UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LUV N' CARE, LTD.,

Petitioner,

V.

MICHAEL L. McGINLEY,

Patent Owner.

Patent No. 8,636,178

Filing Date: October 22, 2008

Issue Date: January 28, 2014

Title: FLEXIBLE PANEL PITCHER

PETITION FOR *INTER PARTES* REVIEW OF U.S. PATENT NO. 8,636,178

Inter Partes Review No. Unassigned

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LIST OF EXHIBITS

Pursuant to 35 U.S.C. §§311-319 and 37 C.F.R. §42, Petitioner Luv n' care, Ltd., requests *inter partes* review of claims 1-10 of U.S. Patent No. 8,636,178 (the '178 patent) (Exhibit 1001). There is a reasonable likelihood that it will prevail with respect to each of the claims challenged in this Petition. The '178 Patent is a pre-AIA patent.

I. MANDATORY NOTICES – 37 C.F.R. § 42.8

a. Real Party-In-Interest – 37 C.F.R. § 42.8(b)(1)

Petitioner, Luv n' care, Ltd., is the real party-in-interest for this Petition.

b. Related Matters – 37 C.F.R. § 42.8(b)(2)

McGinley, et al., v. Luv n' care, Ltd., Case No. 4:16-cv-00283 (W.D. Mo.) is presently pending. A complaint alleging infringement of the '178 patent was filed on March 30, 2016. Service of the complaint alleging patent infringement was effected on March 31, 2016, less than one year ago.

Luv n' care, Ltd., v. McGinley, et al., Case No. 3:16-cv-00641 (W.D. La.) is presently pending. A complaint seeking a declaratory judgment of non-infringement of the '178 patent was filed on May 10, 2016, which is less than one year ago. The complaint seeking a declaratory judgment of non-infringement was also served less than one year ago. The complaint does not seek a declaration of invalidity.

c. Lead and Back-Up Counsel – 37 C.F.R. § 42.8(b)(3)

LEAD COUNSEL	BACK-UP COUNSEL
Robert M. Chiaviello, Jr. Reg. No. 32,461 NUBYLAW 3030 Aurora Avenue Monroe, Louisiana 71201 Tel: (318) 410-4012 Fax: (318) 388-5892 Email: bobc@nuby.com	Hartwell P. Morse, III IP Litigation Counsel NUBYLAW 3030 Aurora Avenue Monroe, Louisiana 71201 Tel: (318) 338-3108 Fax: (318) 388-5892 Email: hartwellm@nuby.com

Petitioner may be served at the address provided above and consents to electronic service by e-mail at the addresses provided as well as pto@nuby.com.

d. Service Information – 37 C.F.R. § 42.8(b)(4)

This Petition is being served by Federal Express to the attorney of record, John C. McMahon, for the '178 patent at 11006 Parallel Parkway, Suite 200, Kansas City, Kansas 66109. The Petition is also being served by Federal Express on the counsel of record in the Missouri and Louisiana actions with local counsel in the Louisiana action being served by hand delivery.

II. POWER OF ATTORNEY – 37 C.F.R. § 42.10(b)

A Power of Attorney is filed concurrently with this petition.

III. PAYMENT OF FEES – 37 C.F.R. § 42.103

The Office is authorized to deduct the fee due ($9,000.00) in connection with this Petition from U.S. Patent and Trademark Deposit Account No. 505393 of Luv n' care, Ltd.

IV. REQUIREMENTS FOR *INTER PARTES* REVIEW UNDER 37 C.F.R. §§ 42.104 AND 42.108

a. Grounds for Standing – 37 C.F.R. § 42.104(a)

Petitioner certifies that the '178 patent is available for *inter partes* review and that the Petitioner is not barred or estopped from requesting an *inter partes* review challenging the patent claims on the grounds identified in this petition, nor is Petitioner in privity with any party who is barred or estopped from challenging the patent claims on the grounds identified herein.

b. Challenge Under – 37 C.F.R. § 42.104(b) and Requested Relief

Petitioner respectfully requests that the Board initiate *inter partes* review of all ten of the '178 patent claims, and find those claims unpatentable. Claims 1-10 of the '178 patent are unpatentable as anticipated under 35 U.S.C. §102 and obvious under 35 U.S.C. §103. The prior art relied upon and the specific statutory grounds under 35 U.S.C. §102 and §103 on which the challenge to the claims is based is set forth below.

This petition cites the following prior art references:

Ex. No.	Title of Document
1005	U.K. Patent No. 2,269,811 to Weston et al., published February 22, 1994.
1006	U.S. Patent No. 2,610,490 to Tupper, issue December 5, 1946.
1007	Swiss Patent No. 274,789 to Horz published July 16, 1951.
1008	Application Serial No. 10/357,651 filed February 4, 2002.

Each of these references qualifies as prior art to the '178 patent claims under at least 35 U.S.C. §§ 102(a), 102(b) or 102(f) (pre-AIA). The grounds on which this petition is based are:

Ground	'178 Patent Claims	Basis for Challenge
1	1-10	Anticipated Under 35 U.S.C. §102(f) by the Invention of McGinley
2	1-2 and 6-7	Obvious Under §103 in view of U.K. Patent No. 2,269,811 to Weston et al., together with U.S. Patent No. 2,610,490 to Tupper
3	1-2 and 6-7	Obvious Under §103 in view of U.K. Patent No. 2,269,811 to Weston et al., together with Swiss Patent No. 274,789 to Horz and U.S. Patent No. 2,610,490 to Tupper

The '178 patent (Ex. 1001) issued on January 28, 2014 from application Serial No. 12/255,797 (Ex. 1010) (the '797 application), which was filed on October 22, 2008. On its face, the '178 patent claims priority to a chain of continuation-in-part and provisional applications. The '178 patent claims priority directly to continuation-in-part application Serial No. 10/770,325 (Ex. 1009) (the '325 application), which was filed on February 2, 2004. The '325 application claims priority to application Serial No. 10/357,651 (Ex. 1008) (the '651 application) which was filed on February 4, 2003. The '651 application names Michel L. McGinley as the sole inventor. The '797 and '325 applications both name Michel L. McGinley

and Brian Lau as co-inventors. Accordingly, February 4, 2004, the filing date of the '325 application, represents the earliest possible priority date for the '178 patent.

c. Claim Terms Needing Construction – 37 C.F.R. § 42.104(b)(3) – "Generally flat" – Claims 1 and 6

The only term needing construction is the limitation "generally flat" appearing in independent claims 1 and 6 and depending therefrom in all claims. Pursuant to 37 C.F.R. § 42.100(b), and solely for the purposes of this *Inter Partes* Review, Petitioner interprets the claims of the '178 patent such that they are given their broadest reasonable construction in light of the specification of the patent. For terms not specifically listed and construed below, Petitioner interprets the broadest reasonable construction of those terms to be no narrower than their plain and ordinary meaning.

Claims 1 and 6 of the '178 patent state that a "continuous sidewall having a flexible portion thereof that defines **a generally flat** sidewall section." The phrase "generally flat" should be given its ordinary meaning: That a section of the container sidewall is flat meaning not curved. Figures 1 and 2 show a container with a flat section of the sidewall portion where the remaining portion of the sidewall is curved. Throughout the written description, side wall portion 24 is described in the preferred embodiment as a "generally flat portion." Ex. 1001, 4:30-32. The generally flat limitation was relied upon by the co-inventors in the '797 application to distinguish the claims from the prior art. In the Request for Reconsideration (Ex. 1010, pg. 143),

the Appeal Brief (Ex. 1010, pg. 121-3), the Request for Reconsideration (Ex. 1010, pg. 91) and the Amendment (Ex. 1010, pg. 61) the applicants distinguished the claims from the prior art that showed curved sidewalls. The term generally flat should be given the ordinary meaning of not curved.

d. How the Construed Claims are Unpatentable – 37 C.F.R. § 42.104(b)(4)

An explanation of how claims 1-10 of the '178 patent are unpatentable is set forth below in Section VI.

e. Supporting Evidence and Relevance Thereof – 37 C.F.R. § 42.104(b)(5)

A List of Exhibits identifying the exhibit numbers of all supporting evidence relied upon to support this challenge is attached. The relevance of each piece of evidence to the challenge of the '178 patent is set forth below in Section VI.

V. BACKGROUND OF U.S. PATENT NO. 8,636,178

a. Technical Subject Matter of the '178 Patent

The invention claimed in the '178 patent is described as relating to "containers, specifically containers used to hold fluids." Ex. 1001, 1:12-19. Containers to hold things and specifically to hold fluids or liquids have been a part of human history from the dawn of civilization. The claimed invention describes an alleged improvement by essentially adding a "flexible flat panel" that functions to "matingly mold to the head of a person during use." Ex. 1001, Claims 1-10.

b. History of the ‘178 Patent

i. Application Serial No. 10/357,651

On its face, the ‘178 patent claims priority back to Application Serial No. 10/357,651 (the ‘651 application) (Ex. 1008), now abandoned. The ‘651 application was filed on February 4, 2003 and named Michel L. McGinley as the sole inventor. Ex. 1008, pgs. 22-48. The specification included Figures 1-4, a written specification and claims all describing a container without a divider. Ex. 1008, pgs. 24-43.

The ‘651 application was assigned to Primary Examiner Paul J. Hirsch who mailed an Office Action rejecting all the claims on April 5, 2004. Ex. 1008, pgs. 6-11. All claims in the ‘651 application were directed to a container with no limitation requiring a divider. No response to the Office Action was submitted and a Notice of Abandonment was mailed on December 3, 2004. Ex. 1008, pg.3. The ‘651 application claiming a container without a divider was expressly abandoned on February 2, 2004. Ex. 1009, pg. 154.

ii. Application Serial No. 10/770,325 Now U.S. Patent No. 7,441,675

The ‘325 application (Ex, 1009) was filed on February 2, 2004 for ‘Flexible Panel Pitcher’ naming Michael L. McGinley and Brian Lau co-inventors. The ‘325 application claimed priority to the ‘651 application as a continuation-in-part application. Ex. 1009, pg. 158. The ‘325 application contained six figures, Figures 1-4 were identical to Figures 1-4 in the ‘651 application and show a container with

no divider. Ex. 1009, pgs. 173-4. Figures 5-6 were new matter and show a flexible panel pitcher with a divider. Ex. 1009, pg. 175. The co-inventors also added detailed description describing the embodiments of Figures 5-6 as alternatives. Ex. 1009, pgs. 165-6. All of the written specification of the '651 application was included in the '325 application.

After numerous rejections and amendments, the co-inventors presented claims including the "divider" limitation. Ex. 1009, pg. 66-9. A Notice of Allowance was mailed on June 23, 2008 stating reasons for allowance: "Though the prior art indicates numerous aspects of the present invention, art was not found which disclosed a divided container . . .." Ex. 1009, pg. 58. The Issue Fee was paid on September 18, 2008 and U.S. Patent No. 7,441,675 was issued to named co-inventors McGinley and Lau. (Ex. 1002).

iii. <u>Application Serial No. 12/255,797 Now the '178 Patent</u>

The '797 application (Ex. 1010) was filed on October 22, 2008, together with a Preliminary Amendment, Ex. 1010, pgs. 220-3, naming Michael L. McGinley and Brian Lau as co-inventors. The '797 application claimed priority to the '325 application as a continuation-in-part of that application which in turn claimed priority as a continuation-in-part of the '651 application. Figures 7-9 were added showing a different embodiment of the divider depicted in Figures 5-6 of the '325 application. The co-inventors also added detailed description describing the

embodiments of Figures 7-9 as alternatives, and, in the Preliminary Amendment, amended all of the claims to require a divider. Ex. 1010, pgs. 220-3.

During the prosecution of the '797 application, Michael L. McGinley filed a Power of Attorney. Ex. 1010, pg. 206. On February 18, 2009, the Office Denied the Request for Power of Attorney for the reason that co-inventor Brian Lau's signature had been omitted. Ex. 1010, pg. 205. On March 11, 2009, co-inventor Brian Lau submitted a Power of Attorney, and a Notice of Acceptance was mailed on March 19, 2009. Ex. 1010, pg. 200.

On January 4, 2010, a non-final Office Action was mailed rejecting all pending claims on the basis of a §101 "same invention" type Double Patenting noting that all claims in the '797 application were the same as claims 1-12 of the '675 patent. Ex. 1010, pg. 177-9. An Amendment was filed cancelling claims 32 and 33, adding new claims 34 and 35 and submitting a Terminal Disclaimer. Ex. 1010, pg. 160. New claims 34 and 35, while nearly identical to claims 1 and 7 of the '675 patent, both omitted the divider limitation. Ex. 1010, pg. 162-3. On May 14, 2010, Examiner Cartagena issued an Office Action finally rejecting all the claims but accepting the Terminal Disclaimer. Ex. 1010, pg. 150-54.

The co-inventors responded to the Final Rejection with a Request for Reconsideration. Ex. 1010, pg. 139-45. In the Request, the co-inventors objected to any interpretation that "imports a 'container divider' or a 'dividing wall' into the

claims." Ex. 1010, pg. 144. The Request for Reconsideration failed to place the application in condition for allowance, Ex. 1010, pg. 137-8, and a Notice of Appeal and Appeal Brief were filed. Ex. 1010, pg. 111-35. The Examiner reopened prosecution and issued a non-final office action rejecting all claims. Ex. 1010, pgs. 100-5. A timely reply was not filed and a Notice of Abandonment was mailed on June 22, 2011. Ex. 1010, pg. 99.

On December 6, 2011, the co-inventors filed a Request for Reconsideration together with a Petition to Revive and a Response to the Office Action. Ex. 1010, pgs. 78-96. The Petition to Revive was granted, and the Response was entered. Ex. 1010, pgs. 76. An Office Action finally rejecting all claims was issued on July 5, 2012. Ex. 1010, pgs. 67-72.

On December 11, 2012, Michael L. McGinley filed a Power of Attorney appointing John C. McMahon as an attorney to prosecute the application. Ex. 1010, pgs. 64-5. Also on December 11, 2012, attorney McMahon filed a Response to the Office Action mailed July 5, 2012, a Petition for a two-month time extension to respond and a Request for Continued Examination. Ex. 1010, pgs. 47-63. The Power of Attorney was rejected for the reason that the signature of co-inventor Brian Lau had been omitted. Ex. 1010, pgs. 44-46. On September 30, 2013, a Notice of Allowance was mailed. Ex. 1010, pgs. 28. On December 9, 2013, the Issue Fee was paid and the '797 application issued to McGinley and Lau as the '178 patent.

c. ‘178 Patent Claimed Invention

All ten claims of the ‘178 Patent are directed to a container with no divider. Independent claims 2 and 6 have no limitation that describes any structure that would function as a divider. Claim 1 calls for a “generally continuous sidewall . . . defining an inward fluid holding space bounded by said continuous sidewall.” There are no limitations restricting the “fluid holding space.” In fact, the limitation describing the flexible panel describes the flexible panel as “forming a portion of the generally flat sidewall” and as “having a generally smooth inward surface for unobstructed fluid flow.” Similarly, claim 6 calls for a “generally rigid continuous sidewall . . . defining an inward fluid holding space bounded by said continuous sidewall” and the “inwardly flexible and pliable panel” is described as “forming a portion of the generally flat sidewall” and as “having a generally smooth inward surface for unobstructed fluid flow.” None of dependent claims 2-5 or 7-10 add any limitation relating to a divider. All ten claims of the ‘178 patent are directed to a container without a divider.

d. Inventorship

The ‘178 patent names Michel L. McGinley and Brian Lau as inventors. The Declaration and Power of Attorney submitted with the ‘797 application that resulted in the ‘178 patent was signed by both Michel L. McGinley and Brian Lau. They stated under the penalty of perjury that they were the “original, first and joint

inventor of the subject matter which is claimed and for which a patent is sought on the invention entitled 'Flexible Panel Pitcher.'" At no time during the prosecution of the '797 application did either McGinley or Lau state that Lau was not a co-inventor. During the prosecution of the '797 application, McGinley acting alone submitted a Power of Attorney on February 13, 2009. That Power of Attorney was rejected in a Denial of Request for Power of Attorney mailed on February 18, 2009, stating that the reason for denial was that the signature of co-inventor Brian Lau was omitted. Ex. 1010, pg. 205. McGinley never disputed that Lau was a co-inventor and on March 11, 2009, co-inventor Lau submitted a Power of Attorney that was entered on March 19, 2009. Ex. 1010, pg. 198. The '178 patent issued in the name of co-inventors McGinley and Lau.

In contrast, the '651 application names Michel L. McGinley as the sole inventor of the subject matter described in that application. Brian Lau does not appear in any document contained in the file history of the '651 application. Lau appears for the first time as a co-inventor in the continuation-in-part '325 application filed on February 2, 2004. Ex. 1009, pgs. 176-7. At no time have either McGinley or Brian Lau stated that Lau is a co-inventor of the subject matter described in the '651 application. There is no evidence in the file histories of the '178 patent to support or suggest that Lau is an inventor of the subject matter described in the '651 application.

McGinley and Lau are co-inventors and as such they are the inventive entity of the ‘178 patent. McGinley is the sole inventor and as such he alone is the inventive entity of the subject matter of the ‘691 application. The ‘178 patent and the ‘691 application have different inventive entities.

VI. UNPATENTABILITY OF U.S. PATENT NO. 8,636,178

As detailed below, all limitations of all claims 1-10 of the ‘178 patent were well-known in the prior art alone and in combination. Each claim of the ‘178 patent is both anticipated under 35 U.S.C. §102 and obvious over the prior art under 35 U.S.C. §103. Petitioner requests that an *inter partes* review of the ‘178 patent should be instituted and the claims declared invalid over printed prior art.

a. Ground 1 – Claims 1-10 are Anticipated Under 35 U.S.C. §102(f) by the Invention of McGinley

The claims of the ‘178 patent read on Figures 1-4 of the ‘651 application. The ‘178 patent inventive entity – McGinley and Lau – is different from the inventive entity of the ‘651 application – McGinley. As shown in the attached claim chart, claims 1-10 read on the ‘651 application. “It is a given, of course, that a sole inventor and joint inventors including the sole inventor are separate ‘legal entities,’ a legal proposition from which certain legal consequences flow.” *In re Kaplan*, 789 F.2d 1574, 1575 (Fed. Cir. 1986). Section 102(f) provides that “A person shall be entitled to a patent unless – (f) he did not himself invent the subject matter sought to be patented.” Here, the claims of the ‘178 patent – the alleged invention of McGinley

and Lau – read on the disclosure of the '651 patent – the alleged invention of McGinley alone. McGinley and Lau did not invent the subject matter claimed in the '178 patent and therefore the '178 patent is invalid for failing to satisfy the requirements of §102(f).

Claim No.	Claim Language	McGinley Application
1	A container comprising:	"Fig. 1, an embodiment of the inventive container 10 is shown . . .." Ex. 1008, pg. 30.
1(a)	a generally continuous sidewall terminating in an upper sidewall end and a lower sidewall end and defining an inward fluid holding space bounded by said continuous sidewall,	"Continuous side wall 12 terminates at either end in upper side wall end 14 and lower side wall end 16." Ex. 1008, pg. 30. "Continuous side wall 12 can be formed of rubber or plastic or metal or wood or any material which will serve to hold a fluid within continuous side wall 12." Ex. 1008, pg. 30.
1(b)	said continuous sidewall having a flexible portion thereof that defines a generally flat sidewall section and	"The present invention relates to containers, specifically containers used to hold fluids . . .." Ex. 1008, pg. 24. "Fig. 1 is a top and side perspective view of the pitcher of the present invention showing the flexible panel which comprises a portion of the side wall of the container and the top edge of the side wall of the container." Ex. 1008, pg. 29. "In a preferred embodiment, and in the vicinity of generally flat side wall rim portion 24, is flexible panel 28 which extends from side wall 12 toward generally flat side wall rim segment 24 to connect side wall 12 with rim segment 24." Ex. 1008, pg. 31.

1(c)	a generally non-flexible portion joined on either end to the flexible portion,	Figures 1 and 2. Ex. 1008, pg. 42. "A container or pitcher is provided having a flexible side wall portion." Abstract, Ex. 1008, pg. 41. "A continuous sidewall and . . . a flexible panel forming a portion of said sidewall. Claim 1, Ex. 1008, pg. 36.
1(d)	a bottom closing said lower sidewall end with said upper sidewall end being generally open,	Figures 1-4. Ex. 1008, pg. 42. "Connected to lower sidewall end 16 is bottom or bottom panel 18 (Fig. 2)." Ex. 1008, pg. 31.
1(e)	a generally flat inwardly flexible panel forming a portion of said generally flat sidewall section and extending to form at least a portion of said upper sidewall end,	Figures 1-4. Ex. 1008, pg. 42. "In the vicinity of generally flat side wall rim portion 24, is flexible panel 28 which extends from side wall 12 toward generally flat side wall rim segment 24." Ex. 1008, pg. 30.
1(f)	the flexible panel facing outwardly and being sized, shaped and sufficiently pliable to matingly mold to the head of a person during use;	Figure 3, Ex. 1008, pg. 43. "It will further be appreciated that it is the flexible character of panel 28 and side wall rim 24 which allow for the registerable mating of the flexible portion of container 10." Ex. 1008, pg. 32.
1(g)	said flexible panel having a generally smooth inward surface for unobstructed fluid flow out of said open upper sidewall end, and	A generally smooth inward surface for unobstructed fluid flow is depicted in Figures 2-4. Ex. 1008, pg. 42-3.
1(h)	a handle located on the non-flexible portion opposite the flexible panel to allow a user to lift and pour the container when filled with liquid.	Figures 1-4. Ex. 1008, pg. 42-3. ". . . a handle 22 can be attached to side wall 12 to assist in the manipulation of container 10." Ex. 1008, pg. 30.

2	The container as claimed in claim 1 further comprising a rim attached to said upper side wall end.	Figures 1-4. Ex. 1008, pg. 42-3. See ". . . side wall rim 20 will be comprised of a generally circular side wall rim portion 26 and a generally flat side wall rim portion or side wall segment or rim segment 24." Ex. 1008, pg. 31. See claim 2, Ex. 1008, pg. 36.
3	The container as claimed in claim 2 wherein said rim is comprised of a sponge material.	See claim 3, Ex. 1008, pg. 36 – "said rim is comprised of a sponge."
4	The container as claimed in claim 2 wherein said rim is comprised of rubber.	See claim 4, Ex. 1008, pg. 36 – "said rim is comprised of rubber."
5	The container as claimed in claim 2 wherein said rim is comprised of cloth.	See claim 5, Ex. 1008, pg. 36 – "said rim is comprised of cloth."
6	A container comprising:	"Fig. 1, an embodiment of the inventive container 10 is shown . . .." Ex. 1008, pg. 30.
6(a)	a generally rigid continuous sidewall having an upper sidewall end and a lower sidewall end and defining an inward fluid holding space bounded by said continuous sidewall,	"The present invention relates to containers, specifically containers used to hold fluids . . .." Ex. 1008, pg. 24. "Continuous side wall 12 terminates at either end in upper side wall end 14 and lower side wall end 16." Ex. 1008, pg. 30. "Continuous side wall 12 can be formed of rubber or plastic or metal or wood or any material which will serve to hold a fluid within continuous side wall 12." Ex. 1008, pg. 30.

6(b)	said continuous sidewall having a flexible portion thereof that defines a generally flat sidewall section and a generally non-flexible portion joined on either end to the flexible portion,	"Fig. 1 is a top and side perspective view of the pitcher of the present invention showing the flexible panel which comprises a portion of the side wall of the container and the top edge of the side wall of the container." Ex. 1008, pg. 29. "In a preferred embodiment, and in the vicinity of generally flat side wall rim portion 24, is flexible panel 28 which extends from side wall 12 toward generally flat side wall rim segment 24 to connect side wall 12 with rim segment 24." Ex. 1008, pg. 31.
6(c)	a bottom attached to said lower sidewall end with said upper sidewall end being generally open,	Figures 1-4. "Connected to lower sidewall end 16 is bottom or bottom panel 18 (Fig. 2)." Ex. 1008, pg. 30.
6(d)	a rim connected to said upper sidewall end,	Figures 1-4. See ". . . side wall rim 20 will be comprised of a generally circular side wall rim portion 26 and a generally flat side wall rim portion or side wall segment or rim segment 24." Ex. 1008, pg. 31. See claim 2, Ex. 1008, pg. 36.
6(e)	a portion of said rim being sufficiently inwardly flexible to conform to the shape of an object to which said rim is pressed against,	Figure 3. Ex. 1008, pg. 43. "It will further be appreciated that it is the flexible character of panel 28 and side wall rim 24 which allow for the registerable mating of the flexible portion of container 10." Ex. 1008, pg. 32.
6(f)	an inwardly flexible and pliable panel forming a portion of said generally flat sidewall section and connecting with said inwardly flexible rim portion,	Figures 3 and 4. Ex. 1008, pg. 43. "Referring to Figs. 3 and 4, it is shown that flexible panel 28 and side wall rim 24 are capable of deformation inwardly." Ex. 1008, pg. 32.

6(g)	said inwardly flexible panel having a generally smooth inward surface for unobstructed fluid flow out of said open upper sidewall end and	A generally smooth inward surface for unobstructed fluid flow is depicted in Figures 2 and 3. Ex. 1008, pg. 42-43.
6(h)	an outward facing surface that is sized and shaped to matingly mold to the head of a person during use, and	Figure 3. Ex. 1008, pg. 43. "It will further be appreciated that it is the flexible character of panel 28 and side wall rim 24 which allow for the registerable mating of the flexible portion of container 10." Ex. 1008, pg. 32.
6(i)	a handle joined to the non-flexible portion opposite the flexible portion to provide for lifting and pouring of the contents of the container by a user.	Figures 1-4. Ex. 1008, pg. 42-43. ". . . a handle 22 can be attached to side wall 12 to assist in the manipulation of container 10." Ex. 1008, pg. 30.
7	The container as claimed in claim 6 at least a portion of said side wall is concave, said concave side wall portion having a rim portion of a flexible material.	See claim 8 – "The container of claim 7 at least a portion of said sidewall is concave, . . ." Ex. 1008, pg. 37.
8	The container as claimed in claim 7 wherein said rim is comprised of a sponge material.	See claim 3, Ex. 1008, pg. 36 – "said rim is comprised of a sponge."
9	The container as claimed in claim 7 wherein said rim is comprised of rubber.	See claim 4, Ex. 1008, pg. 36 – "said rim is comprised of rubber."
10	The container as claimed in claim 7 wherein said rim is comprised of cloth.	See claim 5, Ex. 1008, pg. 36 – "said rim is comprised of cloth."

Claims 1-10 of the ‘178 patent are anticipated based on the disclosures presented in the claim chart above and the supporting arguments that follow:

The preamble of claim 1 of the ‘178 patent identifies “a container.” Nothing in the preamble makes the container itself unique for any particular purpose, however McGinley’s application was directed to a container. Fig 1, an embodiment of the inventive container 10 is shown . . ..” Ex. 1008, pg. 30.

Claim element 1(a) calls for “a generally continuous sidewall terminating in an upper sidewall end and a lower sidewall end and defining an inward fluid holding space bounded by said continuous sidewall.” McGinley describes that a “[c]ontinuous side wall 12 terminates at either end in upper side wall end 14 and lower side wall end 16.” Ex. 1008, pg. 30. McGinley also discloses that a “[c]ontinuous side wall 12 can be formed of rubber or plastic or metal or wood or any material which will serve to hold a fluid within continuous side wall 12.” Ex. 1008, pg. 30.

Claim element 1(b) calls for the sidewall “having a flexible portion thereof that defines a generally flat sidewall section.” McGinley discloses: “The present invention relates to containers, specifically containers used to hold fluids . . ..” Ex. 1008, pg. 24. “Fig. 1 is a top and side perspective view of the pitcher of the present invention showing the flexible panel which comprises a portion of the side wall of the container and the top edge of the side wall of the container.” Ex. 1008, pg. 29.

"In a preferred embodiment, and in the vicinity of generally flat side wall rim portion 24, is flexible panel 28 which extends from side wall 12 toward generally flat side wall rim segment 24 to connect side wall 12 with rim segment 24." Ex. 1008, pg. 31.

Claim element 1(c) calls for "a generally non-flexible portion joined on either end to the flexible portion." McGinley discloses: Figures 1 and 2. Ex. 1008, pg. 42. "A container or pitcher is provided having a flexible side wall portion." Abstract, Ex. 1008, pg. 41. "A continuous sidewall and . . . a flexible panel forming a portion of said sidewall. Claim 1, Ex. 1008, pg. 36.

Claim element 1(d) calls for "a bottom closing" and an "upper sidewall end being generally open." McGinley discloses: Figures 1-4. Ex. 1008, pgs. 42-3. "Connected to lower sidewall end 16 is bottom or bottom panel 18 (Fig. 2)." Ex. 1008, pg. 31.

Claim element 1(e) calls for "a generally flat inwardly flexible panel forming a portion of said generally flat sidewall section and extending to form at least a portion of said upper sidewall end." McGinley discloses: Figures 1-4. Ex. 1008, pgs. 42-3 "In the vicinity of generally flat side wall rim portion 24, is flexible panel 28 which extends from side wall 12 toward generally flat side wall rim segment 24." Ex. 1008, pg. 30.

Claim element 1(f) calls for "the flexible panel facing outwardly and being sized, shaped and sufficiently pliable to matingly mold to the head of a person during use." McGinley discloses: Figure 3. Ex. 1008, pg. 43. "It will further be appreciated that it is the flexible character of panel 28 and side wall rim 24 which allow for the registerable mating of the flexible portion of container 10." Ex. 1008, pg. 32.

Claim element 1(g) calls for the flexible panel "having a generally smooth inward surface." McGinley discloses: A generally smooth inward surface for unobstructed fluid flow is depicted in Figures 2-4. Ex. 1008, pg. 42.

Claim element 1(h) calls for a "handle." McGinley discloses: Figures 1-4. Ex. 1008, pgs. 42-3. ". . . a handle 22 can be attached to side wall 12 to assist in the manipulation of container 10." Ex. 1008, pg. 30.

Claim 2 merely calls for "a rim attached to said upper side wall end." McGinley discloses: Figures 1-4. Ex. 1008, pgs. 42-3. See ". . . side wall rim 20 will be comprised of a generally circular side wall rim portion 26 and a generally flat side wall rim portion or side wall segment or rim segment 24." Ex. 1008, pg. 31. See claim 2 of McGinley, Ex. 1008, pg. 36.

Claim 3 adds the limitation to claim 2 that "said rim is comprised of a sponge." See claim 3 of McGinley, Ex. 1008, pg. 36 – "said rim is comprised of a sponge."

Claim 4 adds the limitation to claim 2 that "said rim is comprised of rubber." See claim 4 of McGinley, Ex. 1008, pg. 36 – "said rim is comprised of rubber."

Claim 5 adds the limitation to claim 2 that "said rim is comprised of cloth." See claim 5 of McGinley, Ex. 1008, pg. 36 – "said rim is comprised of cloth."

The preamble of claim 6 of the '178 patent identifies "a container." Nothing in the preamble makes the container itself unique for any particular purpose, however, McGinley's application was directed to a container, see Fig 1, an embodiment of the inventive container 10 is shown . . .." Ex. 1008, pg. 30.

Claim element 6(a) calls for "a generally rigid continuous sidewall having an upper sidewall end and a lower sidewall end and defining an inward fluid holding space bounded by said continuous sidewall." McGinley discloses: "The present invention relates to containers, specifically containers used to hold fluids . . .." Ex. 1008, pg. 24. "Continuous side wall 12 terminates at either end in upper side wall end 14 and lower side wall end 16." Ex. 1008, pg. 30. "Continuous side wall 12 can be formed of rubber or plastic or metal or wood or any material which will serve to hold a fluid within continuous side wall 12." Ex. 1008, pg. 30.

Claim element 6(b) calls for the sidewall "said continuous sidewall having a flexible portion thereof that defines a generally flat sidewall section and a generally non-flexible portion joined on either end to the flexible portion." McGinley discloses: "Fig. 1 is a top and side perspective view of the pitcher of the present invention showing the flexible panel which comprises a portion of the side wall of the container and the top edge of the side wall of the container." Ex. 1008, pg. 29.

"In a preferred embodiment, and in the vicinity of generally flat side wall rim portion 24, is flexible panel 28 which extends from side wall 12 toward generally flat side wall rim segment 24 to connect side wall 12 with rim segment 24." Ex. 1008, pg. 31.

Claim element 6(c) calls for "a bottom" and an "upper sidewall end being generally open." McGinley discloses: Figures 1-4. Ex. 1008, pgs. 42-3. "Connected to lower sidewall end 16 is bottom or bottom panel 18 (Fig. 2)." Ex. 1008, pg. 30.

Claim element 6(d) calls for "a rim connected to said upper side wall end." McGinley discloses: Figures 1-4. Ex. 1008, pgs. 42-3. See ". . . side wall rim 20 will be comprised of a generally circular side wall rim portion 26 and a generally flat side wall rim portion or side wall segment or rim segment 24." Ex. 1008, pg. 31. See claim 2, Ex. 1008, pg. 36.

Claim element 6(e) calls for "a portion of said rim being sufficiently inwardly flexible to conform to the shape of an object to which said rim is pressed against." McGinley discloses: Figure 3. Ex. 1008, pg. 43. "It will further be appreciated that it is the flexible character of panel 28 and side wall rim 24 which allow for the registerable mating of the flexible portion of container 10." Ex. 1008, pg. 32.

Claim element 6(f) calls for "an inwardly flexible and pliable panel forming a portion of said generally flat sidewall section and connecting with said inwardly flexible rim portion." McGinley discloses: Figures 3 and 4. Ex. 1008, pg. 42.

"Referring to Figs. 3 and 4, it is shown that flexible panel 28 and side wall rim 24 are capable of deformation inwardly." Ex. 1008, pg. 32.

Claim element 6(g) calls for "said flexible panel having a generally smooth inward surface for unobstructed fluid flow out of said open upper sidewall end." McGinley discloses: a generally smooth inward surface for unobstructed fluid flow is depicted in Figures 2 and 3. Ex. 1008, pg. 42-43.

Claim element 6(h) calls for "an outward facing surface that is sized and shaped to matingly mold to the head of a person during use." McGinley discloses: Figure 3. Ex. 1008, pg. 43. "It will further be appreciated that it is the flexible character of panel 28 and side wall rim 24 which allow for the registerable mating of the flexible portion of container 10." Ex. 1008, pg. 32.

Claim element 6(i) calls for a "handle." McGinley discloses: Figures 1-4. Ex. 1008, pg. 42-43. ". . . a handle 22 can be attached to side wall 12 to assist in the manipulation of container 10." Ex. 1008, pg. 30.

Claim 7 adds the limitation to claim 6 that "at least a portion of said side wall is concave, said concave side wall portion having a rim portion of a flexible material." McGinley discloses: claim 8 – "The container of claim 7 at least a portion of said sidewall is concave, . . ." Ex. 1008, pg. 37.

Claim 8 adds the limitation to claim 7 that "said rim is comprised of a sponge." McGinley discloses: claim 3, Ex. 1008, pg. 36 – "said rim is comprised of a sponge."

Claim 9 adds the limitation to claim 7 that "said rim is comprised of rubber." McGinley discloses: claim 4, Ex. 1008, pg. 36 – "said rim is comprised of rubber."

Claim 10 adds the limitation to claim 7 that "said rim is comprised of cloth." McGinley discloses: claim 5, Ex. 1008, pg. 36 – "said rim is comprised of cloth."

Thus, McGinley anticipates claims 1-10 of the '178 patent under 35 U.S.C. §102(f).

b. <u>Ground 2 – U.K. Patent No. 2,269,811 to Weston et al., together with U.S. Patent No. 2,610,490 to Tupper Renders Each of Claims 1-2, 6-7 Obvious Under 35 U.S.C. § 103 Either Together or in Light of Other Art</u>

U.K. Patent No. 2,269,811 (Ex. 1005) to Weston et al., titled "Hinged Closure" constitutes prior art under at least 35 U.S.C. §102(b) because its publication date of February 23, 1994 is more than one year prior to the earliest filing date attributable to the '178 patent. Ex. 1005, pg. 1. Weston et al. is not of record in the prosecution of the '178 patent. U.S. Patent No. 2,610,490 (Ex. 1006) to Tupper for "Pitcher or the Like Container" constitutes prior art under at least 35 U.S.C. §102(b) because its publication date of September 16, 1952 is more than one year prior to the earliest filing date attributable to the '178 patent. Ex. 1006, 1. Tupper was of record in the prosecution of the '178 patent.

Weston et al., shows essentially the invention claimed in claims 1-2 and 6-7 of the '178 patent. The only difference is that Weston et al., do not disclose a handle. But handles for containers were well known at the time and a mere matter of design

choice. While the figures of Weston et al., show a flexible panel that is curved, the written description includes a reference to the flexible panel being flat. Ex. 1005, pg. 14.

Referring now to the figures and written description of Weston et al., there is shown a flexible panel 1 attached to a container 2. Ex. 1005, pg. 1. Container 2 maybe a one-piece molded container suitable of products such as milk and the curved portion is very stiff. Ex. 1005, pg. 16. As shown in Figures 1 and 3, container 2 has a thin flexible section 1. Container 2 has a closed bottom, see Figure 10. As shown in Figure 1 and described in Ex. 1005, pg. 14, neck 4 has a rim that is flexible so that when the upper part of section 1 is pressed towards the container 2, it flexes. As shown in Figures 1-6 and described in Ex. 1005, pg. 14, flexible panel 1 is inwardly flexible. The flexible panel 1 has a smooth inward surface as shown in Figure 3. As described, the flexible panel 1 is deformable. Ex. 1005, pg. 11. Weston et al., do not disclose a handle however handles were well known in the art as is evidenced by Tupper, Ex. 1006.

Claim No.	Claim Language	WESTON + TUPPER
1	A container comprising:	Figure 1, container 2. Ex. 1005, pg. 1.

1(a)	a generally continuous sidewall terminating in an upper sidewall end and a lower sidewall end and defining an inward fluid holding space bounded by said continuous sidewall,	"The invention may be embodied in a one-piece moulded container shown in figure 10. For many products, milk for example…" Ex. 1005, pg. 16. ". . . the curved member is very stiff" and "will not distort…" Ex. 1005, pg. 16. See Fig. 1, container 2 and neck 4. Ex. 1005, pg. 2.
1(b)	said continuous sidewall having a flexible portion thereof that defines a generally flat sidewall section and	See Fig. 1 and 3, container 2 has a thin flexible section 1. Ex. 1005, pg. 16. "As section 1 is forced beyond its flat position." Ex. 1005, pg. 14.
1(c)	a generally non-flexible portion joined on either end to the flexible portion,	". . . the curved member is very stiff" and "will not distort…" Ex. 1005, pg. 16.
1(d)	a bottom closing said lower sidewall end with said upper sidewall end being generally open,	See Fig. 10. Ex. 1005, pg. 4.
1(e)	a generally flat inwardly flexible panel forming a portion of said generally flat sidewall section and extending to form at least a portion of said upper sidewall end,	See Fig. 1, flexible panel 1. Ex. 1005, pg. 1. "Part of the wall at the dispensing end of the container is flexible…" Ex. 1005, pg. 2. "As section 1 is forced beyond its flat position…" Ex. 1005, pg. 14.
1(f)	the flexible panel facing outwardly and being sized, shaped and sufficiently pliable to matingly mold to the head of a person during use;	"By pressing on the flexible section when it is convex and in the open position…" Alternatively, the aperture may stretch…" Ex. 1005, pg. 11.
1(g)	said flexible panel having a generally smooth inward surface for unobstructed fluid flow out of said open upper sidewall end, and	See figure 3. Ex. 1005, pg. 2.

1(h)	a handle located on the non-flexible portion opposite the flexible panel to allow a user to lift and pour the container when filled with liquid.	Tupper, Ex. 1006, Figures 1-4 and "Opposite from pouring spout 16, wall 14 extends outwardly forming a handle generally indicated at 18. Ex. 1006, 1:54-2:1.
2	The container as claimed in claim 1 further comprising a rim attached to said upper side wall end.	See Figure 1. "…the rim of the neck 4…" Ex. 1005, pg. 14.
3	The container as claimed in claim 2 wherein said rim is comprised of a sponge material.	Not Shown
4	The container as claimed in claim 2 wherein said rim is comprised of rubber.	Not Shown
5	The container as claimed in claim 2 wherein said rim is comprised of cloth.	Not Shown
6	A container comprising:	Figure 1, container 2. Ex. 1005, pg. 1.
6(a)	a generally rigid continuous sidewall having an upper sidewall end and a lower sidewall end and defining an inward fluid holding space bounded by said continuous sidewall,	"Container 2 preferably with one or more curved walls. Ex. 1005, pg. 11. "The invention may be embodied in a one-piece moulded container shown in figure 10. For many products, milk for example…" Ex. 1005, pg. 16. ". . . the curved member is very stiff" and "will not distort…" Ex. 1005, pg. 16. See Fig. 1, container 2 and neck 4, Ex. 1005, pg. 2.

6(b)	said continuous sidewall having a flexible portion thereof that defines a generally flat sidewall section and a generally non-flexible portion joined on either end to the flexible portion,	See Ex. 1002, pg. 2, Figs. 1 and 3 and "container 2 has a thin flexible panel 1 that forms a "section" in the sidewall of container 2." Ex. 1005, pg. 11-14.
6(c)	a bottom attached to said lower sidewall end with said upper sidewall end being generally open,	See Ex. 1005, pg. 4, Fig. 10.
6(d)	a rim connected to said upper sidewall end,	See Figure 1. Ex. 1005, pg. 2. "…the rim of the neck 4…" Ex. 1005, pg. 14.
6(e)	a portion of said rim being sufficiently inwardly flexible to conform to the shape of an object to which said rim is pressed against,	"When the upper part of section 1 is pressed towards the hollow neck of the container 2, it flexes at . . . the rim of neck 4,…" Ex. 1002, pg. 7.
6(f)	an inwardly flexible and pliable panel forming a portion of said generally flat sidewall section and connecting with said inwardly flexible rim portion,	"As section 1 is forced beyond its flat position, the force exerted by the rim 4 on the edges of the section 1 causes said section to adopt a curvature opposite to its original, and to snap into the hollow of the neck…" Ex. 1005, pg. 14.
6(g)	said inwardly flexible panel having a generally smooth inward surface for unobstructed fluid flow out of said open upper sidewall end and	See figure 3. Ex. 1005, pg. 2.
6(h)	an outward facing surface that is sized and shaped to matingly mold to the head of a person during use, and	"By pressing on the flexible section when it is convex and in the open position…" Ex. 1005, pg. 11. "Alternatively, the aperture may stretch…" Ex. 1005, pg. 11.

6(i)	a handle joined to the non-flexible portion opposite the flexible portion to provide for lifting and pouring of the contents of the container by a user.	Tupper, Ex. 1006, Figures 1-4 and "Opposite from pouring spout 16, wall 14 extends outwardly forming a handle generally indicated at 18. Ex. 1006, 1:54-2:1.
7	The container as claimed in claim 6 at least a portion of said side wall is concave, said concave side wall portion having a rim portion of a flexible material.	See Figure 1. Ex. 1006, pg. 2.
8	The container as claimed in claim 7 wherein said rim is comprised of a sponge material.	Not Shown
9	The container as claimed in claim 7 wherein said rim is comprised of rubber.	Not Shown
10	The container as claimed in claim 7 wherein said rim is comprised of cloth.	Not Shown

Claims 1-2 and 6-7 of the '178 patent are obvious based on the disclosures presented in the claim chart above and the supporting arguments that follow:

The preamble of claim 1 of the '178 patent identifies "a container." Nothing in the preamble makes the container itself unique for any particular purpose.

Claim element 1(a) calls for "a generally continuous sidewall terminating in an upper sidewall end and a lower sidewall end and defining an inward fluid holding space bounded by said continuous sidewall." Weston et al., describe a container 2

"embodied in a one-piece blow moulded container" and is suitable for liquids such as milk. Ex. 1005, pg. 16.

Claim element 1(b) calls for the sidewall "having a flexible portion thereof that defines a generally flat sidewall section." Weston et al., describe a container 2 having a flexible panel 1. While flexible panel 1 is shown to be slightly convex in the figures it is described as also having a flat position. Ex. 1005, pg. 14.

Claim element 1(c) calls for "a generally non-flexible portion joined on either end to the flexible portion." Weston et al., describe "the curved member [of container 2] is very stiff" and "will not distort." Ex. 1005, pg. 16.

Claim element 1(d) calls for "a bottom closing" and an "upper sidewall end being generally open." Weston et al., show in Figure 10 that container 2 has a bottom and Figure 1 shows container 2 to have an upper end that is generally open. Ex. 1005, pg. 4 and pg. 2.

Claim element 1(e) calls for "a generally flat inwardly flexible panel forming a portion of said generally flat sidewall section and extending to form at least a portion of said upper sidewall end." Weston et al., show in Figures 1-6 that flexible panel 1 is inwardly flexible. Ex. 1005, pg. 2. Flexible panel 1 has a flat position, Ex. 1005, pg. 14. Container 2 has preferably one or more curved walls and part of the wall is flexible. Ex. 1005, pg. 11.

Claim element 1(f) calls for "the flexible panel facing outwardly and being sized, shaped and sufficiently pliable to matingly mold to the head of a person during use." Weston et al., show in Figure 1 that flexible panel 1 faces outwardly. Ex. 1005, pg. 2. Weston et al., also show and describe that flexible panel 1 is pliable and from the figures it is readily apparent that flexible panel 2 is sized and shaped to matingly mold the head of a person. Ex. 1005, pg. 2.

Claim element 1(g) calls for the flexible panel "having a generally smooth inward surface." Weston et al., show in Figure 3 that the inward surface of panel 1 is smooth and provides for unobstructed fluid flow. Ex. 1005, pg. 2.

Claim element 1(h) calls for a "handle." Tupper describes "a pitcher or the like container molded of plastic material in either substantially rigid or flexible form." Ex. 1006, 1:1-3. As such, Tupper was in the same field as the '178 patent and addressed the same issue regarding the provision of means for gripping the container. Tupper describes an identical handle to that claimed in the '178 patent. "Opposite from the pouring spout 16, wall 14 extends outwardly forming a handle generally indicated at 18." Ex. 1006, 1:54-2:1. It would have been obvious to include the handle of Tupper with the container of Weston et al.

Claim 2 merely calls for "a rim attached to said upper side wall end." Weston et al., Figure 1, clearly shows a rim on neck 4. Ex. 1002, pg. 7.

The preamble of claim 6 of the ‘178 patent identifies “a container.” Nothing in the preamble makes the container itself unique for any particular purpose.

Claim element 6(a) calls for “a generally rigid continuous sidewall having an upper sidewall end and a lower sidewall end and defining an inward fluid holding space bounded by said continuous sidewall.” Weston et al., describe a container 2 preferably with one or more curved walls. Ex. 1005, pg. 11. They go on to explain that the container is suitable for fluids such as milk. Ex. 1005, pg. 16. They also explain that curved side walls are “very stiff” and “will not distort.” Ex. 1002, pg. 16.

Claim element 6(b) calls for the sidewall “said continuous sidewall having a flexible portion thereof that defines a generally flat sidewall section and a generally non-flexible portion joined on either end to the flexible portion.” Weston et al., describe a container 2 having a thin flexible panel 1 that forms a “section” in the sidewall of container 2. See Ex. 1005, Figures 1 and 3, pg. 2 and p 14. While flexible panel 1 is shown to be slightly convex in the figures it is described as also having a flat position. Ex. 1005, pg. 14. Weston et al., also explain that curved side walls are “very stiff” and “will not distort.” Ex. 1005, pg. 16.

Claim element 6(c) calls for “a bottom” and an “upper sidewall end being generally open.” Weston et al., show in Figure 10, Ex. 1005, pg. 4, that container 2

has a bottom and in Figure 1, Ex. 1005, pg. 2, shows container 2 to have an upper end that is generally open.

Claim element 6(d) calls for "a rim connected to said upper side wall end." Weston et al., Figure 1, Ex. 1005, pg. 2, clearly shows a rim on neck 4 and it is described in the written specification at Ex. 1005, pg. 14.

Claim element 6(e) calls for "a portion of said rim being sufficiently inwardly flexible to conform to the shape of an object to which said rim is pressed against." Weston et al., describe that "[w]hen the upper part of section 1 is pressed towards the hollow neck of the container 2, it flexes at . . . the rim of neck 4." Ex. 1005, page 14.

Claim element 6(f) calls for "an inwardly flexible and pliable panel forming a portion of said generally flat sidewall section and connecting with said inwardly flexible rim portion." Weston et al., show in Figures 1-6 that flexible panel 1 is inwardly flexible. Ex. 1005, pg. 2. Flexible panel 1 has a flat position, Ex. 1005, pg. 14. Container 2 has preferably one or more curved walls and part of the wall is flexible. Ex. 1005, pg. 11. Weston et al., further describe that "[w]hen the upper part of section 1 is pressed towards the hollow neck of the container 2, it flexes at . . . the rim of neck 4." Ex. 1005, page 14.

Claim element 6(g) calls for "said flexible panel having a generally smooth inward surface for unobstructed fluid flow out of said open upper sidewall end."

Weston et al., show in Figure 3, Ex. 1005, pg. 4, that the inward surface of panel 1 is smooth and provides for unobstructed fluid flow.

Claim element 6(h) calls for "an outward facing surface that is sized and shaped to matingly mold to the head of a person during use." Weston et al., show in Figure 1 that flexible panel 1 faces outwardly. Ex. 1005, pg. 2. Weston et al., also show and describe that flexible panel 1 is pliable and from the figures it is readily apparent that flexible panel 2 is sized and shaped to matingly mold the head of a person.

Claim element 6(i) calls for a "handle." Tupper describes "a pitcher or the like container molded of plastic material in either substantially rigid or flexible form." Ex. 1006, 1:1-3. As such, Tupper was in the same field as the '178 patent and addressed the same issue regarding the provision of means for gripping the container. Tupper describes an identical handle to that claimed in the '178 patent. "Opposite from the pouring spout 16, wall 14 extends outwardly forming a handle generally indicated at 18." Ex. 1006, 1:54-2:1. It would have been obvious to include the handle of Tupper with the container of Weston et al.

Claim 7 adds the limitation that "at least a portion of said side wall is concave, said concave side wall portion having a rim portion of a flexible material." Container 2 has preferably one or more curved walls and part of the wall is flexible. Ex. 1005, pg. 11. Weston et al., further show in Figure 1 that flexible panel 1 faces outwardly

and describe in the abstract that the panel is "outwardly convex" and that the "rim 7 of the container may . . . also deform to aid movement of the panel." Ex. 1005, abstract, pg. 1.

Thus, Weston et al., in view of Tupper render claims 1-2 and 6-7 of the '178 patent obvious under 35 U.S.C. §103.

c. Ground 3 – U.K. Patent No. 2,269,811 to Weston et al., together with Swiss Patent No. 274,789 to Horz and U.S. Patent No. 2,610,490 to Tupper Renders Each of Claims 1-2, 6-7 Obvious Under 35 U.S.C. § 103 Either Together or in Light of Other Art

U.K. Patent No. 2,269,811 (Ex. 1005) to Weston et al., titled "Hinged Closure," constitutes prior art under at least 35 U.S.C. §102(b) because its publication date of February 23, 1994 is more than one year prior to the earliest filing date attributable to the '178 patent. Ex. 1005, pg. 1. Weston et al., is not of record in the prosecution of the '178 patent. Swiss Patent No. 274,789 (Ex. 1007) to Horz, titled "Bucket," constitutes prior art under at least 35 U.S.C. §102(b) because its publication date of July 16, 1951 is more than one year prior to the earliest filing date attributable to the '178 patent. Ex. 1007, pg. 1. Horz is not of record in the prosecution of the '178 patent. U.S. Patent No. 2,610,490 (Ex. 1006) to Tupper for "Pitcher or the Like Container" constitutes prior art under at least 35 U.S.C. §102(b) because its publication date of September 16, 1952 is more than one year prior to the earliest filing date attributable to the '178 patent. Ex. 1006, 1. Tupper was of record in the prosecution of the '178 patent.

Weston et al., shows essentially the invention claimed in claims 1-2 and 6-7 of the ‘178 patent. To the extent Weston et al., do not disclose a “generally flat sidewall section” such a generally flat sidewall section is taught and described in Horz. Alternatively, Horz discloses essentially the invention claimed in claims 1-2 and 6-7 of the ‘178 patent with the exception of a “flexible panel.” To the extent Horz does not teach a “flexible panel” such a “flexible panel” is taught and described in Weston et al. To the extent Weston et al., do not disclose a handle, handles were well known in the art as is evidenced by Tupper, Ex. 1006 and Horz, Ex. 1007.

Claim No.	Claim	WESTON + HORZ + TUPPER
1	A container comprising:	**Weston**: Figure 1, container 2. Ex. 1005, pg. 1. **Horz**: Title is “Bucket.” Ex. 1007, pg. 1.
1(a)	a generally continuous sidewall terminating in an upper sidewall end and a lower sidewall end and defining an inward fluid holding space bounded by said continuous sidewall,	**Weston**: “The invention may be embodied in a one-piece moulded container shown in figure 10. For many products, milk for example…” Ex. 1005, pg. 16. “. . . the curved member is very stiff” and “will not distort…” Ex. 1005, pg. 16. See Fig. 1, container 2 and neck 4. Ex. 1005, pg. 2. **Horz**: Figures 1-6, Ex. 1007, pg. 4. “The invention relates to a bucket having an upwardly widening casing.” “The upwardly widening casing 2 . . . is circularly delimited in the example shown.” Ex. 1007, pg. 1, col. 1.

1(b)	said continuous sidewall having a flexible portion thereof that defines a generally flat sidewall section and	**Weston**: See Fig. 1 and 3, container 2 has a thin flexible section 1. Ex. 1005, pg. 16. "As section 1 is forced beyond its flat position." Ex. 1005, pg. 14. **Horz**: Figures 1-6, Ex. 1007, pg. 4. "In one embodiment, the casing is flattened by at least one planar surface running parallel to the bucket axis." Ex. 1007, pg. 1, col. 1. "On one side, the casing 2 forms the flattening 8, which runs parallel to the bucket axis…" Ex. 1007, pg. 1, col. 2. "They can also be manufactured, e.g. pressed, from non-metallic materials, e.g. synthetic resins, hardboard, synthetic wood or the like." Ex. 1007, pg. 2, col. 2. "Bucket according to the main claim, characterized in that it is manufactured from non-metallic material." Claim 7, Ex. 1007, pg. 3, col. 1.
1(c)	a generally non-flexible portion joined on either end to the flexible portion,	**Weston**: ". . . the curved member is very stiff" and "will not distort…" Ex. 1005, pg. 16. **Horz**: "The flattened buckets can, for example, also be folded from iron or steel sheets and galvanized or enameled, or drawn from aluminum or other metal sheets, like other buckets." Claim 7, Ex. 1007, pg. 3, col. 1.
1(d)	a bottom closing said lower sidewall end with said upper sidewall end being generally open,	**Weston**: See Fig. 10. Ex. 1005, pg. 4. **Horz**: Figures 1-6, Ex. 1007, pg. 4. "The upwardly widening casing 2 and a placement ring 3 are connected in a known way to the bucket bottom 1, which is circularly delimited in the example shown." Ex. 1007, pg. 1, col. 1.
1(e)	a generally flat inwardly flexible panel forming a portion of said generally flat sidewall section and extending to form at least a portion of said upper sidewall end,	**Weston**: See Fig. 1, flexible panel 1. "Part of the wall at the dispensing end of the container is flexible…" Ex. 1005, pg. 2. "As section 1 is forced beyond its flat position…" Ex. 1005, pg. 14. **Horz**: Figures 1-6, Ex. 1007, pg. 4. "The upper edge 9 of the flattening, which is incorporated into the flanging 4, runs substantially straight." Ex. 1007, pg. 1, col. 2.

1(f)	the flexible panel facing outwardly and being sized, shaped and sufficiently pliable to matingly mold to the head of a person during use;	**Weston**: "By pressing on the flexible section when it is convex and in the open position…" Alternatively, the aperture may stretch…" Ex. 1005, pg. 11. **Horz**: "The flattened buckets therefore allow versatile advantageous possibilities of use which are independent of the material and the manner in which the buckets are manufactured." Ex. 1007, pg. 2, col. 2.
1(g)	said flexible panel having a generally smooth inward surface for unobstructed fluid flow out of said open upper sidewall end, and	**Weston**: See figure 3. Ex. 1005, pg. 2. **Horz**: "On the inside, the flattening offers the possibility of being able to remove the contents of the bucket conveniently . . .." Ex. 1007, pg. 2, col. 1.
1(h)	a handle located on the non-flexible portion opposite the flexible panel to allow a user to lift and pour the container when filled with liquid.	**Tupper**: Ex. 1006, Figures 1-4 and "Opposite from pouring spout 16, wall 14 extends outwardly forming a handle generally indicated at 18. Ex. 1006, 1:54-2:1. **Horz**: Figures 1-6, Ex. 1007, pg. 4. "On one side, the casing 2 forms the flattening 8, which runs parallel to the bucket axis and to the connecting line of the bearing points of the handle 7." Ex. 1007, pg. 1, col. 2.
2	The container as claimed in claim 1 further comprising a rim attached to said upper side wall end.	**Weston**: See Figure 1. "…the rim of the neck 4…" Ex. 1005, pg. 14. **Horz**: "The upper edge 9 of the flattening, which is incorporated into the flanging 4, runs substantially straight." Ex. 1007, pg. 1, col. 2.
3	The container as claimed in claim 2 wherein said rim is comprised of a sponge material.	Not Shown
4	The container as claimed in claim 2 wherein said rim is comprised of rubber.	Not Shown

5	The container as claimed in claim 2 wherein said rim is comprised of cloth.	Not Shown
6	A container comprising:	**Weston**: Figure 1, container 2. Ex. 1005, pg. 1. **Horz**: Title is "Bucket" Ex. 1007, pg. 1.
6(a)	a generally rigid continuous sidewall having an upper sidewall end and a lower sidewall end and defining an inward fluid holding space bounded by said continuous sidewall,	**Weston**: "Container 2 preferably with one or more curved walls. Ex. 1005, pg. 11. "The invention may be embodied in a one-piece moulded container shown in figure 10. For many products, milk for example…" Ex. 1005, pg. 16. ". . . the curved member is very stiff" and "will not distort…" Ex. 1005, pg. 16. See Fig. 1, container 2 and neck 4, Ex. 1005, pg. 2. **Horz**: Figures 1-6, Ex. 1007, pg. 4. "The invention relates to a bucket having an upwardly widening casing." Ex. 1007, pg. 1, col. 1. "The upwardly widening casing 2 . . . is circularly delimited in the example shown." Ex. 1007, pg. 1, col. 1.
6(b)	said continuous sidewall having a flexible portion thereof that defines a generally flat sidewall section and a generally non-flexible portion joined on either end to the flexible portion,	**Weston**: See Ex. 1002, pg. 2, Figs. 1 and 3 and "container 2 has a thin flexible panel 1 that forms a "section" in the sidewall of container 2." Ex. 1005, pg. 11-14. **Horz**: Figures 1-6, Ex. 1007, pg. 4. "In one embodiment, the casing is flattened by at least one planar surface running parallel to the bucket axis." Ex. 1007, pg. 1, col. 1. "On one side, the casing 2 forms the flattening 8, which runs parallel to the bucket axis…" Ex. 1007, pg. 1, col. 2. "They can also be manufactured, e.g. pressed, from non-metallic materials, e.g. synthetic resins, hardboard, synthetic wood or the like." Ex. 1007, pg. 2, col. 2. "Bucket according to the main claim, characterized in that it is manufactured from non-metallic material." Claim 7, Ex. 1007, pg. 3, col. 1.

6(c)	a bottom attached to said lower sidewall end with said upper sidewall end being generally open,	**Weston**: See Ex. 1005, pg. 4, Fig. 10. **Horz**: Figures 1-6, Ex. 1007, pg. 4. "The upwardly widening casing 2 and a placement ring 3 are connected in a known way to the bucket bottom 1, which is circularly delimited in the example shown." Ex. 1007, pg. 1, col. 1.
6(d)	a rim connected to said upper sidewall end,	**Weston**: See Figure 1. Ex. 1005, pg. 2. "…the rim of the neck 4…" Ex. 1005, pg. 14. **Horz**: Figures 1-6, Ex. 1007, pg. 4. "The upper edge 9 of the flattening, which is incorporated into the flanging 4, runs substantially straight." Ex. 1007, pg. 1, col. 2.
6(e)	a portion of said rim being sufficiently inwardly flexible to conform to the shape of an object to which said rim is pressed against,	**Weston**: "When the upper part of section 1 is pressed towards the hollow neck of the container 2, it flexes at . . . the rim of neck 4…" Ex. 1002, pg. 7. **Horz**: Figures 1-6, Ex. 1007, pg. 4. "The upper edge 9 of the flattening, which is incorporated into the flanging 4, runs substantially straight." Ex. 1007, pg. 1, col. 2.
6(f)	an inwardly flexible and pliable panel forming a portion of said generally flat sidewall section and connecting with said inwardly flexible rim portion,	**Weston**: "As section 1 is forced beyond its flat position, the force exerted by the rim 4 on the edges of the section 1 causes said section to adopt a curvature opposite to its original, and to snap into the hollow of the neck…" Ex. 1005, pg. 14. **Horz**: Figures 1-6, Ex. 1007, pg. 4. "They can also be manufactured, e.g. pressed, from non-metallic materials, e.g. synthetic resins, hardboard, synthetic wood or the like." Ex. 1007, pg. 2, col. 2.
6(g)	said inwardly flexible panel having a generally smooth inward surface for unobstructed fluid flow out of said open upper sidewall end and	**Weston**: See figure 3. Ex. 1005, pg. 2. **Horz**: "On the inside, the flattening offers the possibility of being able to remove the contents of the bucket conveniently . . .." Ex. 1007, pg. 2, col. 1.

6(h)	an outward facing surface that is sized and shaped to matingly mold to the head of a person during use, and	**Weston**: "By pressing on the flexible section when it is convex and in the open position…" Ex. 1005, pg. 11. "Alternatively, the aperture may stretch…" Ex. 1005, pg. 11. **Horz**: "The flattened buckets therefore allow versatile advantageous possibilities of use which are independent of the material and the manner in which the buckets are manufactured." Ex. 1007, pg. 2, col. 2.
6(i)	a handle joined to the non-flexible portion opposite the flexible portion to provide for lifting and pouring of the contents of the container by a user.	**Tupper**: Ex. 1006, Figures 1-4 and "Opposite from pouring spout 16, wall 14 extends outwardly forming a handle generally indicated at 18. Ex. 1006, 1:54-2:1. **Horz**: Figures 1-6, Ex. 1007, pg. 4. "On one side, the casing 2 forms the flattening 8, which runs parallel to the bucket axis and to the connecting line of the bearing points of the handle 7." Ex. 1007, pg. 1, col. 2.
7	The container as claimed in claim 6 at least a portion of said side wall is concave, said concave side wall portion having a rim portion of a flexible material.	**Weston**: See Figure 1. Ex. 1006, pg. 2. **Horz**: Figures 1-6, Ex. 1007, pg. 4. "The penetration line 10 of the flattening with the conical casing 2 almost reaches the bottom of the bucket." Ex. 1007, pg. 1, col. 2.
8	The container as claimed in claim 7 wherein said rim is comprised of a sponge material.	Not Shown
9	The container as claimed in claim 7 wherein said rim is comprised of rubber.	Not Shown
10	The container as claimed in claim 7 wherein said rim is comprised of cloth.	Not Shown

Claims 1-2 and 6-7 of the ‘178 patent are obvious based on the disclosures presented in the claim chart above and the supporting arguments that follow:

The preamble of claim 1 of the ‘178 patent identifies “a container.” Nothing in the preamble makes the container itself unique for any particular purpose.

Claim element 1(a) calls for “a generally continuous sidewall terminating in an upper sidewall end and a lower sidewall end and defining an inward fluid holding space bounded by said continuous sidewall.” Weston et al., describe a container 2 “embodied in a one-piece blow moulded container” and is suitable for liquids such as milk. Ex. 1005, pg. 16. Horz describes Figures 1-6, Ex. 1007, pg. 4. “The invention relates to a bucket having an upwardly widening casing.” “The upwardly widening casing 2 . . . is circularly delimited in the example shown.” Ex. 1007, pg. 1, col. 1.

Claim element 1(b) calls for the sidewall “having a flexible portion thereof that defines a generally flat sidewall section.” Weston et al., describe a container 2 having a flexible panel 1. While flexible panel 1 is shown to be slightly convex in the figures it is described as also having a flat position. Ex. 1005, pg. 14. Horz describes Figures 1-6, Ex. 1007, pg. 4. “In one embodiment, the casing is flattened by at least one planar surface running parallel to the bucket axis.” Ex. 1007, pg. 1, col. 1. “On one side, the casing 2 forms the flattening 8, which runs parallel to the bucket axis…” Ex. 1007, pg. 1, col. 2. “They can also be manufactured, e.g.

pressed, from non-metallic materials, e.g. synthetic resins, hardboard, synthetic wood or the like." Ex. 1007, pg. 2, col. 2. "Bucket according to the main claim, characterized in that it is manufactured from non-metallic material." Claim 7, Ex. 1007, pg. 3, col. 1.

Claim element 1(c) calls for "a generally non-flexible portion joined on either end to the flexible portion." Weston et al., describe "the curved member [of container 2] is very stiff" and "will not distort." Ex. 1005, pg. 16. Horz describes "The flattened buckets can, for example, also be folded from iron or steel sheets and galvanized or enameled, or drawn from aluminum or other metal sheets, like other buckets." Claim 7, Ex. 1007, pg. 3, col. 1.

Claim element 1(d) calls for "a bottom closing" and an "upper sidewall end being generally open." Weston et al., show in Figure 10 that container 2 has a bottom and Figure 1 shows container 2 to have an upper end that is generally open. Ex. 1005, pg. 4 and pg. 2. Horz describes Figures 1-6, Ex. 1007, pg. 4. "The upwardly widening casing 2 and a placement ring 3 are connected in a known way to the bucket bottom 1, which is circularly delimited in the example shown." Ex. 1007, pg. 1, col. 1.

Claim element 1(e) calls for "a generally flat inwardly flexible panel forming a portion of said generally flat sidewall section and extending to form at least a portion of said upper sidewall end." Weston et al., show in Figures 1-6 that flexible

panel 1 is inwardly flexible. Ex. 1005, pg. 2. Flexible panel 1 has a flat position, Ex. 1005, pg. 14. Container 2 has preferably one or more curved walls and part of the wall is flexible. Ex. 1005, pg. 11. Horz describes Figures 1-6, Ex. 1007, pg. 4. "The upper edge 9 of the flattening, which is incorporated into the flanging 4, runs substantially straight." Ex. 1007, pg. 1, col. 2.

Claim element 1(f) calls for "the flexible panel facing outwardly and being sized, shaped and sufficiently pliable to matingly mold to the head of a person during use." Weston et al., show in Figure 1 that flexible panel 1 faces outwardly. Ex. 1005, pg. 2. Weston et al., also show and describe that flexible panel 1 is pliable and from the figures it is readily apparent that flexible panel 2 is sized and shaped to matingly mold the head of a person. Ex. 1005, pg. 2. Horz describes "The flattened buckets therefore allow versatile advantageous possibilities of use which are independent of the material and the manner in which the buckets are manufactured." Ex. 1007, pg. 2, col. 2.

Claim element 1(g) calls for the flexible panel "having a generally smooth inward surface." Weston et al., show in Figure 3 that the inward surface of panel 1 is smooth and provides for unobstructed fluid flow. Ex. 1005, pg. 2. Horz describes "On the inside, the flattening offers the possibility of being able to remove the contents of the bucket conveniently . . .." Ex. 1007, pg. 2, col. 1.

Claim element 1(h) calls for a "handle." Tupper describes "a pitcher or the like container molded of plastic material in either substantially rigid or flexible form." Ex. 1006, 1:1-3. As such, Tupper was in the same field as the '178 patent and addressed the same issue regarding the provision of means for gripping the container. Tupper describes an identical handle to that claimed in the '178 patent. "Opposite from the pouring spout 16, wall 14 extends outwardly forming a handle generally indicated at 18." Ex. 1006, 1:54-2:1. Horz describes Figures 1-6, Ex. 1007, pg. 4. "On one side, the casing 2 forms the flattening 8, which runs parallel to the bucket axis and to the connecting line of the bearing points of the handle 7." Ex. 1007, pg. 1, col. 2. It would have been obvious to include the handles of Tupper or Horz with the container of Weston et al.

Claim 2 merely calls for "a rim attached to said upper side wall end." Weston et al., Figure 1, clearly shows a rim on neck 4. Ex. 1002, pg. 7. Horz describes "The upper edge 9 of the flattening, which is incorporated into the flanging 4, runs substantially straight." Ex. 1007, pg. 1, col. 2.

The preamble of claim 6 of the '178 patent identifies "a container." Nothing in the preamble makes the container itself unique for any particular purpose.

Claim element 6(a) calls for "a generally rigid continuous sidewall having an upper sidewall end and a lower sidewall end and defining an inward fluid holding space bounded by said continuous sidewall." Weston et al., describe a container 2

preferably with one or more curved walls. Ex. 1005, pg. 11. They go on to explain that the container is suitable for fluids such as milk. Ex. 1005, pg. 16. The also explain that curved side walls are "very stiff" and "will not distort." Ex. 1002, pg. 16. Horz describes Figures 1-6, Ex. 1007, pg. 4. "The invention relates to a bucket having an upwardly widening casing." Ex. 1007, pg. 1, col. 1. "The upwardly widening casing 2 . . . is circularly delimited in the example shown." Ex. 1007, pg. 1, col. 1.

Claim element 6(b) calls for the sidewall "said continuous sidewall having a flexible portion thereof that defines a generally flat sidewall section and a generally non-flexible portion joined on either end to the flexible portion." Weston et al., describe a container 2 having a thin flexible panel 1 that forms a "section" in the sidewall of container 2. See Ex. 1005, Figures 1 and 3, pg. 2 and p 14. While flexible panel 1 is shown to be slightly convex in the figures it is described as also having a flat position. Ex. 1005, pg. 14. Weston et al., also explain that curved side walls are "very stiff" and "will not distort." Ex. 1005, pg. 16. Horz describes Figures 1-6, Ex. 1007, pg. 4. "In one embodiment, the casing is flattened by at least one planar surface running parallel to the bucket axis." Ex. 1007, pg. 1, col. 1. "On one side, the casing 2 forms the flattening 8, which runs parallel to the bucket axis…" Ex. 1007, pg. 1, col. 2. "They can also be manufactured, e.g. pressed, from non-metallic materials, e.g. synthetic resins, hardboard, synthetic wood or the like." Ex.

1007, pg. 2, col. 2. "Bucket according to the main claim, characterized in that it is manufactured from non-metallic material." Claim 7, Ex. 1007, pg. 3, col. 1.

Claim element 6(c) calls for "a bottom" and an "upper sidewall end being generally open." Weston et al., show in Figure 10, Ex. 1005, pg. 4, that container 2 has a bottom and in Figure 1, Ex. 1005, pg. 2, shows container 2 to have an upper end that is generally open. Horz describes Figures 1-6, Ex. 1007, pg. 4. "The upwardly widening casing 2 and a placement ring 3 are connected in a known way to the bucket bottom 1, which is circularly delimited in the example shown." Ex. 1007, pg. 1, col. 1.

Claim element 6(d) calls for "a rim connected to said upper side wall end." Weston et al., Figure 1, Ex. 1005, pg. 2, clearly shows a rim on neck 4 and it is described in the written specification at Ex. 1005, pg. 14. Horz describes Figures 1-6, Ex. 1007, pg. 4. "The upper edge 9 of the flattening, which is incorporated into the flanging 4, runs substantially straight." Ex. 1007, pg. 1, col. 2.

Claim element 6(e) calls for "a portion of said rim being sufficiently inwardly flexible to conform to the shape of an object to which said rim is pressed against." Weston et al., describe that "[w]hen the upper part of section 1 is pressed towards the hollow neck of the container 2, it flexes at . . . the rim of neck 4." Ex. 1005, page 14. Horz describes Figures 1-6, Ex. 1007, pg. 4. "The upper edge 9 of the flattening,

which is incorporated into the flanging 4, runs substantially straight." Ex. 1007, pg. 1, col. 2.

Claim element 6(f) calls for "an inwardly flexible and pliable panel forming a portion of said generally flat sidewall section and connecting with said inwardly flexible rim portion." Weston et al., show in Figures 1-6 that flexible panel 1 is inwardly flexible. Ex. 1005, pg. 2. Flexible panel 1 has a flat position, Ex. 1005, pg. 14. Container 2 has preferably one or more curved walls and part of the wall is flexible. Ex. 1005, pg. 11. Weston et al., further describe that "[w]hen the upper part of section 1 is pressed towards the hollow neck of the container 2, it flexes at . . . the rim of neck 4." Ex. 1005, page 14. Horz describes Figures 1-6, Ex. 1007, pg. 4. "They can also be manufactured, e.g. pressed, from non-metallic materials, e.g. synthetic resins, hardboard, synthetic wood or the like." Ex. 1007, pg. 2, col. 2.

Claim element 6(g) calls for "said flexible panel having a generally smooth inward surface for unobstructed fluid flow out of said open upper sidewall end." Weston et al., show in Figure 3, Ex. 1005, pg. 4, that the inward surface of panel 1 is smooth and provides for unobstructed fluid flow. Horz describes "On the inside, the flattening offers the possibility of being able to remove the contents of the bucket conveniently . . .." Ex. 1007, pg. 2, col. 1.

Claim element 6(h) calls for "an outward facing surface that is sized and shaped to matingly mold to the head of a person during use." Weston et al., show in

Figure 1 that flexible panel 1 faces outwardly. Ex. 1005, pg. 2. Weston et al., also show and describe that flexible panel 1 is pliable and from the figures it is readily apparent that flexible panel 2 is sized and shaped to matingly mold the head of a person. Horz describes "The flattened buckets therefore allow versatile advantageous possibilities of use which are independent of the material and the manner in which the buckets are manufactured." Ex. 1007, pg. 2, col. 2.

Claim element 6(i) calls for a "handle." Tupper describes "a pitcher or the like container molded of plastic material in either substantially rigid or flexible form." Ex. 1006, 1:1-3. As such, Tupper was in the same field as the '178 patent and addressed the same issue regarding the provision of means for gripping the container. Tupper describes an identical handle to that claimed in the '178 patent. "Opposite from the pouring spout 16, wall 14 extends outwardly forming a handle generally indicated at 18." Ex. 1006, 1:54-2:1. Horz describes Figures 1-6, Ex. 1007, pg. 4. "On one side, the casing 2 forms the flattening 8, which runs parallel to the bucket axis and to the connecting line of the bearing points of the handle 7." Ex. 1007, pg. 1, col. 2. It would have been obvious to include the handle of Tupper and Horz with the container of Weston et al.

Claim 7 adds the limitation that "at least a portion of said side wall is concave, said concave side wall portion having a rim portion of a flexible material." Container 2 has preferably one or more curved walls and part of the wall is flexible. Ex. 1005,

pg. 11. Weston et al., further show in Figure 1 that flexible panel 1 faces outwardly and describe in the abstract that the panel is "outwardly convex" and that the "rim 7 of the container may . . . also deform to aid movement of the panel." Ex. 1005, abstract, pg. 1. Horz describes Figures 1-6, Ex. 1007, pg. 4. "The penetration line 10 of the flattening with the conical casing 2 almost reaches the bottom of the bucket." Ex. 1007, pg. 1, col. 2.

Thus, Weston et al., together with Horz in view of Tupper render claims 1-2 and 6-7 of the '178 patent obvious under 35 U.S.C. §103.

VII. CONCLUSION

For at least the reasons set forth above, Petitioner requests *inter partes* review of the '178 patent to declare that claims 1-10 are invalid over the prior art cited herein. Petitioner has demonstrated a reasonable likelihood that at least one of the claims challenged in this Petition is unpatentable.

It is therefore respectfully submitted that this Petition be granted and that claims 1-10 of the '178 patent be declared invalid.

Respectfully submitted this 30th day of March 2017,

By: /s/Robert M. Chiaviello, Jr.
Robert M. Chiaviello, Jr.
Reg. No. 32,461
NUBYLAW
3030 Aurora Avenue
Monroe, Louisiana 71201
Tel: (318) 410-4012
bobc@nuby.com

CERTIFICATION

The undersigned hereby certifies that based on the word-processing system used to prepare this Petition, the word count is 14,000 words or less excluding the Cover Page, the Table of Contents, the Table of Exhibits, the Mandatory Notices under §42.8 and the Certificate of Service.

Dated this 30th day of March, 2017.

/s/Robert M. Chiaviello, Jr.
Robert M. Chiaviello, Jr.
Reg. No. 32,461
NUBYLAW
3030 Aurora Avenue
Monroe, Louisiana 71201
Tel: (318) 410-4012
bobc@nuby.com

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §§ 42.6(e)(4) and 42.105, the undersigned certifies that a copy of the foregoing Petition for *Inter Partes* Review of U.S. Patent No.: 8,636,178, including its supporting Exhibits 1001-1010, was served via Federal Express on the Patent Owner at the following addresses:

Mr. Michael Brian Sichter, Esq.
Mr. Kip D. Richards, Esq.
WALTERS, BENDER, STROHBEHN & VAUGHAN, PC
1100 Main Street, Suite 2500
Kansas City, Missouri 64105
Telephone: (816) 421-6650
Facsimile: (816) 421-4747

Mr. John C. McMahon, Esq.
LAW OFFICE OF JOHN C. MCMAHON
11006 Parallel Parkway, Suite 200
Kansas City, Kansas 66109
Telephone: (913) 721-1511
Facsimile: (913) 721-1501

POLSINELLI, P.C.
900 West 48th Place, Suite 900
Kansas City, Missouri 64112-1895
Telephone: (816) 753-1000
Facsimile: (816) 753-1536

And via Hand Delivery on the Patent Owner to the following address:

Mr. Jan P. Christiansen, Esq.
HUDSON, POTTS & BERNSTEIN
1800 Hudson Lane, Suite 300
Monroe, Louisiana 71201
Telephone: (318) 388-4400
Facsimile: (318) 322-4194

Dated this 30th day of March, 2017.

/s/Robert M. Chiaviello, Jr.
Robert M. Chiaviello, Jr.
Reg. No. 32,461
NUBYLAW
3030 Aurora Avenue
Monroe, Louisiana 71201
Tel: (318) 410-4012
bobc@nuby.com