

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 20

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte JOHN W. SAFIAN

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Appeal No. 2005-0084  
Application No. 09/835,726

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ON BRIEF

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Before KIMLIN, WARREN and OWENS, Administrative Patent Judges.

KIMLIN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-10

Claim 1 is illustrative:

1. A multilayer container that comprises:

inner and outer layers that are coextruded and blow molded simultaneously with each other,

said outer layer being a relatively rigid plastic layer having a body portion, a finish having an axial end surrounding a dispensing opening, and a base having an atmospheric vent opening formed by removal of material from said base after blow molding,

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said inner layer being a relatively thin flexible plastic layer that extends around an inner surface of said outer layer and is unadhered to said outer layer,

said inner flexible layer being of uniform thickness throughout, having a portion that overlies said vent opening, and having a portion engaging the inner surface of said finish and a radially extending flange portion overlying said axial end of said finish.

The examiner relies upon the following references as evidence of obviousness:

Avery	4,982,872	Jan. 08, 1991
Ellion et al. (Ellion)	5,497,911	Mar. 12, 1996
Kobayashi et al. (Kobayashi)	5,513,761	May 07, 1996
Thomas	EP 0 182 094	May 02, 1986
Takakusagi et al. (JP '069)	JP 6-345,069	Dec. 20, 1994
Okada et al. (JP '561)	JP 8-183,561	Jul. 16, 1996

Appellant's claimed invention is directed to a multilayer container that is formed by coextruding and blow molding inner and outer layers of plastic material. The outer layer has a base portion comprising an atmospheric vent opening. The vent opening is formed by the removal of material from the base after the blow molding operation. Appellant submits that "[t]he appealed claims of the present application are directed specifically to the atmospheric vent opening 42" (page 3 of principal brief, third paragraph).

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The appealed claims stand rejected under 35 U.S.C. § 103(a) as follows:

- (a) Claims 1-3 and 8 over Thomas in view of Ellion,
- (b) Claims 4, 5 and 10 over Thomas in view of Avery and Kobayashi,
- (c) Claims 6 and 9 over Thomas in view of Chambers,
- (d) Claim 7 over Thomas in view of Ellion and either JP '069 or JP '561.

Appellant submits at page 5 of the principal brief that "claims 2-6 and 9-10 are considered to stand or fall with associated independent claims 1 and 8" (second paragraph).

We have thoroughly reviewed each of appellant's arguments for patentability. However, we are in complete agreement with the examiner that the claimed subject matter would have been obvious to one of ordinary skill in the art within the meaning of § 103 in view of the applied prior art. Accordingly, we will sustain the examiner's rejections for essentially those reasons set forth in the answer, and we add the following primarily for emphasis.

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Appellant does not dispute the examiner's factual determination that Thomas, like appellant, discloses a multilayer container having outer and inner plastic layers that is formed by extrusion blow molding operations. Also like appellant's claimed container, the container of Thomas has an atmospheric vent 57 in the base portion of its outer layer.

Although appellant recognizes that the article of the present invention is claimed in product-by-process format, and the patentability of the product is determined by the structure of the article and not by its particular process of preparation, it is appellant's contention that the vent opening of the present invention, performed by the removal of the material after blow molding, is different than the vent opening of Thomas. Appellant urges that the vent opening of Thomas is different than the claimed opening because the Thomas

vent is formed either by thermal shrinkage after the mold has been opened and the container is allowed to cool (FIGS. 5 and 7, and page 8, first two paragraphs of the translation), or the mold is constructed in such a way that the action of opening the mold itself forms the atmospheric vent by tearing the container base wall along the mold parting line (Thomas FIGS. 6 and 8-9, paragraph bridging pages 8 and 9 of the translation)"

(page 7 of principal brief, last 6 sentences). Appellant maintains that

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[t]he photomicrographs of record in this application, and enclosed with this Appeal Brief for the convenience of the Board, clearly show that the vent opening formed by removing material from the base wall of the container is structurally different from a vent opening that would be formed according to Thomas by merely tearing the base of the outer shell along the parting line.

(page 8 of principal brief, second paragraph).

With emphasis on the fact that it is appellant's burden to convincingly demonstrate that the claimed multilayer container with its vent opening, as a whole, is patentably distinct and nonobvious over the multilayer container of Thomas, as a whole, it is our judgement that appellant has fallen considerably short in shouldering this burden. The photomicrographs submitted by appellant are not in declaration or affidavit form, and, therefore, are considered to be no more than argument and of little probative value. See In re Greenfield, 571 F.2d 1185, 1188, 197 USPQ 227, 229 (CCPA 1978); In re Mehta, 347 F.2d 859, 866, 146 USPQ 284, 289 (CCPA 1965). Furthermore, the photomicrographs fail to present a comparison with multilayer containers within the scope of the appealed claims and multilayer containers fairly taught by Thomas. As stated by appellant,

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"[b]oth of these photomicrographics were taken of containers manufactured in accordance with the invention as claimed in the present invention" (page 6 of principal brief, first paragraph). Manifestly, in the absence of any comparative photographs of Thomas' vent openings, it cannot be reasonably concluded that the claimed vent opening is in any way different than the vent opening of Thomas. Moreover, even assuming for the sake of argument, that it can be demonstrated that there is a structural difference between the vent openings of the containers of appellant and Thomas, appellant has not carried the burden of demonstrating that such difference would have been a nonobvious one.

We note that appellant has not argued the merits of the various combinations of references with Thomas set forth by the examiner.

In conclusion, based on the foregoing, the examiner's decision rejecting the appealed claims is affirmed.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv).

AFFIRMED

EDWARD C. KIMLIN	)	
Administrative Patent Judge	)	
	)	
	)	
	)	BOARD OF PATENT
CHARLES F. WARREN	)	APPEALS AND
Administrative Patent Judge	)	INTERFERENCES
	)	
	)	
TERRY J. OWENS	)	
Administrative Patent Judge	)	

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