



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
11/749,501	05/16/2007	Richard C. Darr	65440-171 (05-237-1)	8357
26127	7590	10/21/2013	EXAMINER	
DYKEMA GOSSETT PLLC 39577 WOODWARD AVENUE SUITE 300 BLOOMFIELD HILLS, MI 48304-5086			RUSH, KAREEN KAY	
			ART UNIT	PAPER NUMBER
			3728	
			MAIL DATE	DELIVERY MODE
			10/21/2013	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

*Ex parte* RICHARD C. DARR and EDWARD V. MORGAN

---

Appeal 2011-011436  
Application 11/749,501  
Technology Center 3700

---

Before MICHAEL W. KIM, MICHAEL C. ASTORINO, and  
HYUN J. JUNG, *Administrative Patent Judges*.

ASTORINO, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

The Appellants appeal under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 36-70. We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We REVERSE.

*Claimed Subject Matter*

Claims 36 and 65 are independent. Claim 36, reproduced below with added emphasis, is illustrative of the subject matter on appeal.

36. A plastic preform for making a blow molded container, comprising:

a closed bottom portion;

a lower portion extending upwardly from the bottom portion;

a neck portion extending upwardly from the lower portion; the neck portion including a support flange having an upper and lower surface;

a tamper-evident formation, and a dispensing opening at the top of the neck portion, a neck portion extending upwardly from the lower portion, the neck portion including a support flange having an upper and lower surface;

a tamper-evident formation; and

a dispensing opening at the top of the neck portion, the dispensing opening having an inner diameter that is at least 22 mm;

*wherein the vertical distance from the dispensing opening to the lower surface of the support flange is 0.580 inches or less.*

Claim 65 is directed to “[a] method for making a container” and, similar to claim 36 recites, “wherein the vertical distance from the dispensing opening to the lower surface of the support flange being 0.580 inches or less.” App. Br., Clms. App’x.

*Rejections*<sup>1</sup>

Claims 36-40 and 42-70 are rejected under 35 U.S.C. § 103(a) as unpatentable over Brewster (US 5,888,598, iss. Mar. 30, 1999).

Claim 41 is rejected under 35 U.S.C. § 103(a) as unpatentable over Brewster and Ryder (US 4,756,438, iss. Jul. 12, 1988).

OPINION

Claims 36 and 65 call for a plastic preform having a distance of *0.580 inches or less* between the dispensing opening at the top of the neck portion and the lower surface of the support flange. *See* App. Br., Clms. App'x.; *see also* Spec. fig. 5, para. [00023] (stating “the vertical distance **X** from the top of the dispensing opening/ neck portion (e.g., point 30) to the lower surface 22 of the support flange 18 (e.g., point 32) is 0.580 inches or less.”).

The Examiner finds that Brewster discloses that “[t]he vertical distance from the dispensing opening to the lower surface of the support flange is 0.580 inches or less (the vertical distance is  $e = 0.827\text{mm}$  or 0.033 inches, which is less than 0.580 inches).” Ans. 5. Indeed, Brewster states that distance “e” in Figures 1 and 2 is 0.827 mm. Brewster, Tables 3 and 4, col. 5, ll. 30-35, 38, 46-50, 55 and col. 6, ll. 18-21.

The Appellants contend that one of ordinary skill in the art would immediately recognize that the unit of length for distance “e” in Brewster’s Tables 3 and 4, among others, are incorrect. *See* App. Br. 5. Specifically,

---

<sup>1</sup> Although the Examiner includes *In re Aller*, 220 F.2d 454 (CCPA 1955), as part of both grounds of rejection (Ans. 5, 18), case law is used to support a ground of rejection and is not considered as part of the ground of rejection. Accordingly, we have removed the Examiner’s citation to *Aller* in the ground of rejection.

that the unit of length must be in inches rather than millimeters, and as such, the unit of length listed in Tables 3 and 4 of Brewster is clearly a typographical error. *See id.* The Appellants rely on Brewster's disclosure and a Declaration of Richard C. Darr, filed March 1, 2010<sup>2</sup> as evidence to explain why the unit of length listed in Brewster's disclosure as millimeters for distance "e" is a clear typographical error. *See App. Br. 5-8, Reply Br. 1-2.* Most notably, the Appellants assert that Brewster's disclosure provides contradictory lengths for the length of the preform. *App. Br. 7.*

The Appellants' contention is persuasive. Brewster refers to the length of the preform between 40-110 mm. *See, e.g.,* Brewster, col. 2, ll. 55-63 and col. 7, ll. 31-50; *see also* *App. Br. 7, Reply Br. 1-2.* However, the length of the preform, i.e., distance "a," in Figures 1 and 2 is 3.125 mm and 2.864 mm, respectively. Brewster, col. 5, ll. 29-35, 46-52, 64-66 and col. 6, ll. 37-38. Assuming the identification of millimeters in Tables 3 and 4 is a typographical error and should be inches instead, it is notable that 3.125 inches converts to approximately 79 mm and 2.864 in converts to approximately 72 mm. Since 79 mm and 72 mm is between the range of 40 – 110 mm and 3.125 mm and 2.864 mm is well outside of the aforementioned range, the Appellants' contention that one of ordinary skill in the art would immediately recognize 0.827 as inches rather than millimeters as the unit of length for distance "e" is persuasive. Further, this contention is supported by the Appellants' remaining arguments at pages 5-7 of the Appeal Brief and pages 1-2 of the Reply Brief explaining why one of

---

<sup>2</sup> The Appellants present the Declaration of Richard C. Darr in the Evidence Appendix of the Appeal Brief, at pages 19-21.

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.