

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MPL BRANDS NV, INC.

Petitioner,

v.

BUZZBALLZ, LLC

Patent Owner.

PTAB Case No. PGR2024-00035

U.S. Patent No. 11,932,441

PETITIONER REPLY

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EXHIBIT LIST (Changed)

Exhibit	Description
EX1001	U.S. Patent No. 11,932,441 B1 (“’441 patent”)
EX1002	Declaration of Nathan J. Delson, PhD (“Delson”)
EX1003	Prosecution File History of US Design Patent Application 29/824,813
EX1004	Prosecution File History of ’441 Patent
EX1005	Declaration of Joseph T. Norris (“Norris”)
EX1006	Coca-Cola Plastic Can Marketing Material
EX1007	The American Heritage Dictionary
EX1008	U.S. Patent No. 8,524,349 B2 to Protais et al. (“Protais”)
EX1009	U.S. Patent No. 4,405,546
EX1010	U.S. Patent No. 8,141,741 B2 to Metzger, et al. (“Metzger”)
EX1011	U.S. Patent No. 4,465,204 to Kaminski (“Kaminski”)
EX1012	U.S. Patent No. 6,729,495 B2 to Gardiner (“Gardiner”)
EX1013	U.S. Patent No. 6,585,123 B1 to Pedmo et al. (“Pedmo”)
EX1014	U.S. Patent No. 4,024,981 to Brown (“Brown”)
EX1015	The 1985 Los Angeles Times Article
EX1016	The 1985 New York Times Article
EX1017	Handbook of Engineering and Specialty Thermoplastics
EX1018	Declaration in Support of Petitioners’ Motion for Pro Hac Vice Admission of Andrew Kalamarides
EX1019 (NEW)	Reply Declaration of Nathan J. Delson, PhD (“Delson Reply”)

Exhibit	Description
EX1020 (NEW)	Reply Declaration of Joseph T. Norris (“Norris Reply”)
EX1021 (NEW)	US Patent Application No. 12/762,934
EX1022 (NEW)	Transcript of Deposition Dr. Rojas, May 28, 2025 (“Rojas Depo.”)

I. INTRODUCTION

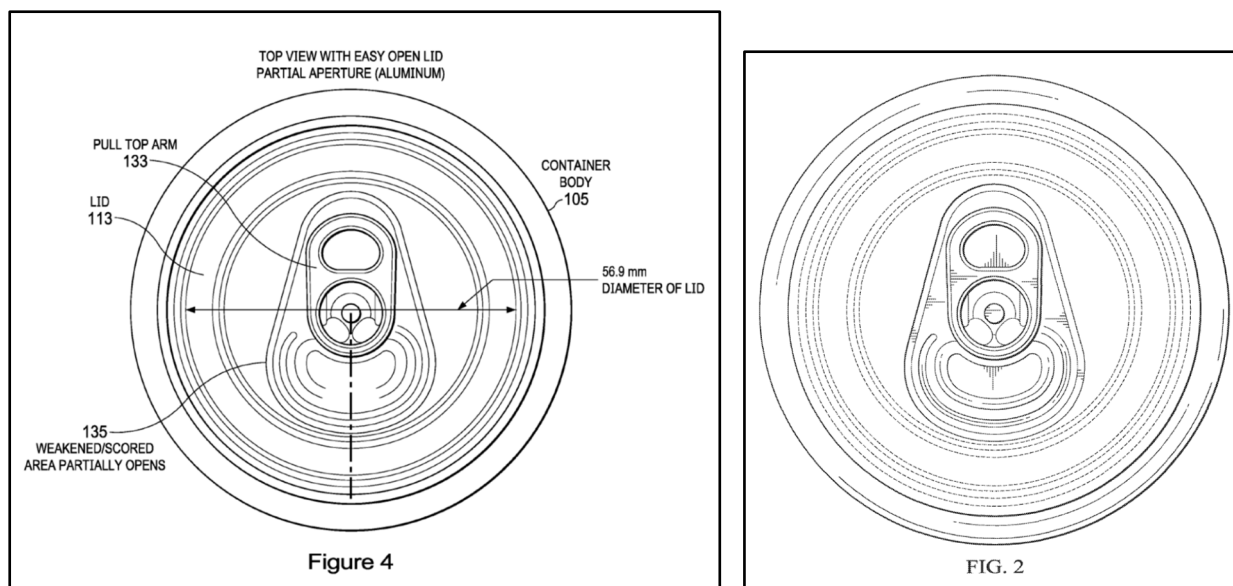
Petitioner fails to refute that the '441 patent claims are invalid and should be cancelled.

II. THE '441 PATENT IS PGR ELIGIBLE BECAUSE NEW MATTER WAS ADDED TO THE '813 APPLICATION.

A. Petitioner proved that new matter was added.

Because U.S. Patent Application No. 29/824,813 (“the '813 application”) claimed new matter when filed on January 27, 2022, that application falls under AIA §3(n)(1)(A). Under AIA §3(n)(1)(B), the '441 patent is PGR eligible because it claims priority to the '813 application. (Petition, 4-7.)

PO asserts that Petitioner did not provide “*any* evidence” that a POSITA would find that Figure 2 of the '813 application lacked written description support in its parent U.S. Application No. 16/800,195 (“the '195 application”). (POR, 4.) Petitioner, however, provided such evidence—the application figures themselves, which show different contour lines below the tabs:



(EX2002, 106; EX1003, 187.) These differences can be seen by an ordinary observer, especially because both figures were full-page size in the applications.

Petitioner also identified evidence in the prosecution history that new matter was added. The Examiner recognized the new matter in Figure 2 and offered the applicant to change the figure to eliminate the new matter or proceed with priority based upon the '813 application date. (EX1003, 108.) Applicants acquiesced to that rejection by replacing Figure 2 with a figure where the contour lines do not connect (EX1003, 70, 102), just as in Figure 4 of the '195 application.

PO next argues that the lack of written description evidence is “attorney argument” and not a declaration of a POSITA. (POR, 5.) Because the figure difference is readily apparent and does not involve technical issues requiring special education or expertise, however, no expert testimony is needed. *See, e.g., Union Carbide Corp. v. Am. Can Co.*, 724 F.2d 1567 (Fed. Cir. 1984) (expert testimony not needed for

non-complex technology); *Primera Tech., Inc. v. Automatic Mfg. Sys., Inc.*, IPR2013-00196, 2014 WL 4421844, *3-4 (PTAB Aug. 29, 2014) (rejecting argument that the Board “misapprehended or overlooked that attorney argument is not evidence” because the evidence was “easily understandable”). Additionally, in response to the declarations of PO’s experts, Dr. Delson explains that a POSITA would recognize that the two figures depict different lid designs. (Delson Reply, ¶¶6-18.)

Notably, while the Board stated in its Institution Decision (“ID”) that “[o]n this record we are not directed to any other figures or disclosure in the ’195 parent application that provide support for the line design depicted in Figure 2 of the ’813 design application” (ID, 23), the POR fails to identify any such support, as there is none.

B. PO fails to refute that new matter was added and claimed in the ’813 application.

PO argues that “minor inconsistencies” between figures do not constitute new matter. (POR, 6.) The differences in the figures, however, are not “minor inconsistencies” that reflect the same design; they reflect actual differing lid designs. (Delson Reply, ¶¶16-18.)

For example, the following lids have contour lines that do not connect, like Figure 4 of the ’195 application:

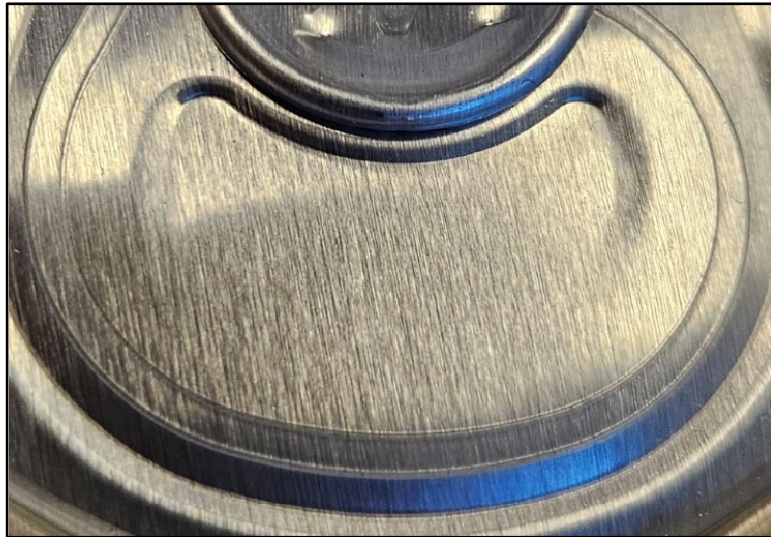


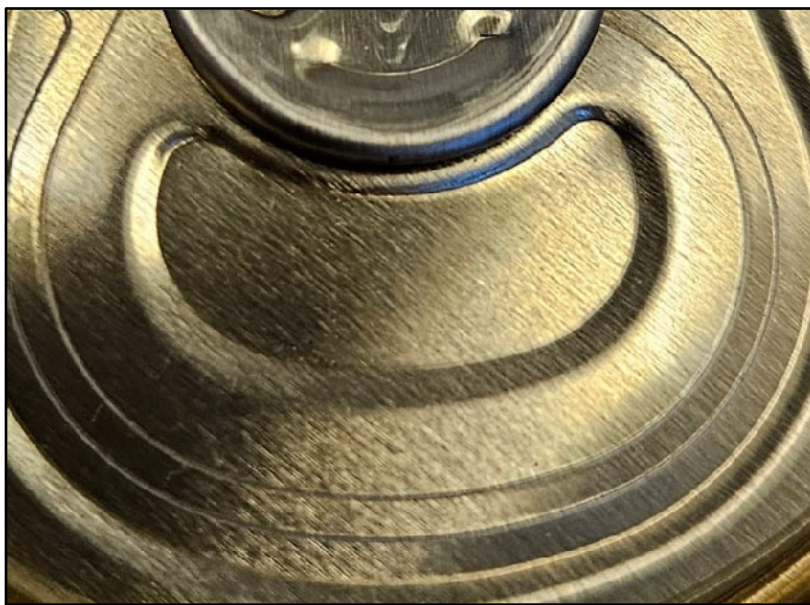
(*Id.*, ¶13.) By contrast, the following lids have contour lines (indents or protrusions) that do connect, like Figure 2 of the '813 application:





(*Id.*, ¶14.) Enlargements show these are physical differences, not the result of lighting or angle:





(*Id.*, ¶15.)

While Dr. Rojas asserts that a POSITA “would understand these drawings show the same design,” he offers no legitimate explanation why. (EX2028 (“Rojas,”) ¶48.) He cites no evidence that the two figures depict the same physical structure. He asserts that the contour lines in Figure 4 of the ’195 application that stop illustrate a ridge that “gradually flatten[s] toward the bottom.” (*Id.*, ¶50.) But there are no contour lines at the bottom, depicting no ridge, not a shallower ridge. (EX2002, 106; Delson Reply, ¶¶8, 16.) Dr. Rojas further asserts that the figure differences depict “surface shading” of the same design. (Rojas, ¶53.) That is refuted by the figures themselves and by the actual lids depicted above. Furthermore, according to MPEP §1503.02, “if the surface shape is not evident from the disclosure as filed, the addition of surface shading after filing may comprise new matter.” Therefore, even if the additional lines were added surface shadings, they would be new matter.

As to Mr. Kirkpatrick, he is a patent illustrator (EX2001 (“Kirkpatrick”), ¶5), not a POSITA, so he is unqualified to offer an expert opinion as to what a POSITA would recognize. (ID, 28-29.) Additionally, Mr. Kirkpatrick’s conclusory assertions that the differences between the figures are minor and simply show two approaches to illustrate the same design (*e.g.*, Kirkpatrick, ¶16) fail for the same reasons as Dr. Rojas’ opinions addressed above. While Mr. Kirkpatrick asserts that both figures reflect the “‘very popular’ pop top lid” (*id.*, ¶19), he offers no details regarding the design of that “very popular” lid and provides no evidence that all pop top lids are the same. As demonstrated above, they are not.

PO cites *Skechers U.S.A., Inc. v. Nike, Inc.*, IPR2016-00871, Paper 8 at 21 (PTAB Sept. 29, 2016) to argue that the figure differences are “minor inconsistencies.” (POR, 6.) The Board already rejected PO’s reliance on *Skechers* because the design differences there were so minute they could only be observed through magnification and/or could be resolved by reference to other figures in the application. (ID, 24-25; *see also* Prel. Reply, 4.) Notably, *Skechers* distinguishes a prior decision where earlier-filed figures did not support later-filed figures because “[t]he side-by-side comparison was undertaken by the Board without any embellishment or magnification of the drawings.” IPR2016-00871, Paper 8 at 22, citing *Munchkin, Inc. v. Luv N’ Care Ltd.*, IPR2013-00072, Paper 28 at 6-8 (PTAB April 21, 2014). The same is true here, where the differences between the originally-filed, full page-sized

figures can be easily observed without embellishment or magnification. (*Compare* EX2002, 106 *with* EX1003, 187.) The Board also found that PO's reliance on *David's Bridal, Inc. v. Jenny Yoo Collection, Inc.*, PGR2016-00041, Paper 9 (PTAB Feb. 22, 2017) (POR, 7) is equally misplaced. (ID, 25; Prel. Reply, 5.)

PO also cites *Ex Parte Asano*, 201 U.S.P.Q. 315, 1978 WL 21280 (BPAI 1978). *Asano* is inapposite because it concerns whether inconsistencies in figures in a single application are significant enough to support written description and indefiniteness rejections. *Id.*, *1. It does not address changes between figures in parent and child applications. Moreover, *Asano* states:

Mechanical drawing errors and inconsistencies between the figures of the drawing *which* do not preclude the overall understanding of the drawing as a whole are an insufficient basis for holding the design both indefinite and insufficiently disclosed under 35 USC 112.

Id., *2 (emphasis added). In the POR, PO replaced the word “which” with ellipses, which changed the meaning of the sentence. (POR, 6.) Here, the inconsistencies between the figures in the '195 and '813 applications do change the overall understanding of lid designs. (Delson Reply, ¶18.)

The evidence of record—most significantly the differing figures from the two patent applications—demonstrates that the '813 application claimed new matter.¹

III. THE COCA-COLA PET CANS WERE AUTHENTICATED

A. PO waived any authenticity arguments.

PO repeatedly asserts that the Coca-Cola PET cans have not been “authenticated.” (POR, 15-35; *id.*, 35 (“For these additional reasons, the Board *should not consider the Sprite can authenticated* prior art.”) (emphasis added).) If PO contends that the cans are not what Petitioner asserts (i.e., are not authentic cans sold by Coca-Cola), PO waived such an authenticity argument by not timely objecting under 37 C.F.R. § 42.64(b). Petitioner nevertheless addresses PO’s arguments below.

¹ PO and Dr. Rojas go beyond asserting that Petitioner failed to prove that the '441 patent is PGR eligible; both affirmatively assert that the '441 patent is not PGR eligible. (POR, 1, 3; Rojas, ¶¶24, 43). For that assertion to be true, Figure 2 of the '813 design patent application would have to be supported by the '934 application filed on April 19, 2010, as that is the only priority application filed before March 15, 2013. The '934 application, however, has completely different figures of the lid, which do not support Figure 2 of the '813 application. (*See* EX1021, 17 (Figures 4 and 6 of the '934 application depicting completely different lid designs than Figure 2 of the '813 application).)

B. Petitioner authenticated the Coca-Cola PET cans.

FRE 901(a) states that “[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” The Rule provides examples of evidence that satisfies this requirement, including the “[t]estimony of a [w]itness with [k]nowledge” and “[d]istinctive [c]haracteristics and the [l]ike.” FRE 901(b)(1) and (4). Authentication is “not an especially high hurdle for a party to overcome.” *Hamilton Techs. LLC v. Fleur Tehrani*, IPR2020-01199, Paper 57 at 23 (PTAB Dec. 28, 2021).

Petitioner proved the Coca-Cola PET cans, with the design, shape, and composition of those presented in its Petition, were publicly sold in western Georgia and eastern Alabama in 1985 through Mr. Norris’ testimony. (Pet., 14.) Mr. Norris was a packaging engineer for The Coca-Cola Company from 1977-90, and in 1984-85 he “was responsible for package engineering and commercialization of Coca-Cola’s PET products” (Norris, ¶5; *id.*, ¶¶11-12, 20, 26-30.) Mr. Norris initially inspected the Coca-Cola PET cans depicted in his declaration and the Petition through both photographs and during videoconferences. (Norris Reply, ¶6.) As he explained, those cans bear distinctive markings, including “PETAINER ®” and “PAT 4,405,546 AND OTHERS” on the bottom of the cans. Through his inspections, comparison to cans in his own possession, and his personal knowledge about the

cans, he confirmed the images show authentic Coca-Cola PET cans sold in 1985-86. (Norris, ¶36.) Thus, the authenticity of the cans is demonstrated through both the testimony of a knowledgeable witness and distinctive markings on the cans. FRE 901(b)(1) and (4).

Coca-Cola's sale of PET cans in 1985 is corroborated by contemporaneous documents. A Coca-Cola pamphlet (EX1006)—distributed with the cans when they were sold (Norris, ¶¶37-38)—reflects the shape of the cans and bears a 1985 copyright date.² Additionally, October 15, 1985 New York Times and LA Times articles state that Coca-Cola will be selling drinks in the plastic cans “this week” in the same geographic area identified by Mr. Norris and that the cans will contain “Coca-Cola, Coca-Cola Classic, Diet Coke and Sprite.” (EX1015; EX1016.) The LA Times article also includes an image of the Coca-Cola plastic can that matches the image of the can in the Petition. (*Compare* EX1015 *with* Petition, 14.)

PO presents no evidence the cans are inauthentic. Instead, PO asserts that the images of the PET cans do not show all four markings discussed in Mr. Norris'

² While failing to timely object to EX1006, PO belatedly asserts that the copyright date in EX1006 is not sufficient for authentication. (POR, 27.) PO, however, fails to account for the testimony of Mr. Norris (Norris, ¶37), authenticating the exhibit through his first-hand familiarity with that advertisement.

declaration. (POR, 17-22.) PO mischaracterizes Mr. Norris' testimony, however, as he never stated he needed to see all four markings to authenticate the cans. The images in his declaration show the cans, the can labels, and the bottom of the cans, including the markings "PETAINER ®" and "PAT 4,405,546 AND OTHERS." (Norris, ¶16.) PO asserts that the image of the bottom of the can does not adequately show the name Petainer or the patent number (POR, 21), but an enlargement of the image shows that it does:



(Norris, ¶16 (image enlarged).) The shape of the cans, the labels in the images, and the markings on the bottom of the cans were sufficient for Mr. Norris (*id.*, ¶36) to authenticate the cans as publicly sold by Coca-Cola in 1985-86. FRE 901(b)(1) and (4).

Mr. Norris also responds to PO's arguments by clarifying that his prior inspections were not limited to photographs because he also inspected the cans during videoconferences. (Norris Reply, ¶6.) Additionally, Mr. Norris reconfirmed through a subsequent, in-person inspection that the cans contain the markings relating to (1) the location of the canning, (2) the recycling information, (3) the bar code information, and (4) the markings on the bottom of the cans. (*Id.*, ¶¶10-11.)

PO next argues that Mr. Norris' testimony was "inconsistent, uncorroborated, and unreliable." (POR, 16, 22-24.) As to inconsistency or unreliability, Mr. Norris explained that he made a typo in his declaration regarding the phone number on the cans (438-2053 instead of 438-2653). (EX2014, 34:17-35:10.)³ And he explained that while all the cans list the recycling phone number "1-800-GET-COKE," only the Sprite can includes translation into digits, "(438-2653)." (*Id.*, 35:11-24.) These minor errors do not render his testimony inconsistent or unreliable. That these differing ways to list the phone number precisely match the listings on the Coke and Sprite cans in his possession further confirms the authenticity of the cans. (Norris Reply, ¶13.)

To argue that Mr. Norris' testimony requires further corroboration, PO cites. 37 C.F.R. § 42.65(a), which states "[e]xpert testimony that does not disclose the

³ Humorously, PO made the same typo, identifying Han as EX2020 when it is actually EX2026. (POR, 44-45.)

underlying facts or data on which the opinion is based is entitled to little or no weight.” Mr. Norris provided *factual* testimony, based on his personal knowledge as project manager of Coca-Cola’s PCAN project in 1984, that such Coca-Cola PET cans were publicly sold in 1985. As to his opinion that the cans presented in the Petition were authentic cans from 1985, he provided extensive factual bases for his opinion, which was further corroborated by the Coca-Cola brochure and the newspaper articles. While PO argues that the brochure and newspaper articles alone do not prove when the cans were sold (POR, 26-27), they are not presented alone; they are presented with and corroborate Mr. Norris’ testimony.

PO cites *AQ Textiles, LLC v. Arun Agarwal*, PGR2017-00042, Paper 10 at 14 (PTAB Feb. 7, 2018) to argue that Petitioner has not corroborated Mr. Norris’ testimony. (POR, 25-26.) *AQ Textile* concerned whether an invoice of a single sale to the petitioner shortly before the patent’s priority date and a declaration from an individual affiliated with the petitioner was sufficient to prove a product was on sale. PGR2017-00042, Paper 10 at 15-16. The Board found such evidence sufficient. *Id.*, 16. Here, the Coca-Cola PET cans were widely sold throughout western Georgia and eastern Alabama in 1985, over 25 years before the earliest possible priority date for the ’441 patent. And Mr. Norris, the project manager for that product, explained in detail that those products were sold in 1985-86 and that he “was a frequent

visitor to stores to inspect the cans and the in-store displays for any performance related issues.” (Norris, ¶28.)

PO also relies (POR, 27-28) on *Pelican Biothermal, LLC v. Va-Q-Teq AG*, PGR2021-00085, Paper 9 at 61-63 (PTAB Dec. 17, 2021). In *Pelican*, the petitioner presented pictures of the 98330-type product but could not confirm whether the pictures represented a current design or design that pre-dated the priority date of the patent, and the only testimony provided was from petitioner’s employees. *Id.*, 62-63. Here, unlike *Pelican*, Petitioner presented testimony from a former employee of the third party that manufactured and sold the prior art products, and he confirmed that the cans in the Petition have the same shape and design of the cans manufactured and sold by Coca-Cola only in 1985-86. (Norris, ¶36.)

Finally, PO argues that Petitioner has not shown that the cans are examples of Coca-Cola PET cans that were publicly available in 1985. (POR, 16-17, 29-35.) That is not correct. Mr. Norris declared that the cans in Petitioner’s possession and shown in the Petition are authentic cans sold in 1985. (Norris, ¶36.) PO’s reliance (POR, 31-32) on, *China Lithium Battery Tech. Co. v. Contemp. Amperex Tech. Co.*, PGR2022-00008, Paper 8 (PTAB June 6, 2022) is misplaced. Claim limitations at issue in *China Lithium* concerned aspects of batteries that could change over time, and the petitioner failed to show that their present testing of the batteries reflected the state of those batteries before the priority date of the patent. *Id.*, 12-14. Here,

Mr. Norris confirmed that the cans presented in the Petition reflect the shape and design of the cans in 1985, and PO fails to identify any feature that might have changed over time and impacted the invalidity analysis.

PO's reliance on *Albany Int'l Corp. v. Kimberly-Clark Worldwide, Inc.*, PGR2021-00019, Paper 18 at 2 (PTAB Mar. 22, 2021) is also misplaced. In *Albany*, the Board first found that alleged prior art product did not meet a claim limitation. *Id.*, 28-29. The Board further found that the petitioner did not present evidence regarding the relevant aspects of the products when sold, as the product images presented in the PGR showed deterioration in ways that could have impacted the invalidity analysis. *Id.*, 29-30. Here, there is no deterioration in the Coca-Cola cans that would impact the invalidity analysis.

Finally, PO appears to challenge the authenticity of the Mr. Norris' own Coca-Cola PET cans. (POR, 33-35.) Mr. Norris testified that he obtained the cans when they were manufactured and sold by Coca-Cola in 1985-86. (Norris, ¶32.) PO has not raised any basis to doubt the authenticity of those cans. But to address any possible doubt, Mr. Norris confirms that he is familiar with the shape and design of the Coca-Cola PET cans that were sold by Coca-Cola in 1985-86, and that the cans in his and Petitioner's possession and depicted in the Petition have the same shape, design, and markings as cans sold in 1985-86. (Norris Reply, ¶14.)

PO has failed to raise any sustainable authenticity argument.

IV. GROUND 1: PO RAISES NO ADDITIONAL ISSUES.

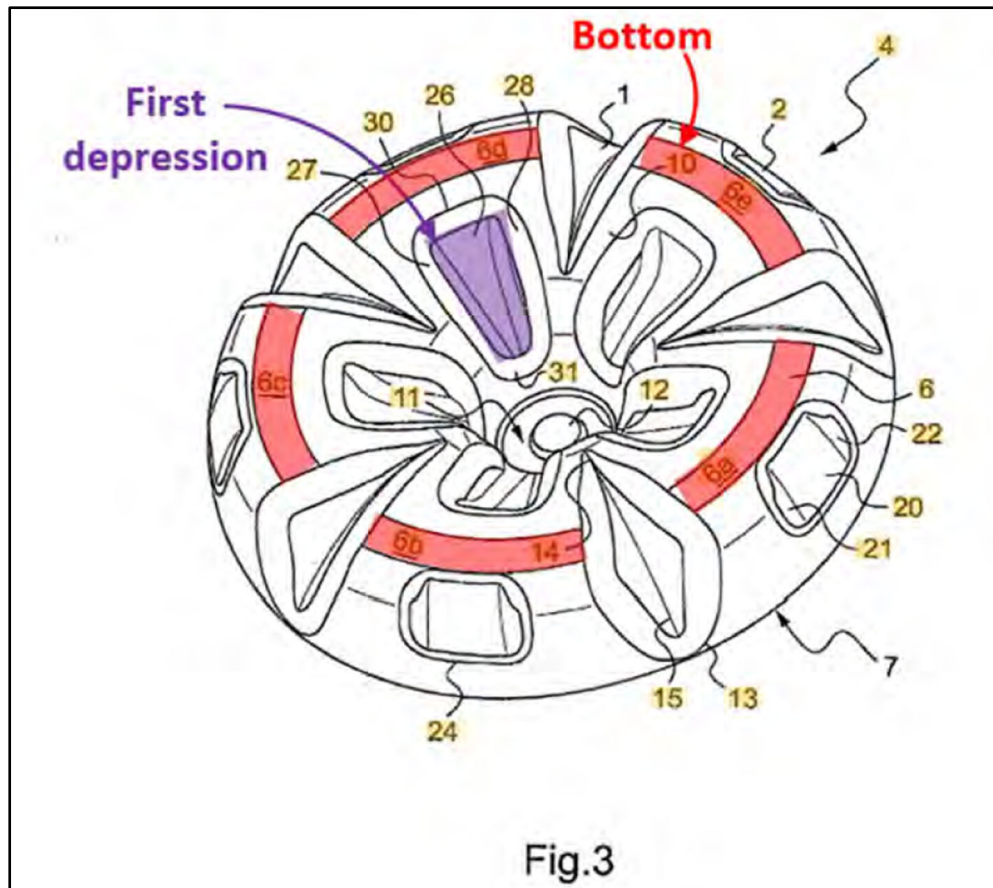
Other than disputing PGR eligibility and authenticity, PO does not raise any other arguments against Ground 1. Therefore, claims 1-8 should be found invalid.

V. GROUND 2: PETITIONER DEMONSTRATED THAT THE COCA-COLA PET CANS AND PROTAIS RENDER CLAIMS 9-20 OBVIOUS.

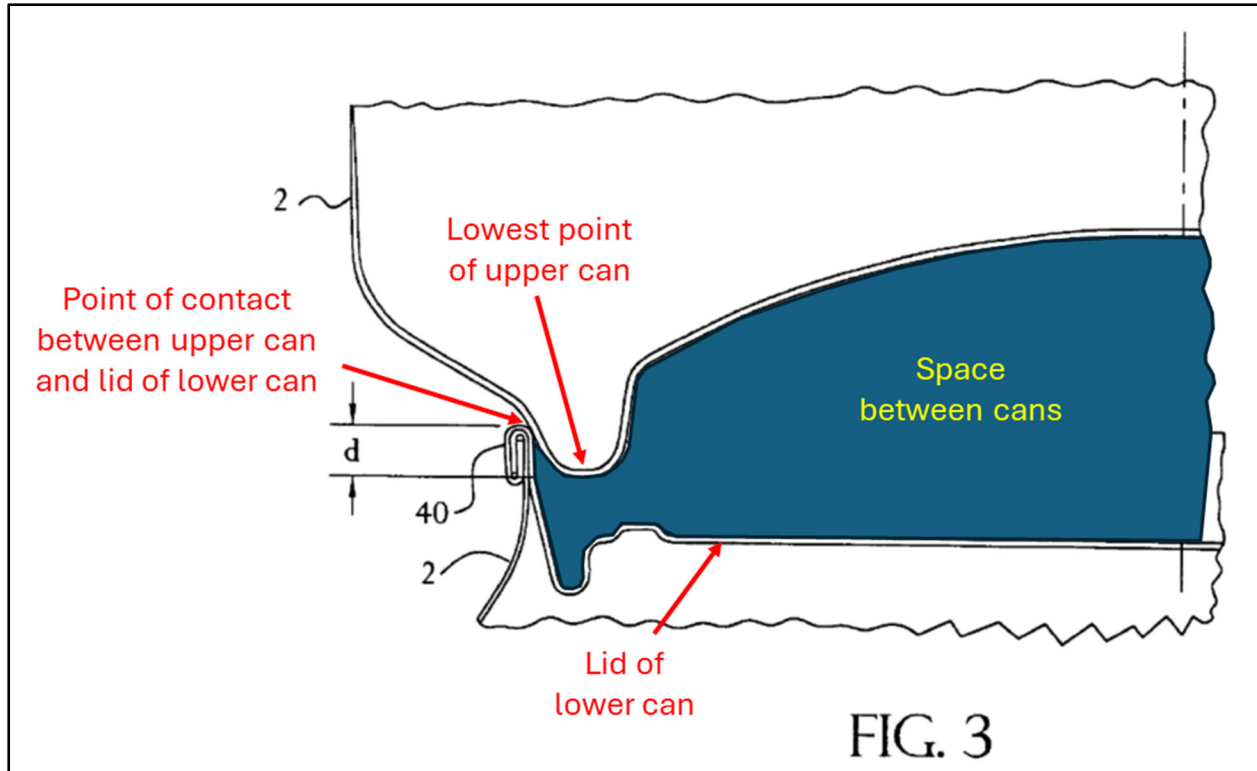
A. PO fails to refute Petitioner's showing of a motivation to combine.

Petitioner demonstrated that a POSITA would have been motivated to combine the Coca-Cola PET can with Protrais' bottom. (Petition, 69-70.)

PO asserts a lack of motivation to make that combination because the cans would not be stackable (something not required by the claims). (POR, 38-44.) Contrary to PO's assertions, cans with Protais's bottom would be stackable for multiple reasons. Like the can in Cheng, the bottom of Protrais is arched upward, as shown in Protrais' perspective view of Figure 3:



(EX1008, Fig. 3 (annotated); *id.*, Abstract, 3:38 (describing the “concave inner wall” of the bottom); Delson Reply, ¶22.) Therefore, the overlay drawing in the POR (POR, 43) proves nothing, as Protrais’ arched bottom would provide sufficient room for the tab of the lower can. (Delson Reply, ¶22.) Additionally, though not needed, a POSITA could have adjusted the size and angle of Protrais’ bottom so that it would sit above the central part of the lower can as depicted in Cheng, providing even additional space for a tab:



(EX2016, Fig. 3 (annotated), Delson Reply, ¶21.)

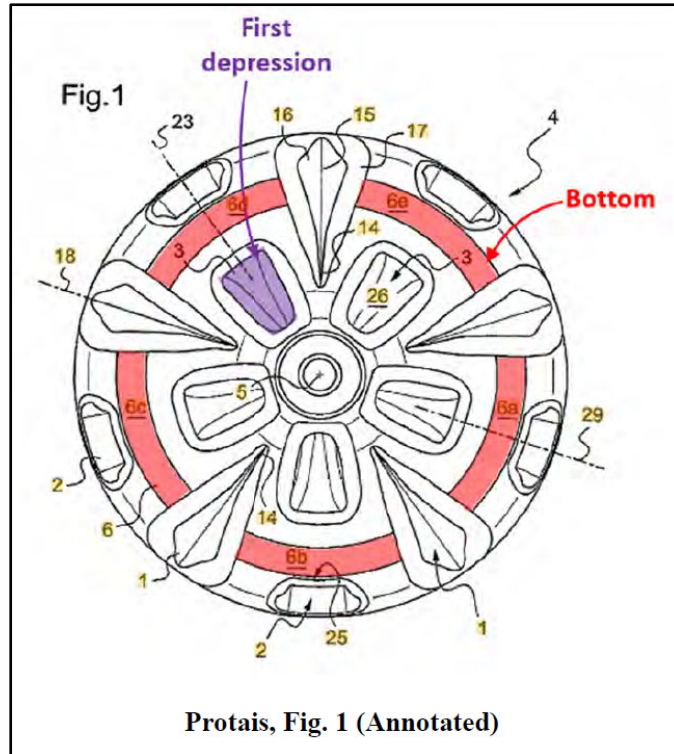
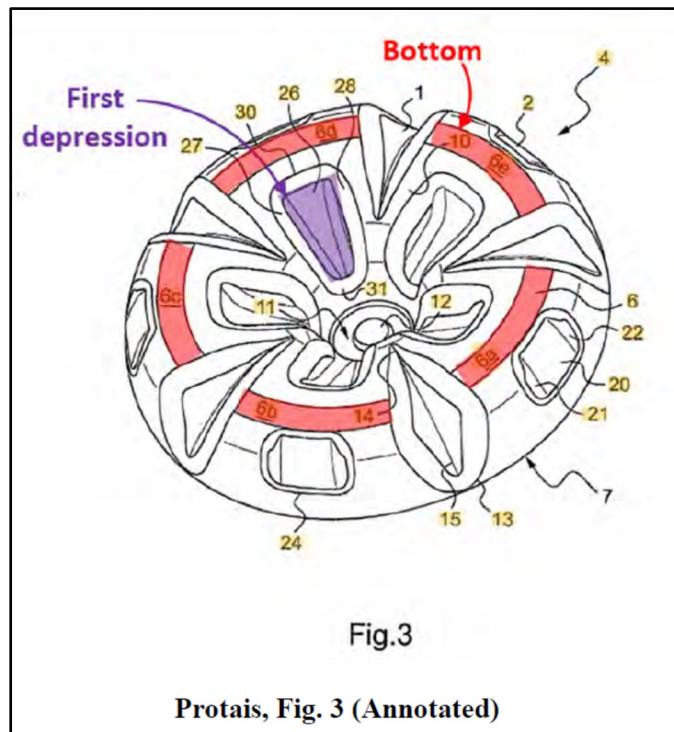
PO also misleadingly cites Han (EX2026) to argue that the Coca-Cola PET can bottom has the strongest shape, so a POSITA would not be motivated to use Protrais' bottom. (POR, 44-45.) But Han concerns shape optimization for an *aluminum* bottom. (See, e.g., EX2026, 1.) Han does not address the best shape for plastic, so Han is irrelevant to proposed combination. (Delson Reply, ¶25.) By contrast, Protrais proposes a stronger design for a plastic bottom (EX1008, 3:14-31), so a POSITA would have been motivated to make the combination.

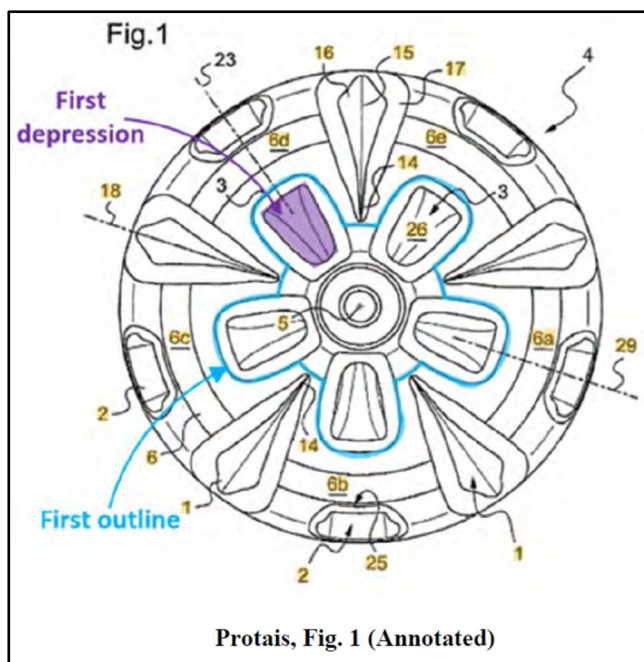
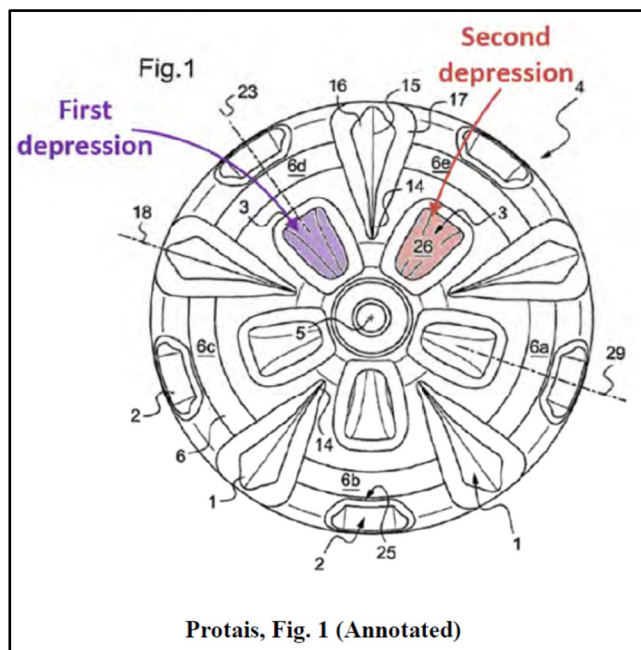
B. Petitioner mapped claims 15-20 with sufficient particularity.

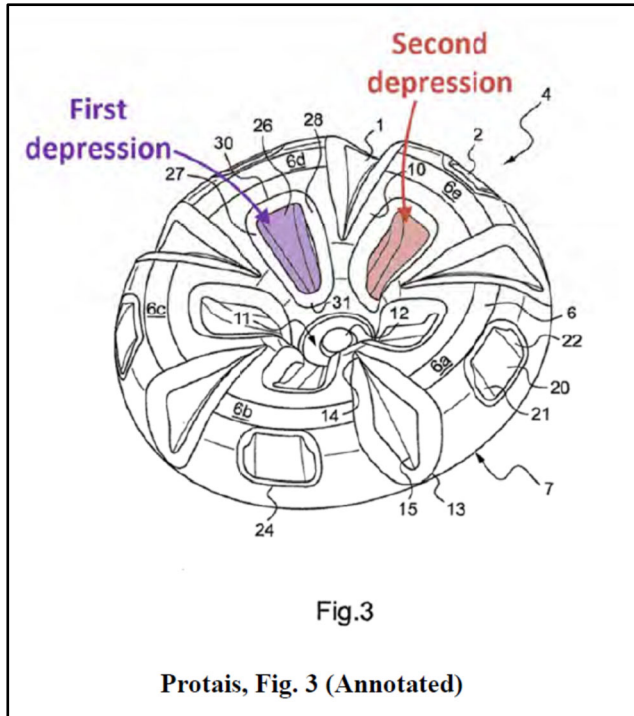
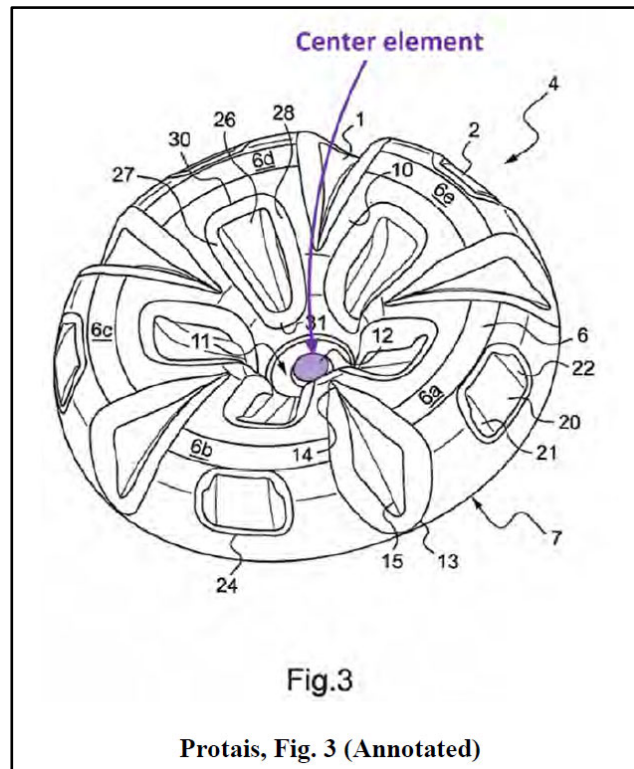
PO argues that Petitioner did not set forth the invalidity grounds for claims 15-20 in Ground 2 with sufficient particularity. (POR, 46-48.) Many of the

limitations of claim 15 are almost identical to those of claim 1, so Petitioner cross referenced the invalidity bases for claim 1 under Ground 1. But Petitioner made clear that for Ground 2, it was relying on Protais' container bottom. (Petition, 69-70.)

PO asserts that it is unclear what Petitioner was identifying under Ground 2 for limitations 15.E-J and 15.L-M, but given the labeling of images in claims 9 and 11, which are cross-referenced by the mapping in claim 15, the Petition shows with sufficient particularity where each limitation can be found on Protrais' bottom. Each limitation—15.E (base portion), 15.F (bottom and first depression), 15.G (first outline), 15.H (center element), 15.I (first outline partially defined by the first depression), 15.I (center element and first outline centered with respect to the container sidewall), 15.J (center element and first outline centered with respect to the base), 15.L (base defines a diameter less than diameter of middle portion of container side wall), 15.M (lower portion of sidewall having greater diameter than the base)—is shown in the Petition:







(Petition, 73-78, 80.) Thus, Petitioner identified where each limitation is found, and the Board's ID had no difficulty parsing claim 15 limitations and finding it obvious

in view of the Ground 2 combination. (ID, 45-46.). This clarification in reply to arguments in the POR is appropriate, as Petitioner set forth in the Petition that Ground 2 consisted of the combination of the Coca-Cola PET can combined with the bottom of Protrais. (*See, e.g.*, Petition, 69 (“A POSITA would have found it obvious to make a container that has the body and lid of the Coca-Cola PCAN, and Protrais’ bottom.”).) *See, e.g., Satco Prods., Inc. v. Regents of the Univ. of Cal.*, IPR2021-00662, Paper 57 at 6-7 (PTAB Nov. 4, 2022) (affirmed in relevant part, rev’d on other grounds).

VI. GROUND 3

A. It would have been obvious to a POSITA to make a container using a resin-based plastic.

Petitioner demonstrated that: (1) Metzger teaches that its container can be made of “various plastics” (EX1010, 3:56-58); and (2) it would have been obvious to a POSITA to make the plastic container from a resin (Petition, 108; Delson, ¶¶23, 36, 187). PO responds that Petitioner improperly invoked “inherency.” (POR, 48-51.) The Petition, however, states that the use of a resin would have been “obvious,” not that it was inherent. (Petition, 108.)

Metzger does not limit the type of plastic that can be used to make the container. (EX1010, 3:56-58.) As Dr. Delson explains, long before and at the time of the alleged invention, molded plastic bottles and containers were commonly made from PET, a resin-based plastic, and therefore making a container from a resin would

have been obvious to a POSITA. (Delson, ¶¶23, 36, 187; EX1007 (defining resin as “[a]ny of numerous physically similar polymerized synthetics ... to form plastics”).) Protais further demonstrated that the use of a resin-based plastic, PET, for making drink containers was well known and obvious. (EX1008, 1:7-16, 1:22-54 (describing the prior art method of making blow molded drink containers using PET).) And Dr. Rojas admitted that POSITAs would have been familiar with the use of PET, a plastic-based resin, for making blow-molded liquid containers. (EX1022, 38:23-39:11, 47:20-48:14, 48:25-49:17.) Moreover, the ’441 patent attaches no significance to the use of plastic/synthetic resin. (’441 patent, 3:9-15.)

Thus, it would have been obvious to a POSITA to make a container from a resin-based plastic in view of the teachings of Metzger, Protais, and the knowledge of a POSITA.

PO next argues that Petitioner failed to provide a “reason” that a POSITA would select a resin-based plastic. (POR, 51-52.) Petitioner, however, provided such a “reason” because Metzger discloses that the container can be made of “various plastics” (EX1010, 3:56-58), and liquid containers were commonly made from plastic resins (Delson, ¶¶23, 36). PO’s argument that Petitioner was required to present a “reason” was rejected by the Supreme Court in *KSR*, where the Court rejected the strict requirement of a “teaching, suggestion, or motivation” (“TSM”). *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007) (rejecting that a TSM is mandatory

because “[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results”). As Petitioner explained, the combination of the teachings of Metzger, Protrais, and Kiminski to arrive at the claimed invention “would have been a simple combination of known elements by known methods, yielding predictable results.” (Petition, 100.)

As the USPTO Guidance states:

Federal Circuit case law since *KSR* follows the mandate of the Supreme Court to understand the prior art—including combinations of the prior art—in a flexible manner that credits the common sense and common knowledge of a PHOSITA. ... An argument that the prior art lacks a specific teaching will not be sufficient to overcome an obviousness rejection when the allegedly missing teaching would have been understood by a PHOSITA—by way of common sense, common knowledge generally, or common knowledge in the relevant art.

Updated Guidance for Making a Proper Determination of Obviousness, 89 Fed. Reg. 14449 (Feb. 27, 2024).

PO cites *In re Stepan Co.*, 868 F.3d 1342, 1346 n.1 (Fed. Cir. 2017) for the proposition that when “selecting from large lists of elements in a single reference, there must be a motivation to make the combination and a reasonable expectation that such a combination would be successful” (POR, 51.) *Stepan*, however,

concerned an herbicidal formula where the Board failed to provide evidence of a reasonable expectation of success given the unpredictable nature of the field. *Stegan*, 868 F.3d at 1347. The '441 patent, however, concerns the shape of a container, where there is nothing unpredictable and no question as to the expectation of success in making a container from a plastic resin given that that drink containers were commonly made from them. (Delson, ¶¶23, 36, Delson Reply, ¶¶33-34.)

B. Metzger's container can be made from PET.

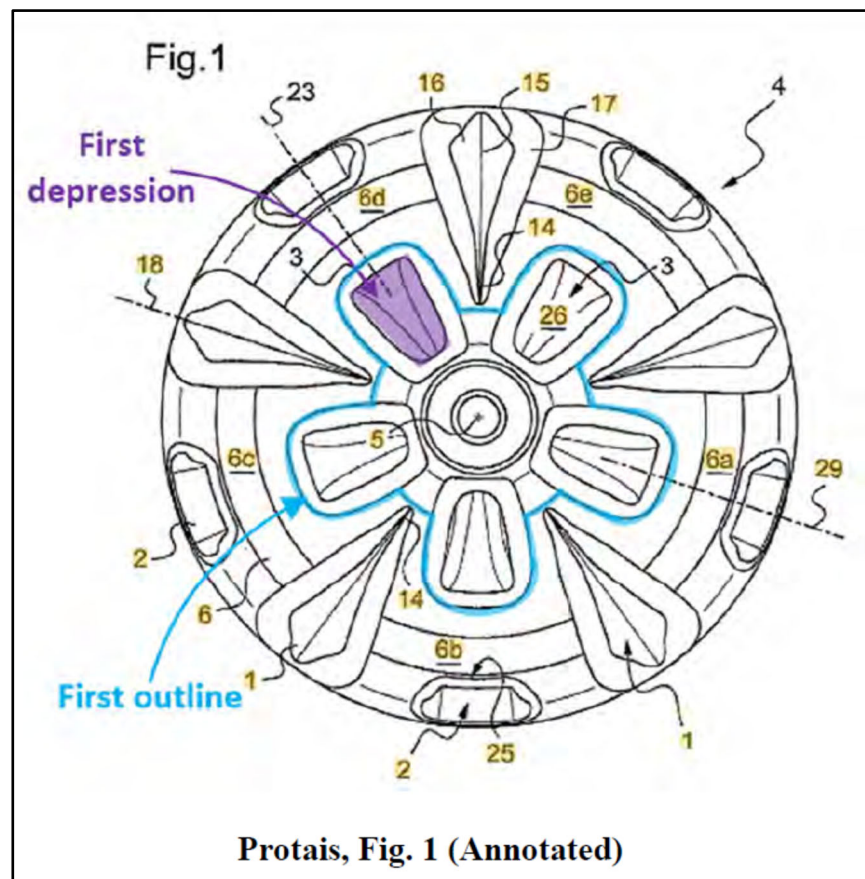
For claims 2, 5-6, PO asserts that Metzger's container cannot be made from PET because the container is intended for a thermal process where food is heated above the PET melting point. (POR, 52-55.) Metzger, however, discusses such heating in regard to one embodiment. Metzger discloses another embodiment for "a non-thermal process." (EX1010, 11:64-65.) Notably, neither Metzger's Abstract nor claims mention the thermal process. (EX1010, Abstract, 12:43-14:44.) Thus, PO's assertion that Metzger's container cannot be made of PET is contrary to the express disclosure in Metzger.

C. Protrais discloses a "first depression" that partially defines a first outline.

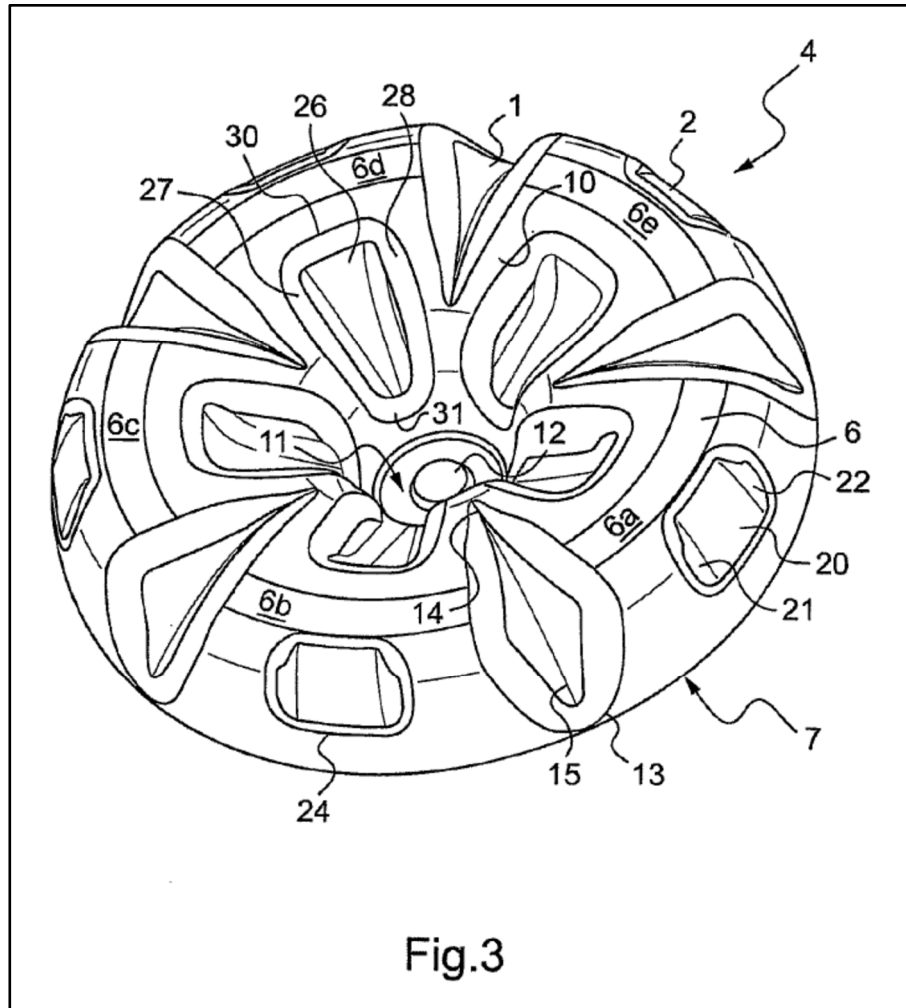
PO asserts that Protrais does not disclose a first outline partially defined by the first or second depression because Protrais allegedly depicts a slight space between the depression and the first outline. (POR, 55-61.) PO makes this argument by asserting that depression sidewall in the '441 patent is part of the claimed

depression, while asserting that groove sidewall is not part of the groove (i.e., depression) in Protrais. (*Id.*) PO cannot have it both ways. Whether the depression includes the sidewall or not, Protrais shows the same relevant structure as the '441 patent, where the first outline runs, in part, along the edge of the depression/groove sidewall.

As shown in the Petition, Protrais discloses multiple depressions (which it calls “reinforcing grooves”) surrounded by sidewalls of the grooves, with the “first outline” running around the sidewalls:

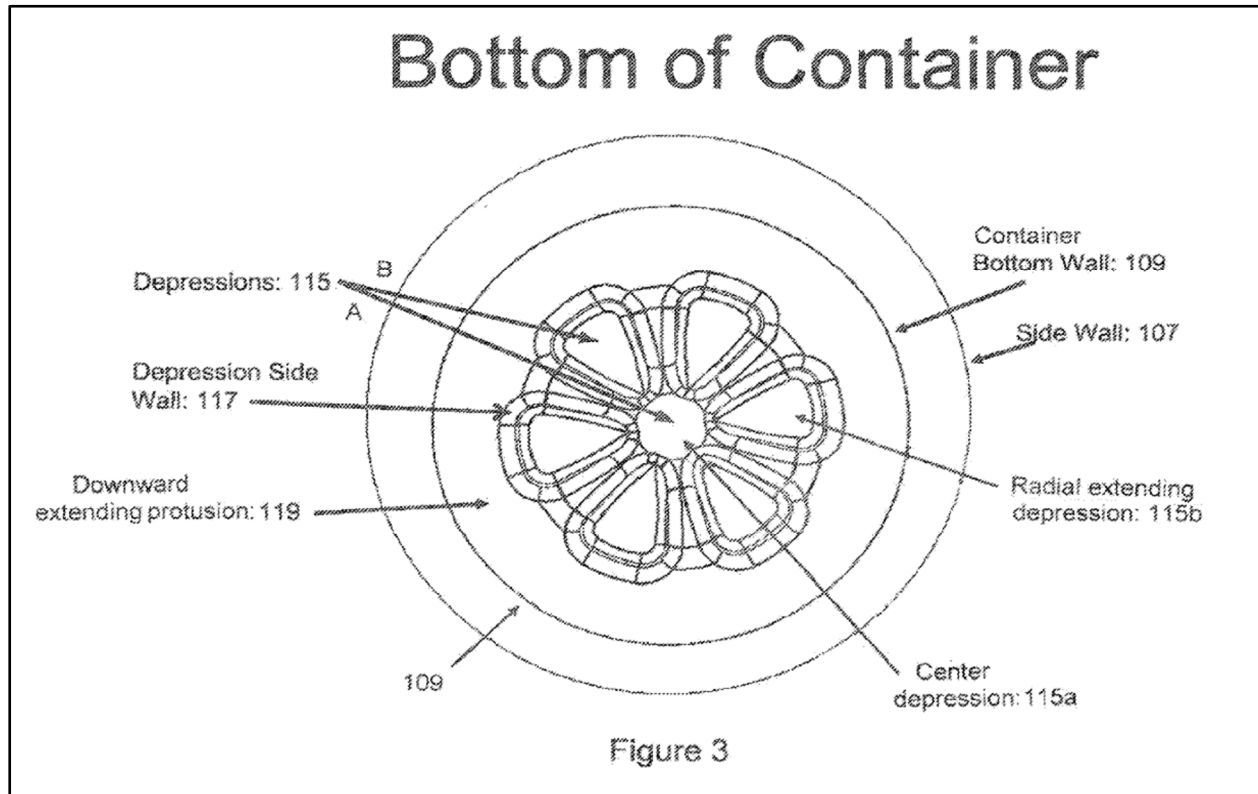


(Petition 114; Protrais, Fig. 1.) As can be seen even more clearly in Protrais' Figure 3, the space between the depression (i.e., groove) and the first outline is the angled sidewall of the groove:

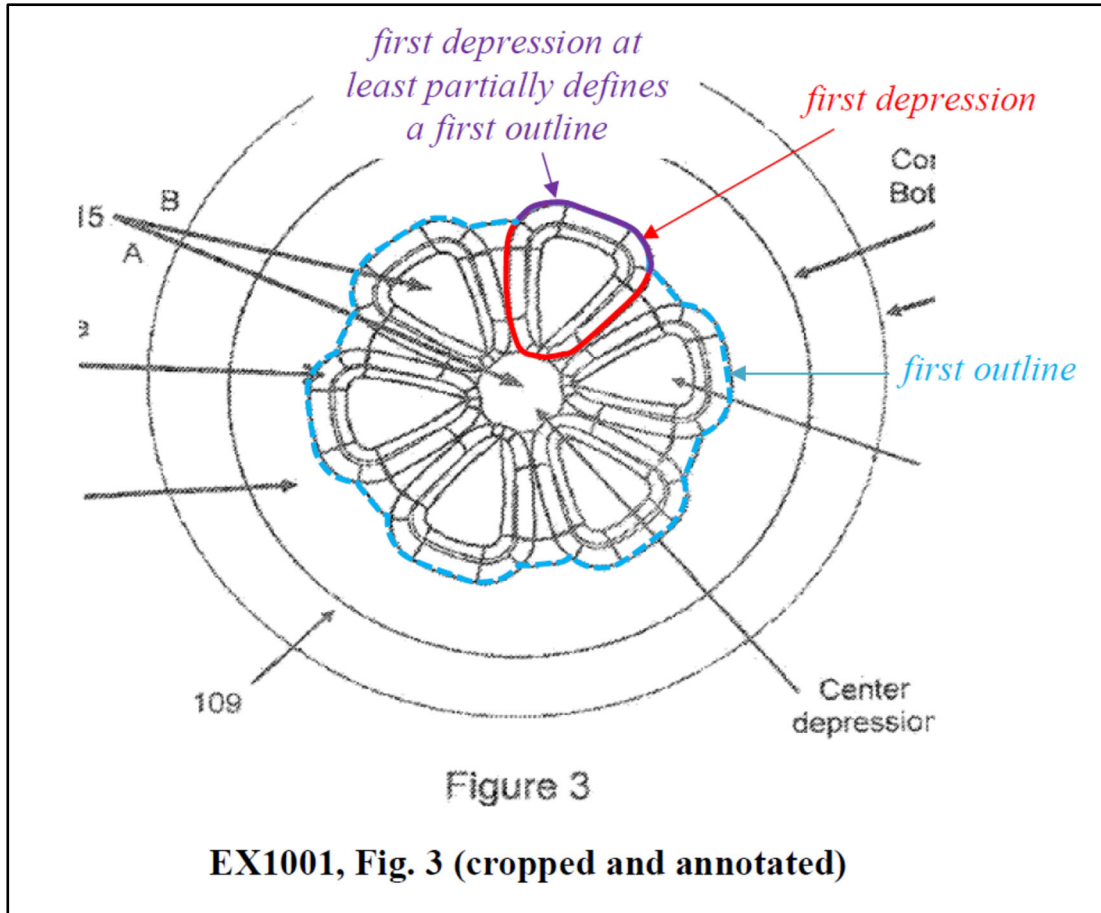


(EX1008, Fig. 3; *id.*, 5:63-6:8 (identifying the “distal end portion end 30 of said reinforcing grooves”).) And that distal end portion partially defines the first outline, as shown in the annotated Figure 1 above.

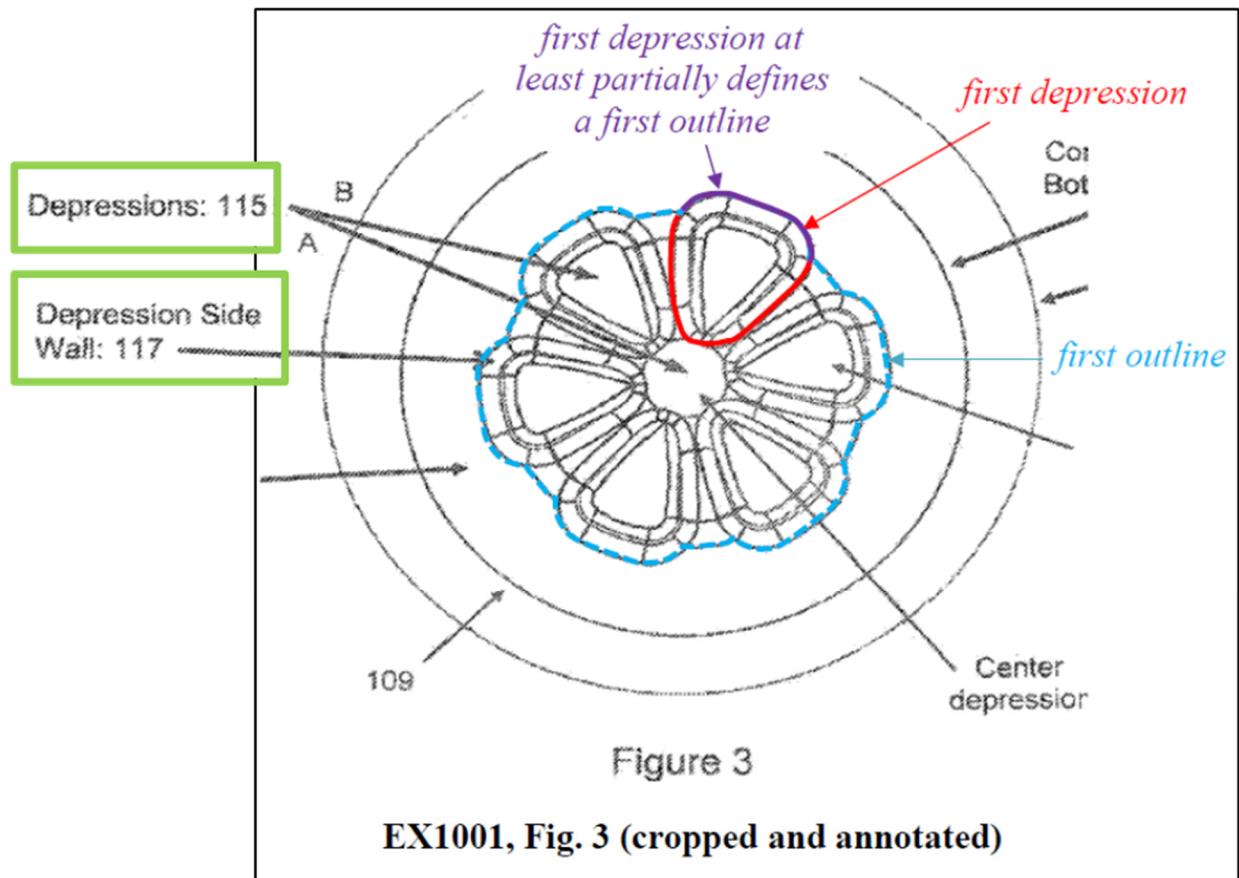
The '441 patent shows the same relation between the depression, the depression sidewalls, and the first outline as in Protrais. A complete copy of Figure 3 of the '441 patent identifies “Depression: 115” surrounded by a “Depression Side Wall: 117”:



('441 Patent, Fig. 3). In the figure below, PO shows that the “first outline” (the blue line) goes around the depression sidewalls:

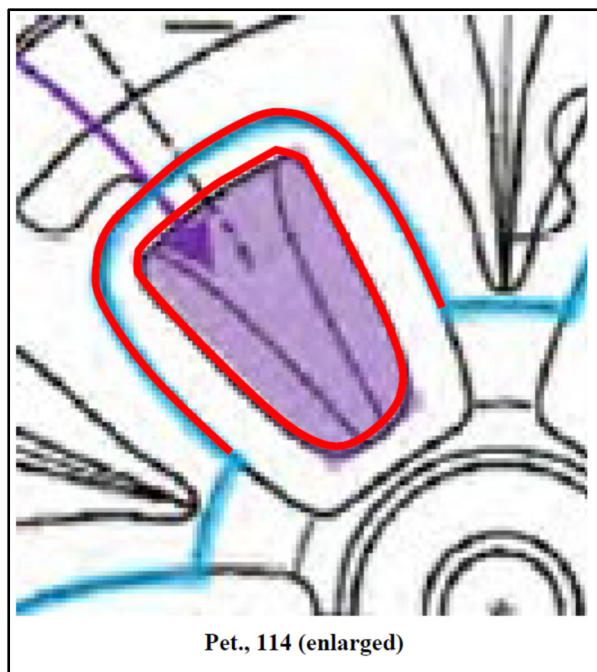


(POR, 56 (cropped and annotated in original).) In an attempt to distinguish Protrais, however, PO added its own labels to Figure 3 and cropped the actual figure labels (added back in and highlighted in green below):



(POR, 56 (annotated).) Because Protrais discloses the same structure, a depression/groove surrounded by a depression/groove sidewall that have the same relationship to the “first outline,” Protrais discloses the disputed limitation.

Moreover, no claim limitation requires the depression to touch the first outline; it only needs to partially define the first outline. Even if the “first depression” in Protrais were to exclude the groove sidewall, the first depression would still at least partially define the first outline because the first outline runs, in part, at a slight offset from such a depression:



(POR, 61.) PO's attempt to distinguish Protrais in this manner fails.

VII. GROUND 4

A. Gardiner and Pedmo render obvious making a plastic resin container body.

PO asserts for claims 1-14 that Gardiner does not disclose or render obvious a body made of plastic resin. (POR, 62-63.) This is essentially the same argument PO made in regard to Ground 3 and fails for the same reason. Gardiner, like Metzger, broadly discloses that the container can be made from plastic. (EX1012, 2:22-24.) Dr. Delson explains that long before 2010, molded plastic containers were commonly made from a PET resin, and therefore the limitation reciting that the container is made out of resin would have been obvious to a POSITA. (Delson, ¶36 (“PET is a common thermoplastic polymer resin and is *often used to manufacture* clothing as well as food or *liquid containers.*”) (emphasis added); *id.*, ¶¶23, 310; *id.*, ¶312 (“First,

with respect to Gardiner-Pedmo, the combination would have been a simple combination of known elements, and as I explained above a POSITA would have had no difficulty implementing this combination.”); *id.*, ¶319 (“It would have been obvious to a POSITA that plastics can be made out of a resin.”).) Moreover, Pedmo confirms that such containers are commonly made through a blow molding process using PET. (EX1013, 1:48-50, 3:1-15; Delson, ¶36 (PET is a resin-based plastic).)

Thus, it would have been obvious to make the container from a plastic resin.

B. It would have been obvious to make the can using PET.

PO asserts for claims 2, 5-6, and 8 that Petitioner did not present a reason to make Gardiner’s container from PET. Similar to the discussion regarding Ground 3 above, Petitioner demonstrated that (1) Gardiner teaches that its container can be made of “any suitable material,” including “plastic” (EX1012, 2:22-24), (2) Pedmo explained the PET was a “preferred material” for such a container (EX1013, 1:48-50, 3:9-10), and (3) it would have been obvious to a POSITA to make the plastic container using PET (Petition, 235-236; Delson, ¶¶23, 380-81).

PO argues that the Petition presented no “reason or motivation” to make the container from PET. (POR, 64.) But Gardiner teaches that the container can be made of any suitable material, including plastic (EX1012, 2:22-24), and Pedmo teaches that PET is a “preferred material” (EX1013, 1:48-50, 3:9-10). And as Dr. Delson explains, long before and at the time of the alleged invention, molded plastic

bottles and containers were commonly made from PET, and therefore making the container from PET would have been obvious to a POSITA. (Delson, ¶¶23, 36, 381.) Moreover, the '441 patent concerns the shape of a container, where there is nothing unpredictable and no question as to the expectation of success in making such a container from a PET. (*Id.*)

C. Petitioner demonstrated that the “circular neck” and “lip” limitations would have been obvious.

PO's final argument is that Petitioner failed to identify the “neck” and “lip” limitations in the Gardiner-Pedmo-Brown combination. As to the container's neck, Petitioner pointed to the portion at the top of the container sidewall that extends essentially vertically and into the container lid. (Petition, 200 (“Gardiner depicted a circular neck by *a substantially vertical section of the container body* that approximately corresponded to a location of a lid sealed to the container body.”) (emphasis added).) PO misstates that the Petition identifies the “rim” of the lid. (POR, 66.) That is incorrect, as Petitioner specifically stated the neck was a “a substantially vertical section of the *container body*,” not the outer part of the lid. (Petition, 200 (emphasis added).)

In regard to the “lip” limitation 1[P], the Petition explains:

Peripheral 140 had a hook-like shape. Since the peripheral was “shaped to be positioned” over the open end of the can body, a POSITA would have found it obvious that the can body would have a reciprocal shape

(a lip) at the top of the can body, over which peripheral 140 was seamed to form a rim for the can, because this reciprocal shape would have enabled a lid to seal to the container body for beverage storage.

(Petition, 203.) As Dr. Delson explains, using such a lip to seam to the container lid was routine and obvious. (Delson, ¶344.)

PO further asserts that “Petitioner points to Gardiner’s ‘cap member’ shown in Figures 10 and 13 as the alleged disclosure of a ‘reciprocal shape’ lip.” (POR, 69.) That is simply incorrect. Petitioner points to the hook shape on the lid as the portion that will be seamed with a lip on the container to form a seal. The Petition therefore explains why it would have been obvious to a POSITA that the container body would include a lip because that is how Gardiner’s lid is designed to be seamed to the container, in a manner well-known and obvious to a POSITA.

VIII. CONCLUSION

Claims 1-20 of the ’441 patent should be found invalid.

Dated: June 4, 2025

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CERTIFICATION OF WORD COUNT

I hereby certify that the foregoing PETITIONER’S REPLY includes 5,595 words (as calculated by Microsoft Word), excluding those in a table of contents; a table of authorities; a listing of facts that are admitted, denied, or cannot be admitted or denied; a certificate of service or word count; or an appendix of exhibits. Accordingly, this Reply is under the word count limit of 5,600 words.

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2025, a true and correct copy of the foregoing
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