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Paper No. 28
Entered: April 21, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MUNCHKIN, INC. AND TOYS "R" US, INC.
Petitioners

v.

LUV N' CARE, LTD.
Patent Owner

Case IPR2013-00072
Patent D617,465

Before JENNIFER S. BISK, BENJAMIN D. M. WOOD, and MICHAEL J. FITZPATRICK, *Administrative Patent Judges.*

FITZPATRICK, *Administrative Patent Judge.*

FINAL WRITTEN DECISION
35 U.S.C. § 318 and 37 C.F.R. § 42.73

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I. BACKGROUND

Munchkin, Inc. and Toys "R" Us, Inc. (collectively, "Petitioner") filed a petition (Paper 3, "Pet.") requesting an *inter partes* review of the sole claim of U.S. Patent D617,465 (Ex. 1002, "the '465 patent"). Patent Owner, Luv N' Care, Ltd., did not file a preliminary response. In an April 25, 2013, Decision to Institute (Paper 8, "Dec. on Pet."), we granted the petition and instituted trial of the patent claim on the following grounds: (1) as obvious over US 2007/0221604 A1, published September 27, 2007 (Ex. 1006, "Hakim '604"); and (2) as obvious over US 6,994,225 B2, issued February 7, 2006 (Ex. 1013, "Hakim '225"). Dec. on Pet. 23.

After institution, Patent Owner filed a response (Paper 14, "PO Resp."), and Petitioner filed a reply (Paper 18, "Pet. Reply"). Additionally, Patent Owner filed a motion to amend the claim (Paper 13, "Mot."), Petitioner filed an opposition (Paper 17, "Pet. Opp."), and Patent Owner filed a reply (Paper 19, "PO Reply"). Oral hearing was held on January 22, 2014.[1]

The Board has jurisdiction under 35 U.S.C. § 6(c). This final written Decision, issued pursuant to 35 U.S.C. § 318(a) and 37 C.F.R. § 42.73, addresses issues and arguments raised during the trial. Issues and arguments raised prior to institution of trial, but not made during trial, are not addressed necessarily in this Decision.

As discussed below, Petitioner has shown by a preponderance of the evidence that the sole claim of the '465 patent is unpatentable, and Patent Owner has not met its burden of proof on the motion to amend.

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[1] A transcript of the oral hearing is included in the record. Paper 26, "Tr."

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A. Related Proceedings

The following district court cases concerning the ’465 patent have been identified by one or more of the parties: (1) *Luv N’ Care, Ltd. v. Toys “R” Us, Inc.*, 1:12-cv-00228 (S.D.N.Y. filed Jan. 11, 2012); (2) *Luv N’ Care, Ltd. v. Regent Baby Products Corp.*, 10-9492 (S.D.N.Y. filed Dec. 21, 2010); and (3) *Luv N’ Care, Ltd. v. Royal King Infant Prod’s Co. Ltd.*, 10-cv-00461 (E.D. Tex. filed Nov. 4, 2010). Paper 6, 2; Pet. 2.

Petitioner additionally identifies an *inter partes* reexamination of related U.S. Patent D634,439 bearing control no. 95/001,973. Pet. 2.

B. The ’465 Patent (Ex. 1002)

The challenged ’465 patent is titled “Drinking Cup,” issued on June 8, 2010, names Nouri E. Hakim as inventor, and is assigned to Patent Owner. Ex. 1002, 1. The claim of the ’465 patent recites “the ornamental design for a drinking cup, as shown and described.” *Id.*; *see also Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 679 (Fed. Cir. 2008) (en banc) (stating that “design patents ‘typically are claimed as shown in drawings’”) (quoting *Arminak and Assocs., Inc. v. Saint-Gobain Calmar, Inc.*, 501 F.3d 1314, 1319 (Fed. Cir. 2007)). The ’465 patent includes five figures, reproduced below.

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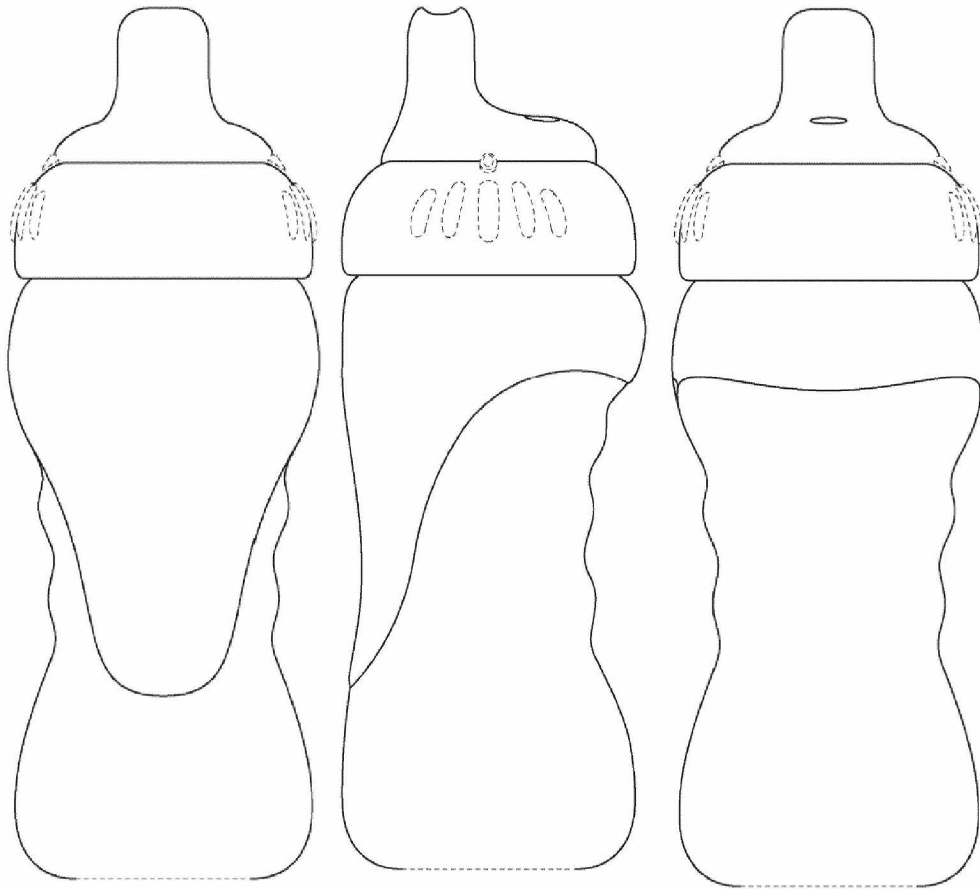

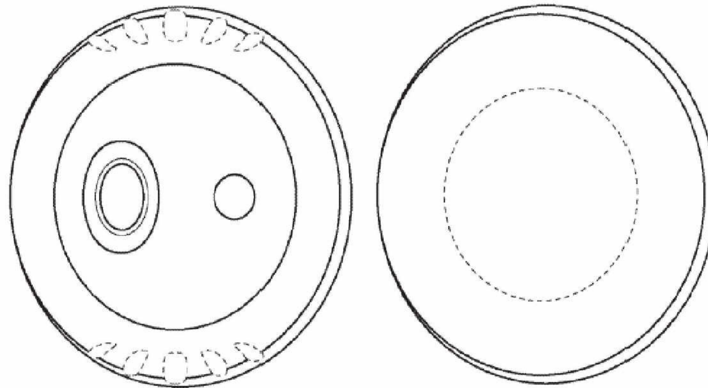

Figures 1-5 show front, right, top, bottom, and back views, respectively, of a drinking cup having a vessel, collar, and spout. Ex. 1002, 1. The "DESCRIPTION" of the '465 patent identifies these five views, and

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states that "[t]he broken lines in the figures illustrate portions of the drinking cup and form no part of the claimed design."[2] *Id.*; *see also In re Owens*, 710 F.3d 1362, 1367 n.1 (Fed. Cir. 2013) ("[I]t is appropriate to disclaim certain design elements using broken lines, provided the application makes clear what has been claimed.").

II. TRIAL OF THE ISSUED CLAIM

In instituting trial, we determined that there was a reasonable likelihood that the claim of the '465 patent would have been obvious over each of Hakim '225 and Hakim '604. Dec. on Pet. 23. In response, Patent Owner does not argue that the claim is patentably distinct from those references. PO Resp. 6-7; Tr. 31:10-17. Rather, Patent Owner argues that the references are not prior art. PO Resp. 6-7; Tr. 31:10-17.

Hakim '225 issued February 7, 2006, and Hakim '604 was published September 27, 2007. Ex. 1013, 1; Ex. 1006, 1. The '465 patent issued from U.S. Application serial no. 29/292,909 ("the '909 application"), which was not filed until October 31, 2007. Ex. 1002, 1. However, the '909 application was filed as a continuation of U.S. Application serial no. 10/536,106 ("the '106 application"), which is the national stage of PCT Patent Application PCT/US2003/024400, filed August 5, 2003.[3] Ex. 1002, 1; Ex. 1006, 1. Patent Owner argues that the claim of the '465 patent is

[2] As shown in the figures, the broken lines are directed to a central portion of the bottom surface of the vessel, two series of five grooved ribs on the sides of the collar, and two notches adjacent to the top of the collar and bottom of the spout. Ex. 1002, Figs. 1-5.
[3] Hakim '604 (Ex. 1006) is a publication of the '106 application (Ex. 3001).

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