located within the container with an opening at the top of the container. Neutrogena does not appear fully transparent – although the container is – because disposed

within the compartment is a light blue opaque liner. The light blue opaque liner is particular obvious from the below View into Compartment perspective where the light blue liner is shown as a similar color to the gel product, but can be seen disposed upon the upper surface of the neck portion of the container.

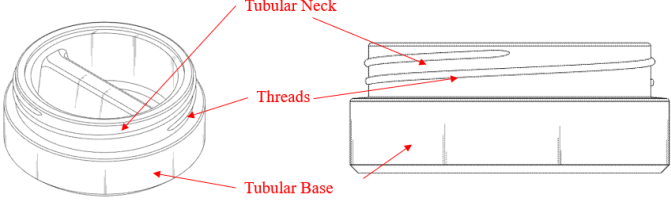
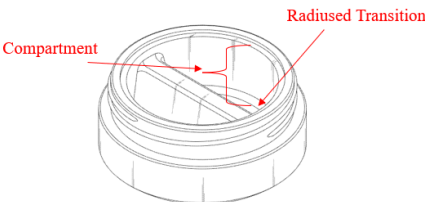
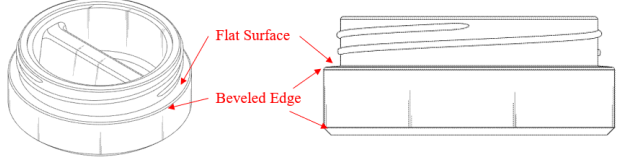
Figure	'705 Patent	Neutrogena
Front Elevation View		
View into Compartment		

126. As shown above, the view from different perspectives of the '705 Patent and Neutrogena establish that a designer of ordinary skill in the art would consider the references as possessing the same overall visual appearance and being extremely related in appearance, design, and article of commerce. As noted above, the only obvious differences are that the '705 Patent includes a dual chamber

compartment while Neutrogena includes a single chamber compartment, that includes the above referenced interior liner deposited in the compartment, and that the Neutrogena container is transparent. However, as discussed below, these differences would not have dissuaded a designer of ordinary skill in the art from finding the ornamental and functional aspects of Neutrogena applicable to the '705 Patent with a motivation to include such features as being known and applicable to the same design and would be nothing more than applying a known feature to a similar device.

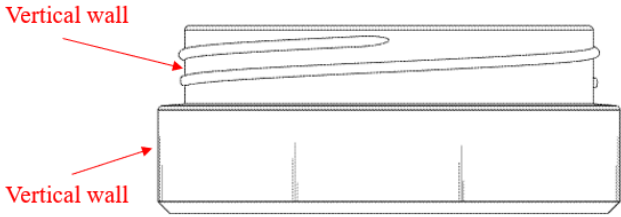
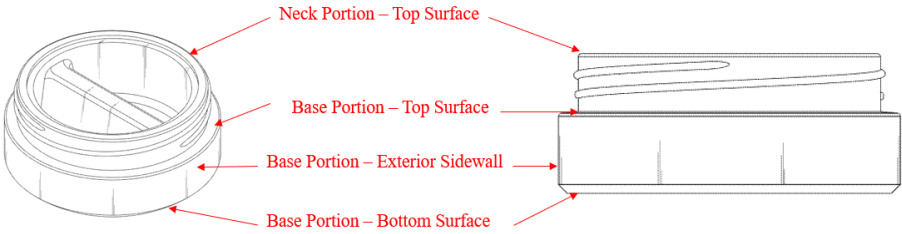
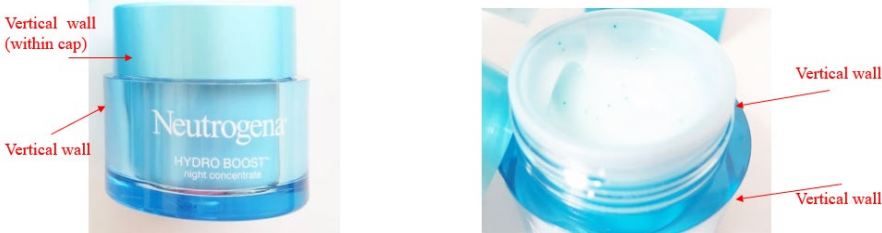
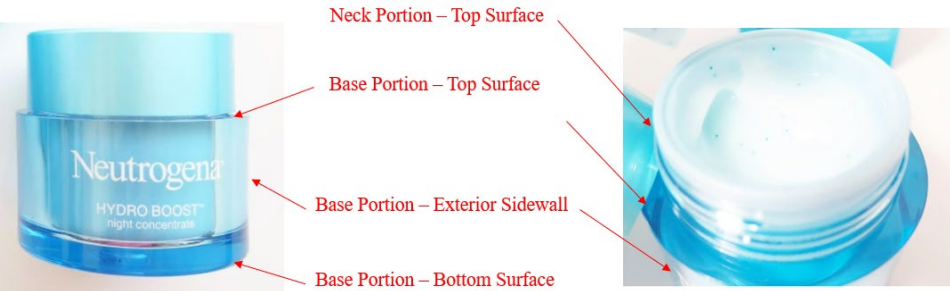
127. As shown above, the Neutrogena container is very similar to the '705 Patent container and includes a number of similarities related to both the overall design and the details. Neutrogena teaches the same overall configuration as the '705 Patent and is similarly a container. Further, generally, both Neutrogena and the '705 Patent, as demonstrated below with the annotated figures, include a tubular base portion, a concentrically located tubular neck portion concentrically positioned on the horizontal top surface of the tubular base portion and extending upwards away from the tubular base portion. As seen from the figures, each reference's neck portion has a smaller diameter than the diameter of its base portion, and also the neck portion is essentially the same height and slightly shorter than the corresponding base section. For example, both the '705 Patent and Neutrogena include threads for the attachment of a cap or lid, with the Neutrogena images demonstrating the

appearance of the container with the attached cap. Furthermore, because the neck portion of Neutrogena is contained within the cap and the cap is shown to be shorter than the base portion, it would be understood by an ordinary designer that the neck portion too is shorter than the base portion. Moreover, both disclose internal compartments disposed concentrically within the tubular neck and base portions and opening through a circular opening at the top of the tubular neck portion. Indeed, even in the smaller detailed orientations, both references include non-cornered transitions between perpendicular surfaces, such as internal and external vertical sidewalls and the corresponding horizontal flat surfaces, e.g., such as the top surface of the neck portion, the top and bottom surfaces of the base portion, and the bottom surface of the compartment from the vertical side walls. By non-cornered, it is meant that the transition is beveled or radiused as opposed to a 90° corner that represents the planes of each surface. Thus, as described above and shown below in the annotated figures, the similarities between the '705 Patent and Neutrogena suggest the application of ornamental and functional features from one to the other, because a designer of ordinary skill would understand that the similarity makes such a substitution obvious for a known purpose.

Reference	Annotated Figures
'705 Patent	
'705 Patent	
'705 Patent	
Neutrogena	
Neutrogena	



128. Additional details further establish that a designer of ordinary skill in the art would find the two references related and representing a similar if not the same overall appearance. For example, focusing on the external appears, as shown in the above and below figures, the base portions contain horizontal top and bottom surfaces that are essentially parallel to the top surface of the neck portion. Similarly, the internal side walls and external sidewalls also are both vertical and parallel. These symmetrical corresponding designs further illustrate the similarity between the overall design aesthetics of the articles of commerce.

Reference	Annotated Figures
'705 Patent	
'705 Patent	
Neutrogena	
Neutrogena	

129. Moreover, in considering the relative proportions of the respective articles, a designer of ordinary skill in the art would also recognize the similarities

in location, dimension, configuration, and design of the compartment disposed within the neck and base portions. For this consideration, it should be understood that the compartment of the '705 Patent includes both chambers shown in the figures. Both compartments are defined by the interior sidewalls of the tubular base portion and tubular neck portion, as well as the bottom surface of the compartment which is located within the tubular base portion. Based upon the muted transition (e.g., radiused or beveled) between the vertical internal side walls and the bottom surface, the bottom surface of both references appears to have a degree of curvature corresponding to a slightly concave bottom surface. At the top end of the compartments, the tubular nature of the neck portion defines a circular opening that makes the compartment accessible to the exterior of the respective article. Finally, to the extent it is even a consideration, a removal of the divider disclosed in the '705 Patent would result in essentially the same compartment as Neutrogena, and therefore have not detracted a designer of ordinary skill in the art from recognizing the applicability of the Neutrogena features to the '705 Patent.

130. Finally, although Neutrogena is transparent while the 705 Patent is opaque, a designer of ordinary skill in the art would not be dissuaded from incorporating ornamental and functional features from one to the other. First, based on the remaining similarities, the simple appearance of a transparent versus opaque container would not dissuade a designer of ordinary skill that the ornamental features

are inapplicable. Second, both the '705 Patent and Neutrogena include an opening at the top of the neck portion showing openness of the compartment and permitting viewing of all aspects of the article. Third, a designer of ordinary skill in the art would further find applicable Neutrogena to the '705 Patent because Neutrogena discloses an interior liner than renders horizontal views into the compartment opaque. Therefore, a designer skilled in the art would understand that should opaqueness be desired to some extent, that other means could be utilized while still utilizing transparent containers. And finally, a designer skilled in the art would understand that transparency and opaqueness are both known in the field and simply a design choice that would have been an obvious selection. Therefore, should end use or functionality require transparency, it would be available, should it not be desired, a designer skilled in the art could opt to use opaque materials or liners. Thus, the fact that the container of Neutrogena is transparent would not undermine the applicability of the disclosure of Neutrogena to the '705 Patent.

131. As would be understood by a designer of ordinary skill in the art, because the '705 Patent and Neutrogena are related and possess the same appearance and design, a designer skilled in the art would be motivated to apply features of Neutrogena to the '705 Patent. Therefore, as described below, a designer of ordinary skill in the art would be motivated to apply features of Neutrogena and his or her own background knowledge to achieve the design claimed in the '151 Patent.

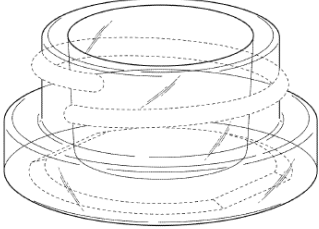
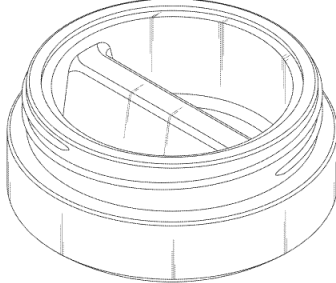
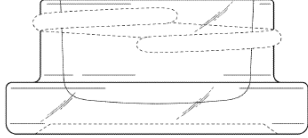
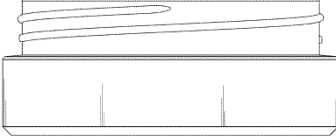
132. Based upon my above comments, the '705 Patent discloses many of the ornamental features of the '151 Patent. However, as described above, designer of ordinary skill in the art would have been motivated to apply the compartment, the radiused transitions, and the transparency of Neutrogena into the '705 Patent's container.

133. Beginning with the compartment, a designer of ordinary skill in the art would have been motivated to apply the single chamber compartment of Neutrogena defined by vertical interior side walls of the neck and base portions, and having a radiused transition to a slightly concave bottom surface of Neutrogena to substitute for the dual chamber compartment of the '705 Patent. Such a combination would result in the '705 Patent container having a single chamber instead of the dual chambers, and have a bottom surface and transition as illustrated in the Neutrogena images. Such a combination would not modify the overall design or dimensions of the '705 Patent, but instead essentially result in a removal of the chamber divider and an adjustment of the curvature of the transition between side wall and bottom surface to be radiused instead of beveled (to the extent it is even beveled). For example, the same configuration and opening at the top of the tubular neck portion would be achieved, the same extension of sidewalls into the tubular base portion would be achieved, and the same accessibility to the compartment would be achieved. Moreover, as discussed above, adjustments to the degree of curvature to

the radiused transition and/or the concave bottom would have been obvious modifications that would have been within the skill and ability of a designer of ordinary skill in the art. A designer would be motivated to make apply these features of Neutrogena to the '705 Patent at least because of the overall similarity of design, arrangement, dimensions, location, and size of the compartment in Neutrogena to the '705 Patent and it would constitute applying a known feature for its intended purpose in the same article.

134. Moreover, a designer of ordinary skill in the art would be explicitly motivated to apply the compartment of Neutrogena to the article of the '705 Patent. As an example, through the inclusion of a single chamber within the compartment, a designer of ordinary skill in the art would recognize that the chamber could contain larger materials. Similarly, through the removal of the divider, a designer would also recognize that an increase in volume could be achieved. Furthermore, by changing the bottom surface and edge transitions within the interior of the compartment, not only may an improved aesthetic be achieved that matches the external dimensions of the tubular base portion of the article, but also, a gel or liquid product may pool towards the middle making the product more accessible and/or easier to remove. Additionally, in certain manufacturing processes, it may be simpler and more cost effective to not include a dual chamber compartment. Thus, a designer of ordinary skill in the art would have ample motivation to incorporate

the compartment disclosed in Neutrogena into the '705 Patent's container. A comparison of the relative designs is illustrated below. Any remaining differences between the compartment of the combination of the '705 Patent and Neutrogena and the '151 Patent, to the extent necessary, would have been obvious modifications that would have been well known to a designer of ordinary skill in the art to optimize and/or adjust for aesthetic or functional purposes.

'151 Patent	'705 Patent	Neutrogena
		
		

135. As briefly addressed relating to the compartment, it would have also been obvious to a designer of ordinary skill in the art to apply radiused transitions instead of beveled transitions throughout the corners of the '705 Patent. Neutrogena discloses a similar and related article that utilized radiused corners to transition vertical side walls to horizontal top and bottom surfaces through its article, such as

between the exterior sidewall and the top and bottom horizontal surfaces of the bottom portion, the transition from the top surface of the bottom portion to the external side wall of the neck portion, and the side wall of the neck portion and horizontal top surface. The similarity of articles between Neutrogena and the '705 Patent suggests the applicability of the radiused transition. Moreover, a designer would be motivated to avoid any sharp edges present in a beveled transition that may be detrimental to hand feel, visual appearance, reflection through the material, and structural integrity of the article. Together with the suggestion of radiused transitions, a designer of ordinary skill in the art would know to optimize the degree of curvature to achieve the desired look and feel of the transition, which would be in said person's ability. Thus, it would have been obvious to apply these transitions to the '705 Patent.

136. Furthermore, as explained above, Neutrogena discloses a transparent container having essentially the same visual appearance as the '705 Patent except that it is transparent instead of opaque. It would have been obvious to a designer of ordinary skill in the art to further apply the transparent teaching of Neutrogena to the container of the '705 Patent. Such a modification would not require any additional adjustment to the container of the '705 Patent in terms of design, dimensions, and configuration. Moreover, the overall similarities between the '705 Patent and Neutrogena motivate a designer skilled in the art to apply the transparency because

it is applying a known ornamental/design feature to a similar design for the same purpose. Also, both the '705 Patent and Neutrogena disclose openings at the top of the respective containers, which permit ordinary observers to view all aspects and the internal aspects of the compartment; hence, applying transparency to the body of the container would be a known application of a desired function. Independently, it would have been obvious to a designer of ordinary skill to apply a transparent material to allow the user to see through the container to ascertain the material without the container or the amount of material remaining in the container, the transparent material can be transparent but tinted in such a manner to better present the appearance of the material contained within the container, a transparent material can allow light through the outer material to illuminate the product within the compartment, and/or a transparent material can simply aesthetically catch the eye of a purchaser in a more meaningful manner depending on the composition intended to be sold. Hence this application as of the priority date would have been within the skill and ability of a designer of ordinary skill in the art.

137. As a separate motivation, the application of the compartment disclosed by Neutrogena and the transparency disclosed by Neutrogena to the '705 Patent would have obvious synergistic benefits. The combination would allow end purchasers of such container articles to see not only the ornamental design of the compartment due to the transparency of the container material, but also to see

through the container to view the product or quantity of product contained within the compartment. Thus, these ornamental features provide not only desirable aesthetic ornamental value, but also practical value for the end user, and make the design not only more appealing, but more practical. As such, the inclusion of both the compartment and transparency of Neutrogena into 'D705 would have been obvious and desired to a designer of ordinary skill in the art

138. Finally, it would have been obvious to a designer of ordinary skill in the art to further modify known result effective variables as discussed above, such as radius of curvature for a concave bottom surface, radius of curvature for a radiused transition edge, and relative height of a tubular neck portion. First, as described above, the '705 Patent and Neutrogena both disclose threads located on the outer surface of the tubular neck portion, which a designer of ordinary skill in the art would have recognized to be used to screw on a lid or cap. The neck portion, therefore, would resultingly be located within the lid or cap and its dimensions would be a result effective variable in designing and arranging the lid or cap for use with the tubular neck portion of the article and a designer of ordinary skill in the art would be motivated to modify the proportions of the neck.

139. In addition, a designer skilled in the art would further recognize that the length of the neck directly impacts the volume of the compartment. As such, a designer of ordinary skill in the art would have been motivated to modify the length

of the neck to achieve the desired amount and/or visual appearance within the compartment (proposed combination being transparent). A relatively longer neck would allow the bottle's design to control the display of the interior composition to provide a container illustrating either a greater or smaller volume of material, further the neck can be designed with a specific length intended if, for example, the lid/cap also includes something inserted into the container such as a nail polish brush. A modification of this type to the cap would not have materially affected any other design feature of the combination of the '705 Patent and Neutrogena.

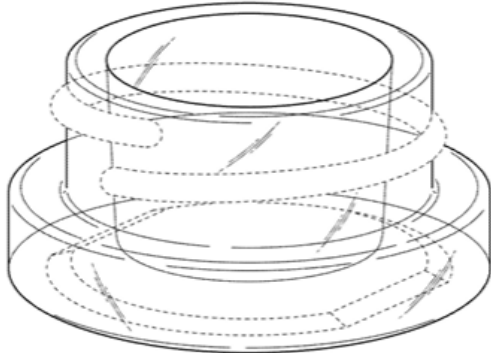
140. Any remaining differences between the above described application of Neutrogena to the '705 Patent together with the background knowledge in the art would be considered minor and/or known in the art. In other words, any further differences between the cited ground would have been obvious to a designer of ordinary skill in the art.

141. Therefore, for the above reasons, in view of the '705 Patent and Neutrogena and the knowledge of a designer of ordinary skill in the art, the ornamental design of the claimed jar of the '151 Patent would have been obvious.

d. Ground 4: The '151 Patent is Obvious in View of the McKernan Jar and Zamberlan

142. In my opinion, the design of the '151 Patent is obvious over the McKernan Jar in view of Zamberlan. As shown below, a comparison of the figures of the '151 Patent to the McKernan Jar demonstrates that the McKernan Jar has a

substantially similar overall visual appearance to the jar of the claimed design. That is, the basic design characteristics of the '151 Patent design are found in the McKernan Jar, namely a glass jar with a wide tubular base portion and a narrow tubular neck portion where the neck portion is taller than the base portion. *See* EX 1003, pgs. 431-439. The view of the open top of the McKernan Jar also shows that the McKernan Jar has a compartment or interior chamber. *Id.* at 436. Such is consistent with the nature of a jar which, by definition, is a type of container that would necessarily include some type of interior compartment.

'D151	McKernan Jar
 FIG. 1	 Picture from catalog published in 2012 (EX1003 at 436)

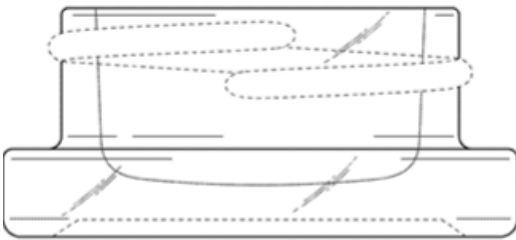


FIG. 2

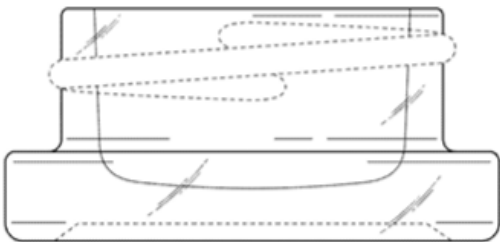
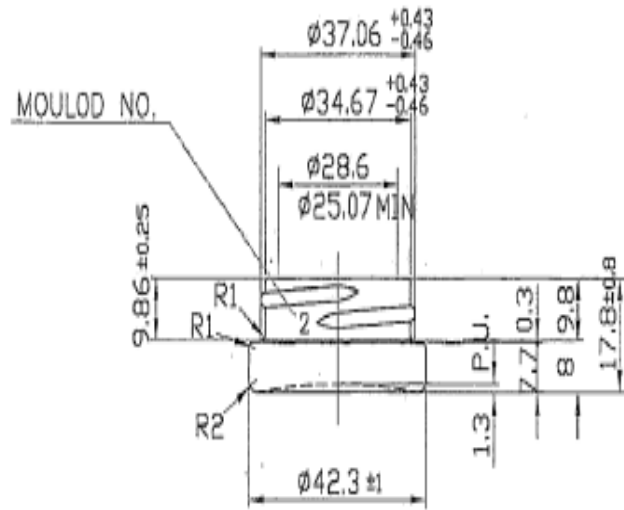


FIG. 3



Side view figure from part drawing dated 2011

(EX1003 at 438)

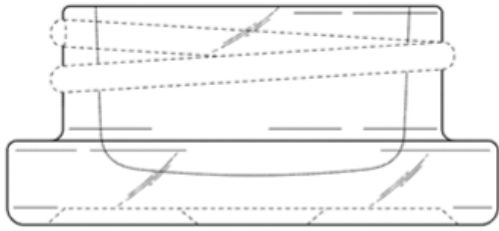


FIG. 4

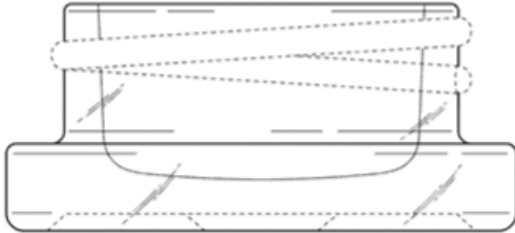


FIG. 5

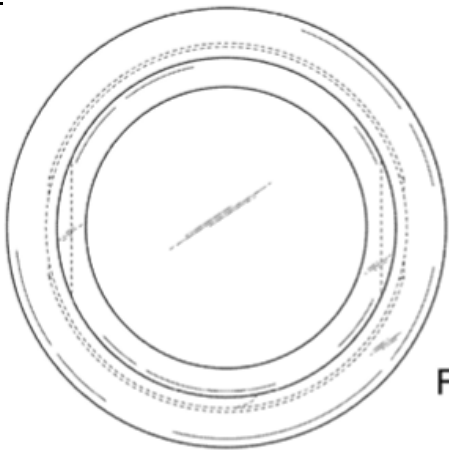
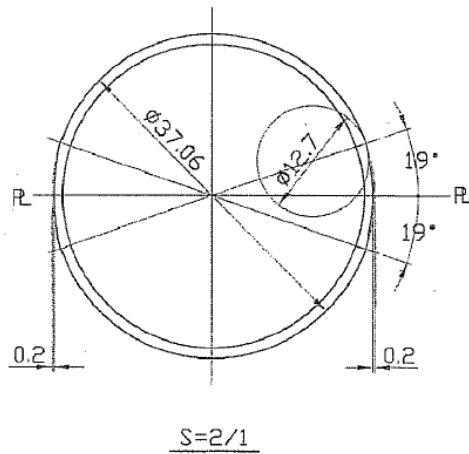


FIG. 6

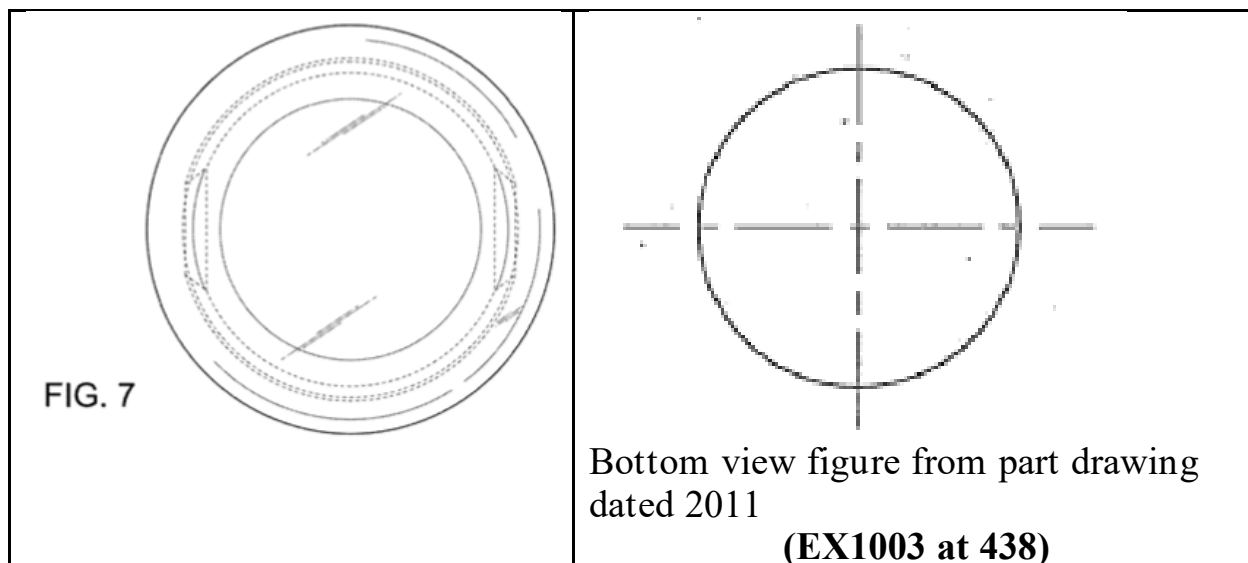


Side view figure from part drawing dated 2011 (annotated to remove dimension markings for clarity)



Top view figure from part drawing dated 2011 (showing top view of the neck portion only)

(EX1003 at 439)



143. As seen above, both the design of the '151 Patent and the McKernan Jar incorporate rounded edge transitions throughout the design, including at the external edges of the base portion, the external edges of the tubular neck portion, and the transition from the vertical walls to bottom surface of the compartment.

144. Regarding Fig. 6 of ' the '151 Patent in the above comparison, in my opinion, the base portion (not shown in the top view of the McKernan Jar) would present as an outermost circle from a top view of the jar that is concentric with the innermost circle that is presented by the neck portion. My opinion is based on and supported by the picture and side view of the McKernan Jar shown above which show that the base portion has a tubular shape and is wider than the neck portion, and that the neck portion is concentric with the base portion.

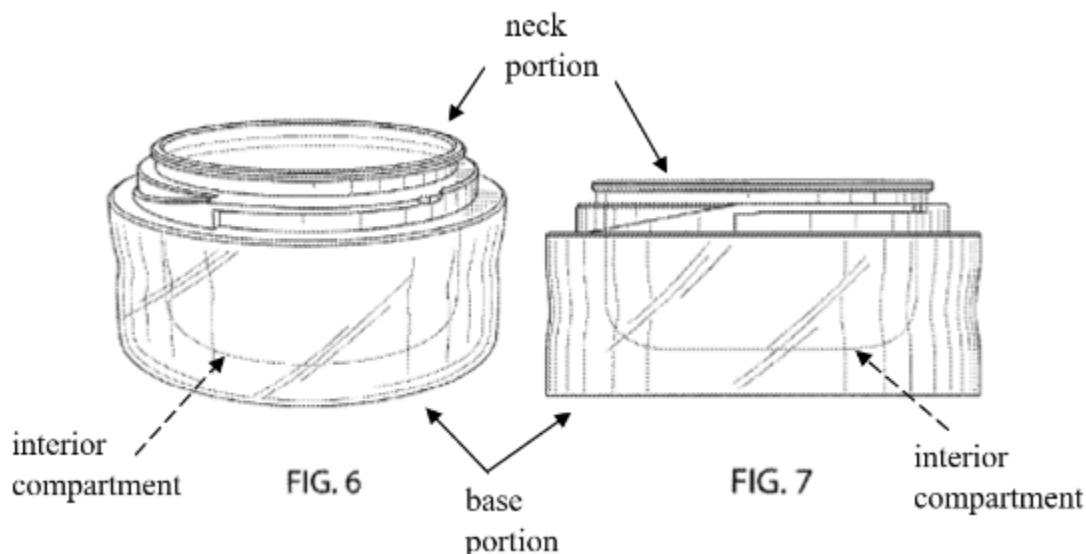
145. The primary difference between the design of the McKernan Jar and the design of the '151 Patent is that only the neck portion of the McKernan Jar is transparent rather than the entirety of the McKernan Jar. In other words, the base portion of the McKernan Jar, unlike its neck portion, is frosted and thus not see-through.

146. Transparency, in my opinion, is a functional feature. Lerman, in fact, admitted to the functionality of the transparent nature of the claimed design during prosecution of the reexamination of the '151 Patent when arguing non-obviousness of the design of the '151 Patent. Lerman specifically argued that the transparency of the claimed jar allowed “anything stored inside the jar to be readily visible from the outside” and “enhanced child-proof characteristics.” *See* EX1003 at pg. 261.

147. Also, transparent containers are well known in the art. Zamberlan, for example, discloses a transparent flask. *See* EX1013 at (54), (57) and Figs. 6 and 7. The design of the '151 Patent, the McKernan Jar, and the flask of Zamberlan are all containers and thus are from the same field of design.

148. Like the '151 Patent design, the flask of Zamberlan has a tubular base portion and a narrower tubular neck portion. *Id.* at Figs. 6 and 7. The neck portion of the Zamberlan flask is sized to accommodate threading for receiving a cap. As seen in Figs. 6 and 7 of Zamberlan (shown below with annotations), the flask is

entirely transparent revealing an interior bowl-shaped compartment similar to the design of the '151 Patent. *Id.*



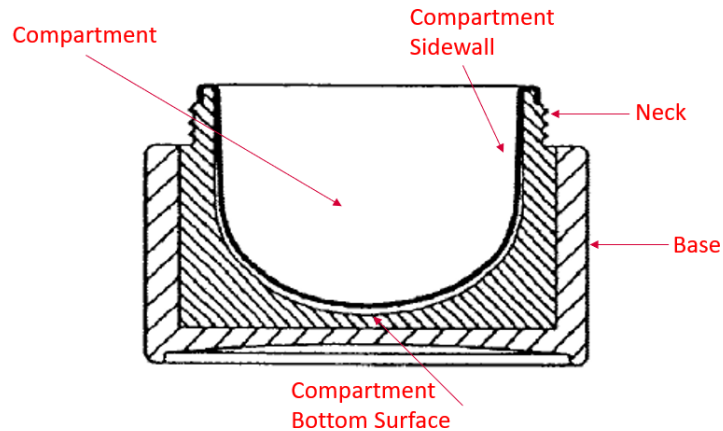
149. In my opinion, Zamberlan suggests the application of its transparent feature to the McKernan Jar to reveal the interior compartment of the McKernan Jar. It would have been obvious to remove the frosted finish from the base portion of the McKernan Jar such that the entirety of the McKernan Jar is transparent in order to reveal the interior compartment of the McKernan Jar and the contents therein. Such a modification of the McKernan Jar would have been obvious to provide visibility into the base portion of the McKernan Jar and any contents therein.

150. Other rationales for combining the McKernan Jar and Zamberlan include design incentives, such as to improve aesthetics, and market forces such as to improve the look and value of the jar to customers. Moreover, it would have been obvious to try a finite number of identified predictable solutions to a problem, such

as complete transparency of the McKernan Jar to solve the problem of not being able to see the contents inside of the jar.

151. To the extent that the combination of the McKernan jar and Zamberlan is considered to not explicitly show every design feature of the claim, any remaining differences from the design of the '151 Patent are minor and would have been obvious as mere design choices to a skilled designer.

152. For example, to the extent that the combination of the McKernan Jar and Zamberlan is considered to fail to explicitly show that the interior compartment thereof has a sloped sides with a concave bottom surface like that of the design of the '151 Patent, a skilled designer would have been motivated to incorporate such a concave shape for at least the simple function of pooling the contents of the jar to ensure use of and accessibility to all of the contents, especially to facilitate access to the contents, such as when using a finger. Also, containers with interior compartments that have sloped sides and minor radius of curvature of a concave bottom surface are well known in the art. For example, as discussed above, Canamasas Puigbo discloses a bottom surface of a compartment having a concave curvature. *See* EX1008, Fig. 3 (shown below with annotations).



153. Like the design of the '151 Patent and Zamberlan, the compartment of Canamasas Puigbo extends from a neck portion of the container into a base portion of the container. *Id.* As can be seen in Fig. 3 above of Canamasas Puigbo, the interior compartment thereof has sidewalls that slope into the bottom surface that has a concave curvature like the '151 Patent design. *Id.*

154. The similarities in design would motivate a skilled designer to apply the sloped sides with concave bottom surface of the compartments known in the art (e.g., Canamasas Puigbo) to the combination of the McKernan jar and Zamberlan. Such a modification would not affect any other design aspect of the combination of the McKernan jar and Zamberlan. And a skilled designer would have understood that the sloped sides and different degrees of radius for the concave bottom surface would be a design choice for accessibility to the contents and depend on the contents of the container for optimization of the degree of curvature, especially together with the radiused transition between the sidewall and bottom surface.

155. To the extent that the interior compartment of the combination of the McKernan Jar and Zamberlan is considered to be deeper than that of the design of the '151 Patent, it would have been an obvious design choice to select any desired depth (shallow or deep) for the compartment based on the desired volume of contents to be held within the jar. Moreover, in view of the truncated nature of the base portion of the McKernan Jar, a skilled designer would recognize the advantage of limiting the depth of the interior compartment into the base portion to maintain a solid base for the jar and avoid damage.

156. The height of the neck portion as compared to the base portion would functionally impact the volume within the compartment, and therefore, adjusting the height of the neck would directly adjust the volume contained in the compartment. For example, reduced shelf space for the same amount of product. And the height of the neck portion allows the neck portion to accommodate threading. Thus, the specific height of the neck portion as compared to the base portion is functional.

157. Also, modifying the proposed combination of the McKernan Jar and Zamberlan to incorporate a taller neck portion relative to the base portion would have been obvious to adjust the volume within the compartment to either aesthetically illustrate additional product without providing additional product in the compartment, or to correspond to the cap dimensions, which would be a designer's consideration as the proposed hypothetical combination is intended for use with a

cap, as shown by the threads in the drawings of '151 Patent; an elongation of the neck would also provide for the ability to include an accessibility tool in the cap. Such a modification of the proportional height would have been minor and not have resulted in any material alteration to other design features of the hypothetical combination.

158. For the reasons explained in detail above, supported by express motivation to modify the McKernan Jar, the expressed modifications would be considered *de minimis* by a skilled designer and driven by obvious design choices.

159. For at least the above reasons, the design '151 Patent as a whole is obvious in view of the combination of the McKernan Jar and Zamberlan. Any deficiencies in the combination of the McKernan Jar and Zamberlan would have been minor, commonplace in the design of jars, and obvious design choices.

XI. CONCLUSION

160. The findings and opinions set forth in this declaration are based on my work and analysis to date. I may continue my analysis. I may also receive additional documentation and other factual evidence over the course of this proceeding that will allow me to supplement and/or refine my opinions. I reserve the right to add to, alter, or delete my opinions and my declaration upon discovery of any additional information. I reserve the right to make such changes as may be deemed necessary.

161. In signing this declaration, I recognize that the declaration will be filed as evidence in a contested case before the Patent Trial and Appeal Board of the United States Patent and Trademark Office. I also recognize that I may be subject to cross-examination in the case and that cross-examination will take place within the United States. If cross-examination is required of me, I will appear for cross-examination within the United States during the time allotted for cross-examination.

162. I hereby declare under the penalty of perjury that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.

Executed this 1st day of July, 2024 in Pittsburgh, Pennsylvania

Respectfully submitted,



APPENDIX A

Materials Considered

- EX1001 – U.S. Patent D781,151
- EX1003 – Ex Partes Reexamination of ’’151 Patent
- EX1007 – U.S. Patent D795,705
- EX1008 – U.S. Patent D578,891 S
- EX1010 – U.S. Patent D781,151 Prosecution File History
- EX1012 – U.S. Patent Application Publication 2010/0307521
- EX1013 – U.S. Patent D634,202 (“Zamberlan”)
- EX1014 – Neutrogena – Our History
- EX1015 – Say Tioco – Neutrogena Hydro Boost Press Launch
- EX1016 – Publicity PR – Nutrogena Hydro Boost Launch
- EX1017 – Tried and Tested Blog – Neutrogena Hydro Boost Water Gel SPF 15 & Hydro Boost Night Concentrate – Review
- EX1018 – U.S. Patent D563,221
- EX1020 – T. Fletcher Curriculum Vitae
- EX1021 – T. Fletcher Publications
- EX1022/1023 – Internet Archive Declaration/Appendix A
- EX1025 – Internet Archive of URL
<http://mckernan.com/store/images/D/EL-28595.jpg> captured October 30 2013.
- EX1026 – Internet Archive URL
<https://www.archive.org/web/20150606135050/http://www.beautypackaging.com/issues/201...>
- Updated Guidance and Examination Instructions for Making a Determination of Obviousness in Designs in Light of *LKQ Corp. v. GM Global Technology Operations LLC*, dated May 22, 2024