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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* JAMES CHRISTOPHER DORN

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Appeal 2019-000938  
Application 13/030,313  
Technology Center 3700

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Before STEFAN STAICOVICI, EDWARD A. BROWN, and  
ANNETTE R. REIMERS, *Administrative Patent Judges*.

STAICOVICI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant<sup>1</sup> appeals under 35 U.S.C. § 134(a) from the Examiner's decision in the Final Office Action (dated July 11, 2017, hereinafter "Final Act.") rejecting claims 1–30. We have jurisdiction over this appeal under 35 U.S.C. § 6(b).

SUMMARY OF DECISION

We REVERSE.

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<sup>1</sup> Plastipak Holdings, Inc. is identified as the real party in interest in Appellant's Appeal Brief (filed May 10, 2018). Appeal Br. 3.

## INVENTION

Appellant's invention is directed to containers that are stackable.

Spec. para. 2.

Claim 1, the sole independent claim, is representative of the claimed invention and reads as follows:

1. A stackable plastic container for holding contents, the container comprising:
  - a base portion configured to support the container on a surface, the base portion including an upwardly-extending central base portion and a base reinforcement formation,
  - a sidewall portion extending upwardly from the base portion, the sidewall portion including a sidewall reinforcement formation;
  - an upper portion extending upwardly from the sidewall portion, the upper portion including a shoulder portion, an angled portion, and a neck portion with a dispensing opening, the neck portion and dispensing opening being substantially centered on the upper portion of the container;
  - wherein the base portion is configured to withstand hydrostatic pressure;
  - the shoulder portion includes a rounded portion and a flex portion;
  - the flex portion is disposed between the rounded portion and the angled portion, includes a segment that extends downwardly from the rounded shoulder in the absence of a top load force, and is configured to flex downwardly substantially radially uniformly around and about a central axis of the container that extends through the dispensing opening in response to a top load force applied to the container;
  - the central base portion is configured to receive an upper portion of another container;
  - the vertical height of the neck portion of the upper portion of the container is greater than the vertical height of the central base portion configured to receive an upper portion of another container;

in a stacked configuration, the top load force applied by the container on a neck of the another container forces the neck of the another container downwardly such that the flex portion of the another container flexes downwardly to accommodate an interference caused by the vertical height of the neck portion of the another container being greater than the vertical height of the central base portion of the container, and the total height of the stacked containers is less than twice the height of the unstacked container.

### REJECTIONS

- I. The Examiner rejects claims 1–9 and 11–30 under 35 U.S.C. § 103(a) as being unpatentable over Rivera<sup>2</sup> and Dike<sup>3</sup>.
- II. The Examiner rejects claim 10 under 35 U.S.C. § 103(a) as being unpatentable over Rivera, Dike, and Shi<sup>4</sup>.

### ANALYSIS

#### *Rejection I*

The Examiner finds that Rivera discloses substantially all the limitations of independent claim 1, but fails to disclose a “flex portion.” *See* Final Act. 2–3. Nonetheless, the Examiner finds that “Dike discloses a stackable container . . . having a flex portion.” *Id.* at 3. Thus, the Examiner concludes that in light of Dike’s teachings, “[i]t would have been obvious to one having ordinary skill in the art at the time the invention was made to have a stackable container having a flex portion” in order “to provide

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<sup>2</sup> Rivera et al., US 2010/0326872 A1, published Dec. 30, 2010.

<sup>3</sup> Dike, US 3,369,688, issued Feb. 20, 1968.

<sup>4</sup> Shi et al., US 2005/0260371 A1, published Nov. 24, 2005.

strength to the container and improve container top loading capability.” *Id.* at 4.

Appellant argues that because Rivera does not disclose a container having a “flex portion” and Dike’s container does not intentionally flex or deform, the combined teachings of Rivera and Dike fail to disclose a “flex portion,” as called for by claim 1. *See* Appeal Br. 14. According to Appellant, “there is no explanation by the Office as to how the proposed combination . . . would result in . . . the claimed flex portion.” *Id.*; *see also* Reply Br. 3–4 (filed Nov. 13, 2018). Appellant contends that in contrast to the container of claim 1, where the load of a top container is supported by the neck portion of the bottom container, the load of the top container in Rivera is supported by shoulder 122 and lip 125 of the bottom container and not by neck 126 and/or cap 128; thus, Rivera’s container does not include a “flex portion,” as required by claim 1. Appeal Br. 12 (citing Rivera, para. 44), 14. Furthermore, Appellant asserts that although “**Dike** may disclose that a material may be flexible, the stackable container itself, or relevant portions thereof, may not be.” *Id.* at 13; *see also* Reply Br. 2–3.

In response, the Examiner cites to paragraph 46 of Rivera, which discloses that in an alternative embodiment the neck portion 126 of the bottom container 110 shares *some* of the load of the top container 10. Ans. 13; *see also* Rivera, Fig. 8. The Examiner further notes that Dike specifically discloses “flexible bottles” having “downwardly bulged or rounded bottom walls.” Ans. 14 (citing Dike, col. 4, ll. 59–64).

We appreciate the Examiner’s position that in Rivera *some* of the load of a top container is supported by the neck portion of a bottom container and that Dike discloses “flexible bottles.” However, the Examiner does not

adequately explain how such general teachings, when combined, results in the particularly claimed “flex portion” that is (1) “disposed between the rounded portion and the angled portion,” (2) “includes a segment that extends downwardly from the rounded shoulder in the absence of a top load force,” and (3) “is configured to flex downwardly substantially radially uniformly around and about a central axis of the container that extends through the dispensing opening in response to a top load force applied to the container.” *See* Appeal Br. 22 (App. A – Claims App.). For example, the Examiner does not point to any particular portion of Rivera’s container, as modified by Dike, which constitutes the claimed “flex portion.”

Accordingly, for the foregoing reasons, we find that the Examiner’s legal conclusion of obviousness is not supported by sufficient factual evidence, and thus, cannot stand. *See In re Warner*, 379 F.2d 1011, 1017 (CCPA 1967) (holding that “[t]he legal conclusion of obviousness must be supported by facts. Where the legal conclusion is not supported by facts it cannot stand.”).

In conclusion, we do not sustain the rejection of independent claim 1, and its dependent claims 2–9 and 11–30, under 35 U.S.C. § 103(a) as unpatentable over Rivera and Dike. *See In re Fine*, 837 F.2d 1071, 1076 (Fed. Cir. 1988) (If an independent claim is nonobvious under 35 U.S.C. § 103, then any claim dependent therefrom is nonobvious).

### *Rejection II*

The Examiner’s use of the Shi disclosure does not remedy the deficiency of the Rivera and Dike combination discussed *supra*. *See* Final Act. 12–13. Therefore, for the reasons discussed above, we also do not

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sustain the rejection under 35 U.S.C. § 103(a) of claim 10 as unpatentable over Rivera, Dike, and Shi.

**SUMMARY**

The Examiner's decision to reject claims 1–30 under 35 U.S.C. § 103(a) is reversed.

<b>Claim(s) Rejected</b>	<b>Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1–9, 11–30	§ 103(a) Rivera, Dike		1–9, 11–30
10	§ 103(a) Rivera, Dike, Shi		10
<b>Overall outcome</b>			1–30

**REVERSED**