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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

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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*¹

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,

¹ 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, 2010² 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

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

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