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Societe des Produits Nestlé S.A. Attn: Patent Department One Checkerboard Square St. Louis, MO 63164			KIM, BRYAN	
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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* JOEL DEAN GENAW, JR.

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Appeal 2019-002587  
Application 14/272,576  
Technology Center 1700

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BEFORE JEFFREY B. ROBERTSON, GEORGE C. BEST, and  
MICHAEL G. McMANUS, *Administrative Patent Judges*.

ROBERTSON, *Administrative Patent Judge*.

DECISION ON APPEAL<sup>1</sup>

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>2</sup> appeals from the Examiner's decision to reject claims 1, 2, 6, 10, 11, and 21. Appeal Br. 5. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> This Decision includes citations to the following documents: Specification filed May 8, 2014 ("Spec."); Final Office Action mailed October 21, 2016 ("Final Act."); Appeal Brief filed March 20, 2017 ("Appeal Br."); and Examiner's Answer mailed July 14, 2017 ("Ans.").

<sup>2</sup> We use the word Appellant to refer to "applicant" as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Nestec S.A. Appeal Br. 1.

### CLAIMED SUBJECT MATTER

Appellant states the invention relates to containers for storing consumable products. Spec. ¶ 1. Claim 1, reproduced below, is illustrative of the claimed subject matter (Appeal Br. 27, Claims Appendix):

1. A flexible package, comprising:

a body defining an interior configured to house a consumable product, the body comprising:

a bottom surface comprising a centrally-located, vertical axis that is substantially perpendicular to the bottom surface,

a top surface having an outlet,

a front surface having a lower straight portion extending upwardly from the bottom surface, an upper straight portion extending downwardly from the top surface, and a curved portion extending from the lower straight portion to the upper straight portion, the curved portion being substantially convex with respect to the vertical axis,

a back surface having a lower straight portion extending upwardly from the bottom surface, an upper straight portion extending downwardly from the top surface, and a curved portion extending from the lower straight portion to the upper straight portion, the curved portion of the back surface being opposed to the front surface and substantially concave with respect to the vertical axis,

a pair of opposing side surfaces extending from the front surface to the back surface, and

wherein the sides surfaces have a width extending between the front surface and the back surface, and the front surface and the back surface each have a width extending between side surfaces,

wherein the width of the front surface and the width of the back surface is greater than the width of the side surfaces,

wherein the lower straight portion of the front surface and the lower straight portion of the back surface are tapered relative to one another from the bottom surface to the curved portions and the curved portion of the front surface and the curved portion of the back surface are tapered relative to one another from the lower straight portions to the upper straight portions such that the

front surface and the back surface are tapered relative to one another from the bottom surface to at least the upper straight portion of the front surface and the upper straight portion of the back surface, and

wherein the top surface is angled relative to the vertical axis at an angle ranging from about 5° to about 45° in a way that the outlet of the top surface is angled relative to the vertical axis and laterally offset from the vertical axis.

### REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Sharon et al. hereinafter "Sharon"	US 4,832,213	May 23, 1989
Hunt	D 296,666	July 12, 1988
Cheng	US 2002/0148806 A1	October 17, 2002
Willows et al. hereinafter "Willow"	US 2005/0258201 A1	November 24, 2005
Clark	US 2009/0178997 A1	July 16, 2009

### REJECTIONS

1. The Examiner rejected claims 1, 2, 6, 11, and 21 under 35 U.S.C. § 103 as obvious over Willows, Clark, Hunt, and Sharon. Final Act. 2-6.
2. The Examiner rejected claim 10 under 35 U.S.C. § 103 as obvious over Willows, Clark, Hunt, Sharon, and Cheng. *Id.* at 6.

*Rejection 1*

Appellant does not present separate arguments with respect to the claims on appeal. *See* Appeal Br. 25. We select claim 1 as representative for disposition of this rejection. 37 C.F.R. § 41.37(c)(1)(iv).

OPINION

*The Examiner's Rejection*

The Examiner found Willows discloses a bottle having the limitations recited in claim 1, with the exception of the top surface being angled from 5°–45°, the front and back surfaces having a lower straight portion extending upwardly from the bottom surface, an upper straight portion extending downwardly from the top surface, and a curved portion extending from the lower straight portion to the upper straight portion, the curved portion being convex and concave, respectively, in relation to the vertical axis, and the front and back surfaces being tapered relative to one another. Final Act. 3–4. The Examiner found Clark discloses top surfaces having angles similar to between 20–80° and that having an angled top surface facilitates dispensing fluid from the bottle. *Id.* at 4. As a result, the Examiner determined it would have been obvious to have applied the angles in Clark to the bottle disclosed in Willows. *Id.* The Examiner determined also that because the bottle is intended to be clipped onto a belt in Willows, it would have been obvious to have angled the bottle top surface away from the wearer to prevent the cap from getting caught in clothes and to prevent droplets/leaks from staining clothes. *Id.* at 4–5. The Examiner found Hunt discloses bottles shaped with the lower straight portions, upper straight portions, and curved portions and Sharon discloses bottles shaped such that the front and back walls are

tapered upwards relative to each other. *Id.* at 5. The Examiner determined that it would have been obvious as a matter of design choice and also having a tapered bottle would have been obvious in case the bottle is used by a toddler/child such that the bottle can be easily grabbed by small hands while the additional bottom volume affords sufficient capacity for a single feeding. *Id.*

*Appellant's Contentions*

Appellant argues the Examiner has not provided sufficient rationale for why one of ordinary skill in the art would have combined the prior art to arrive at the presently claimed invention. Appeal Br. 16, 24–25. Appellant argues the bottle of Willows is formed to mate with a specific retaining device, and there is no reason to modify the Willows bottle when doing so may compromise the particular mating mechanism. *Id.* at 18, 24. Appellant argues Willows discloses a “low profile” bottle, which teaches away from the angles for the top surface disclose in Clark. *Id.* at 17, 19–20. Appellant argues the shape of the flexible packaging recited in claim 1 is significant because it is particularly shaped for a child’s grasp. *Id.* at 21. Appellant argues Willows does not disclose a back surface that is substantially concave. *Id.* at 21–22. Appellant argues Willows teaches away from modifications that would result in a lower center of gravity and as a result one of ordinary skill in the art would not have modified Willows to have tapered walls as in the bottle of Sharon. *Id.* at 23. Appellant argues one of ordinary skill in the art would not have modified the bottle of Willows to have additional stability against falling over because the bottle of Willows is intended to be carried. *Id.* Appellant contends there is no disclosure in

Willows that indicates it would be desirable to make the bottle easily grasped by a child. *Id.* at 23–24.

*Issue*

The dispositive issue is:

Has Appellant identified reversible error in the Examiner’s determination that the flexible package having a top surface angle ranging from about 5° to about 45° relative to the vertical axis, a “substantially concave” back surface, and front surface and back surfaces tapered relative to one another as recited in claim 1 would have been obvious over Willows, Clark, Hunt, and Sharon?

*Discussion*

We are not persuaded by Appellant’s arguments that the bottle of Willows is formed to mate with a specific retaining device, and there is no reason to modify Willows’s bottle when doing so may compromise the particular mating mechanism and that Willows teaches away from bottles having angled top surfaces in the range recited in claim 1. As the Examiner points out, Willows discloses the top surface of the bottle may be angled. Ans. 7 (citing Willows Figs. 93, and 103–111). Thus, we are also not persuaded by Appellant’s argument that by disclosing a bottle having a “low profile,” angling a portion of the bottle away from the bottle would destroy the intended purpose of the bottle sitting close to a user’s body. Appeal Br. 19–20; *see* Willows ¶ 34. As a result, Appellant has not adequately explained why the flattened cross section of the “low profile” bottles disclosed in the preferred embodiment of Willows would teach away from

formulating bottles having a top surface with angles in the range of from about 5° to about 45° relative to the vertical axis as recited in claim 1.

Regarding bottles shaped with the lower straight portions, upper straight portions, and curved portions as recited in claim 1, we are not persuaded by Appellant's argument the Examiner did not provide any reasoning to combine Willows and Hunt, and the particular shape of the claimed invention is significant for a child's grasp. Appeal Br. 21 (citing Spec. ¶¶ 9, 41). We agree with the Examiner, that it is unclear from the portions of the Specification referenced by Appellant how the claimed shape is significant with respect to a child's grasp. In addition to Hunt, Willows discloses the bottle body "include[s] desirable contours . . . to enable the user to easily grasp and to hold the bottle." Willows, ¶ 173. Also, Sharon discloses bottles having curved shapes and tapering to permit gripping the bottle. Sharon, col. 1, ll. 23–27. Thus, we are not persuaded by Appellant's argument that the particular significance of the shape for a child's grasp is sufficient to outweigh the Examiner's position that it would have been obvious to use the lower straight portions, upper straight portions, and curved portions disclosed in Hunt in the bottle of Willows.

We are also not persuaded by Appellant's argument that Willows does not disclose a bottle having a back surface that is "substantially concave." In particular, Appellant contends Willows discloses a back surface with two portions that are convex to the vertical axis. Appeal Br. 21–22. However, as the Examiner points out in the Answer, claim 1 recites the back surface is "substantially" concave, which broadens the scope of the claim such that the back surface "comprises a majority concave portion." Ans. 8. The Examiner found Willows discloses outer portions adjacent to the side walls

that are concave, and points out that Willows is modified with Hunt to have a concave portion. *Id.* (citing Willows, Fig. 2).

Initially, we agree with and adopt the Examiner’s interpretation of “substantially concave.” The plain language of claim 1 only requires the majority of the back surface of the package to be concave.<sup>3</sup> Willows discloses the outer portions, or shoulders are concave. Willows ¶ 176, Fig. 2. Accordingly, we are not persuaded by Appellant’s argument.

As to Appellant’s arguments that Willows teaches away from tapering the walls and the Examiner’s modification would render the bottle of Willows inoperable (Appeal Br. 23), we agree with the Examiner that Appellant has not provided sufficient details to support these arguments (Ans. 9). That is, it is unclear to us how having a low perceived weight would teach away from tapering the walls of the bottle in Willows as disclosed in Sharon when Willows discloses the bottle may have a number of forms and shapes (Willows ¶ 176), and Appellant has not provided any evidence that one of ordinary skill in the art would not have been capable of providing the modified shape with a feature or features that removably but securely mate with the retaining device as disclosed in Willows. *Id.* In

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<sup>3</sup> As to the terms “convex” and “concave,” for the purposes of this appeal, we adopt the Examiner’s discussion of Figures 2–5 of Willows in the Final Action, page 2, where the Examiner stated the figures show “the front surface (left side) is curved towards the central vertical axis, particularly at the upper end of the surface, and is therefore construed to be convex with respect to the central vertical axis” and “[t]he back surface (right side) is curved away from the central vertical axis, particularly at the upper and lower ends of the surface, and is therefore construed to be concave with respect to the central vertical axis.” The Examiner’s explanation of Willows is consistent with the way Appellant uses the terms “convex” and “concave” in the instant application. *See* Spec. ¶ 69; Figs. 1, 2.

addition, Appellant's position regarding the perception of a user is not based on any factual evidence and it is well settled that arguments of counsel cannot take the place of factually supported objective evidence. *In re Huang*, 100 F.3d 135, 139-40 (Fed. Cir. 1996).

We are not persuaded by Appellant's arguments there is no reason to modify the bottle of Willows to have additional stability against falling over, because the bottle of Willows is intended to be carried and there is nothing in Willows suggesting the desirability of the bottle to be easily grasped by children. Appeal Br. 23. As the Examiner points out, the modifications would provide Willows with advantages recognized by the art, and Willows discloses a bottle that would be capable of being placed on a surface. Ans. 9 (citing Willows, Fig. 1). In addition and contrary to Appellant's argument (Appeal Br. 24), Willows does not limit its disclosure to sports applications, but rather is broadly directed to the application of affixing a bottle to a retaining device. Willows ¶¶ 141, 203. As a result, and absent evidence to the contrary, we do not agree with Appellant (Appeal Br. 24) that the modifications to the bottle of Willows would compromise the way the bottle of Willows engages the retaining device, particularly because Willows, as discussed above, discloses the bottle may have a number of forms and shapes. Willows ¶ 176.

Indeed, Appellant's arguments appear to be directed to Willows individually rather than the combination of prior art as a whole. *In re Keller*, 642 F.2d 413, 426 (CCPA 1981); *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). Accordingly, and for all the reasons as herein expressed above, we do not agree with Appellant's argument that the Examiner's rejection is based on improper hindsight. *See* Ans. 9–10.

*Rejection 2*

Appellant does not provide any additional arguments with respect to claim 10, the subject of Rejection 2, and dependent from claim 1. *See* Appeal Br. 25. Accordingly, we affirm the Examiner's rejection of claim 10 for similar reasons as discussed for Rejection 1.

**CONCLUSION**

The Examiner's rejection of claims 1, 2, 6, 10, 11, and 21 under 35 U.S.C. § 103(a) is affirmed.

**DECISION SUMMARY**

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1, 2, 6, 11, 21	103	Willows, Clark, Hunt, Sharon	1, 2, 6, 11, 21	
10	103	Willows, Clark, Hunt, Sharon, Cheng	10	
<b>Overall Outcome</b>			1, 2, 6, 10, 11, 21	

**TIME PERIOD FOR RESPONSE**

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

**AFFIRMED**