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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* LORI A. BREDEMEIER and MICHAEL BREDEMEIER

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Appeal 2019-004375  
Application 29/570,334  
Technology Center 2900

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Before KEN B. BARRETT, JILL D. HILL, and  
CYNTHIAL. MURPHY, *Administrative Patent Judges*.

MURPHY, *Administrative Patent Judge*.

DECISION ON APPEAL

The Appellant<sup>1</sup> appeals the Examiner’s rejection of the single design claim pending in this application (claim 1) under 35 U.S.C. § 112(a). We REVERSE.<sup>2</sup>

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<sup>1</sup> The Appellant is the “applicant” (e.g., the “inventor” or the “joint inventors”) as defined in 37 C.F.R. § 1.42. “The real party in interest is the inventor.” (Appeal Br. 2.)

<sup>2</sup> We have jurisdiction under 35 U.S.C. §§ 6(b), 134(a), and 171(a).

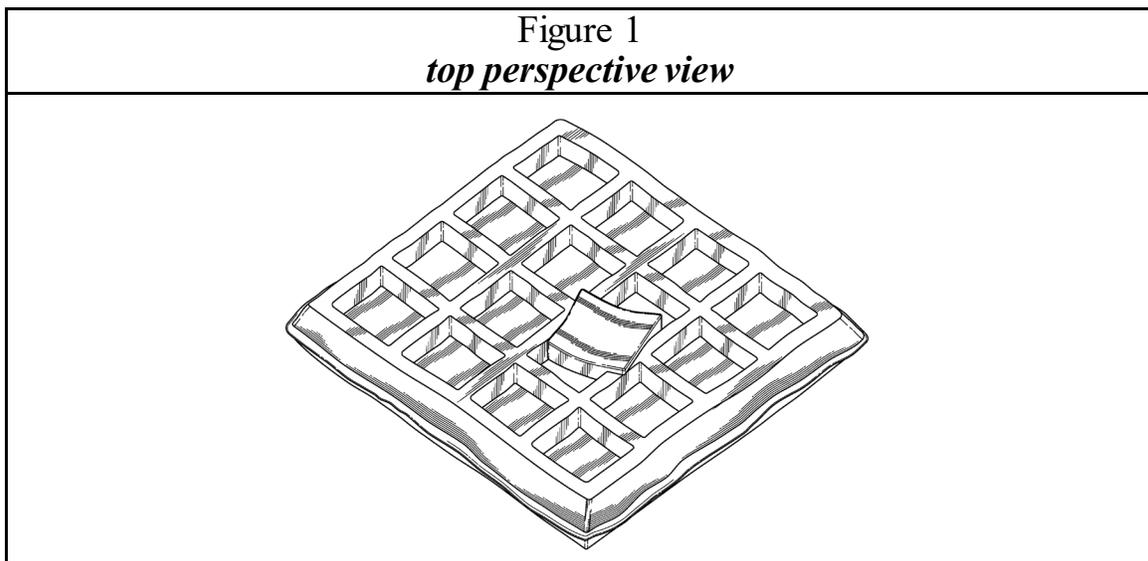
## THE CLAIMED DESIGN

The Appellant claims an ornamental design for a “Teething Toy” as “described” and “shown.” (Appeal Br., Claims App.) In the original application, the Appellant’s teething toy is described as “a Waffle Shaped Teething Toy” and is shown in Figures 1–5. (*See* Specification filed July 7, 2016.)

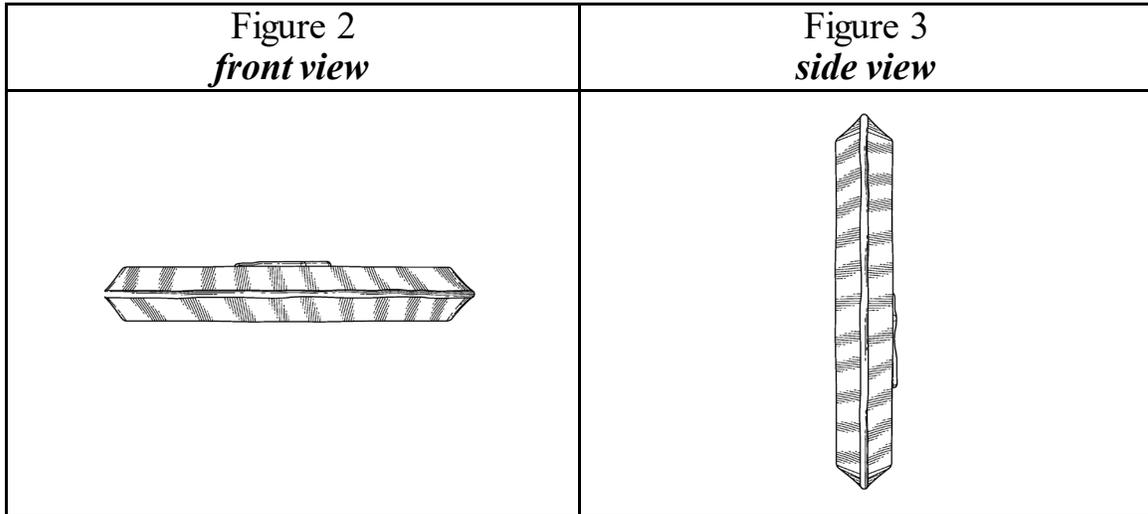
In the presently pending application, the Appellant’s teething toy is still described as “a Waffle Shaped Teething Toy” and is still shown in original Figures 1–5. (*See* Specification filed July 3, 2017.) However, the presently pending application also includes a Figure 6, which was introduced by amendment. (*See id.*) As discussed below, the sole issue in this appeal is whether Figure 6 contains “new matter.” (Final Act. 2.)

### *Original Drawings—Figures 1–5*

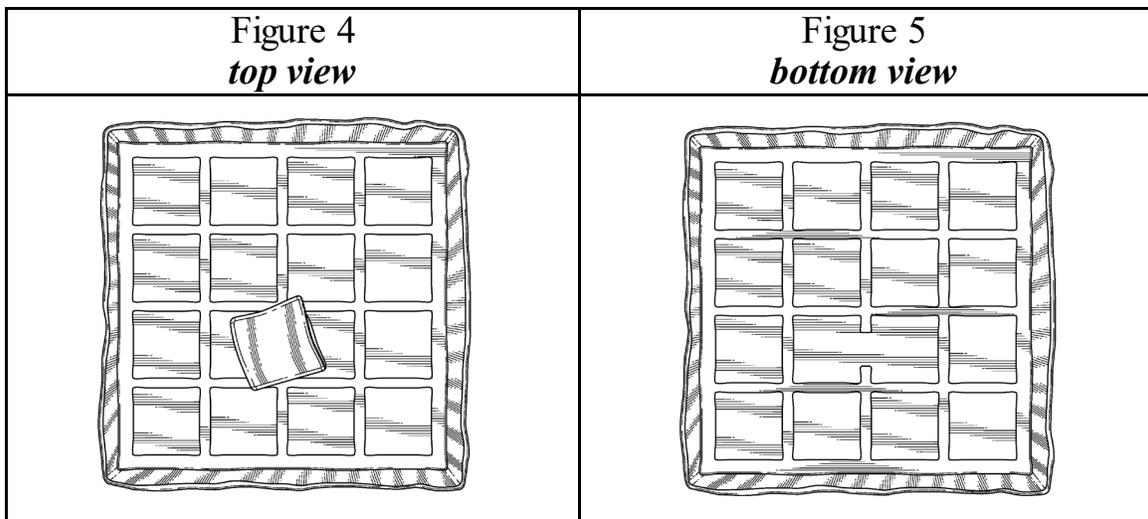
Figure 1, below, is a top perspective view of the Appellant’s teething toy. Figure 1 shows that the teething toy has a top portion and a bottom portion; that the top portion has a gridlike pattern of indentations; and that the top indentations have a certain three-dimensional contour (i.e., depth).



Figures 2 and 3, below, are front and side views of the Appellant's teething toy. They show that the top and bottom portions of the teething toy have symmetrical profiles, and, more particularly, equal thicknesses.



Figures 4 and 5, below, are top and bottom views of the Appellant's teething toy. Figure 4 shows the gridlike pattern of indentations on the top portion of the teething toy; and Figure 5 shows a matching gridlike pattern of indentations on the bottom portion of the teething toy.

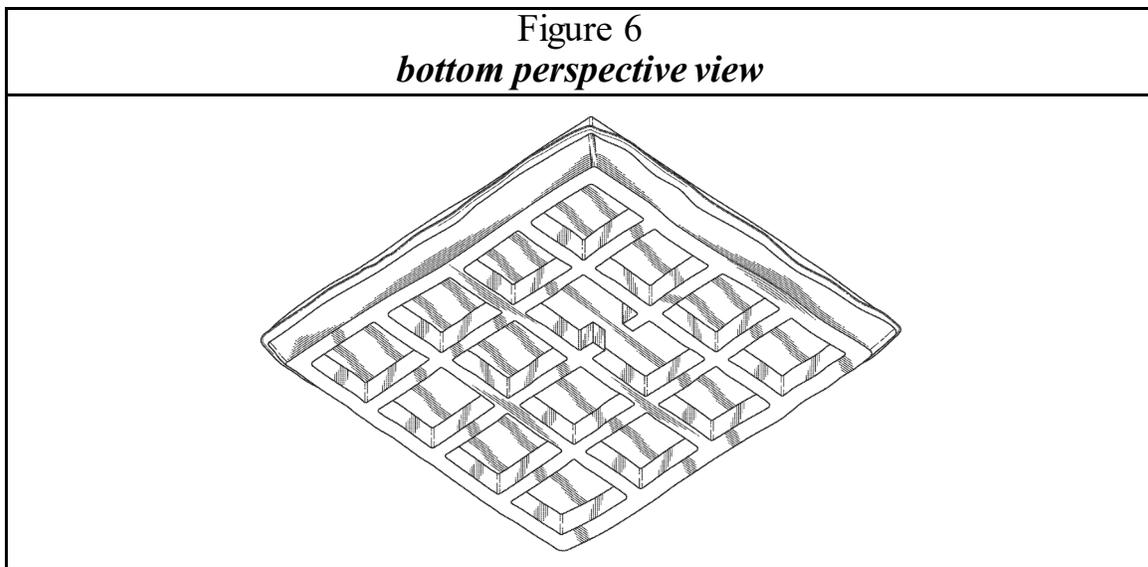


As indicated above, Figure 1 shows that the top indentations have a certain three-dimensional contour (i.e., depth). In Figure 4, this three-dimensional

contour of the top indentations is represented by solid lines and shading. In Figure 5, the three dimensional contour of the bottom indentations is represented by similar solid lines and essentially identical shading.

*Introduced-by-Amendment Drawing—Figure 6*

Figure 6, below, is a bottom perspective view of the Appellant’s teething toy, and it perspectively shows the three-dimensional contour (i.e., depth) of the bottom indentations.



More particularly, Figure 6 expressly depicts that the bottom indentations have the same three-dimensional contour (i.e., depth) as the top indentations expressly depicted in Figure 1.

REJECTION

The Examiner rejects claim 1 under 35 U.S.C. § 112(a) as failing to comply with the written description requirement because Figure 6 allegedly contains “new matter.” (Final Act. 2.) According to the Examiner, “[t]he measurable depth and physical contour” of the bottom indentations of the Appellant’s teething toy are “not disclosed in the original drawings.” (*Id.*)

## ANALYSIS

The Appellant argues that written-description support for Figure 6 is conveyed by a combination of the original claim language and the original drawings. (*See* Appeal Br. 8–12.) We are persuaded by the Appellant’s position, and we do not sustain the Examiner’s rejection.

“The test for sufficiency of the written description, which is the same for either a design or a utility patent, has been expressed as ‘whether the disclosure of the application relied upon reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.’” (*In re Owens*, 710 F.3d 1362, 1366 (Fed. Cir. 2013).)

In the context of a design claim, the original drawings are often exclusively responsible for conveying possession of the claimed subject matter. (*See In re Daniels* 144 F.3d 1452, 1456 (Fed. Cir. 1998).) But 37 C.F.R. § 1.153(a) tells us that a claimed design can be defined “by a combination of the figures and the language.” (*Curver Luxembourg, SARL v. Home Expressions Inc.*, 938 F.3d 1334, 1340–41 (Fed. Cir. 2019).) Put another way, “this regulation permits claim language, not just illustration alone, to identify the [claimed] article.” (*Id.*)

The Appellant’s teething toy is described, in the original application, as “a Waffle Shaped Teething Toy.” (*See* Specification filed July 7, 2016.) A dictionary definition of a “waffle” is “a batter cake with a pattern of deep indentations on each side, formed by the gridlike design on each of the two hinged parts of the metal appliance (waffle iron) in which the cake is baked.” (<https://www.dictionary.com/browse/waffle> (last visited July 1, 2020).) In other words, a traditional waffle is regarded as having a symmetrical shape with matching gridlike indentation patterns on its top and

bottom portions (i.e., the waffle's top and bottom indentations have the same three-dimensional contours).

We share the Appellant's sentiment that a designer of ordinary skill in the teething-toy art (who has enjoyed a waffle for breakfast) would be familiar with this traditional waffle shape. (*See* Appeal Br. 13.) And this designer would understand that, when a teething toy is described as "Waffle Shaped," it is being described as having a traditional waffle shape, which carries the connotation that it has top and bottom indentations with the same three-dimensional contours.<sup>3</sup>

The Examiner is troubled by the notion of basing written-description support for Figure 6 "entirely on the expected appearance of a waffle." (Ans. 5.) The Examiner explains that "teethers (even those simulative of other articles) are notoriously well known to have a different configuration on one surface than on the opposite surface." (*Id.*) As such, the Examiner questions whether it is reasonable to "expect[] a teether to maintain characteristics and design details of a *literal waffle.*" (*Id.*)

Here, the Examiner's concerns are abated because our decision is not based entirely on the Appellant's textual description of its teething toy as "Waffle Shaped." Rather, our decision is based upon what is cumulatively

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<sup>3</sup> The Examiner draws our attention to asymmetrical waffle irons which would not produce a batter cake having top and bottom indentations with the same three-dimensional contours. (*See* Ans. 5.) Insofar as the Examiner is saying that the mere existence of these asymmetrical waffle irons would undermine tradition and sway a designer's understanding of what is meant by "Waffle Shaped," we disagree. Even a teething-toy designer aware of asymmetrical waffle irons would nonetheless immediately envision a symmetrical waffle shape when reading the Appellant's description of its teething toy as "Waffle Shaped."

conveyed by both the original claim language ***and*** the original drawings. Even if it is commonplace for a teething toy to have different surface configurations, the original drawings convey that the Appellant's teething toy has a traditional waffle shape (i.e., its top and bottom indentations have the same three-dimensional contours).

Specifically, Figure 1 shows that the top portion of the teething toy has a gridlike indentation pattern which mimics that formed by the top part of a waffle iron. Figures 2 and 3 show that the teething toy has a symmetrical profile where the top portion and the bottom portion have equal thicknesses, which is characteristic of a traditional waffle shape. Figures 4 and 5 show that the teething toy has matching gridlike indentation patterns on its top and bottom portions, which is the hallmark of a traditional waffle shape. A designer of ordinary skill in the teething-toy art would know from these drawings that the top and bottom indentations, which indent into equal-thickness top and bottom portions, have the same three-dimensional contours.

As correctly pointed out by the Examiner, Figures 4 and 5 reveal that the top and bottom portions of the Appellant's teething toy "are not exactly the same." (Ans. 5.) Indeed, Figure 4 shows what the Appellant calls a "blob of butter" (Appeal Br. 11) straddling two top indentations; while Figure 5 shows an interrupted wall between two aligned bottom indentations. However, we agree with the Appellant that these features do not hinder the original drawings' conveyance that the teething toy has a traditional waffle shape. (*See id.*) A designer would not consider a "blob of butter" on the topside, or lack thereof on the bottomside, to be inconsistent

with a traditional waffle shape in which the top and bottom indentations have the same three-dimensional contours.

Moreover, to the extent that there would be hesitancy as to whether the top and bottom indentations have the same three-dimensional contours, the similar solid lines and essentially identical shading in Figures 4 and 5 eliminate any uncertainty. We agree with the Appellant that a designer of ordinary skill in the teething-toy art would give due consideration to these alike topographies in the original drawings. (*See* Appeal Br. 9.) And we disagree with the Examiner's implication that the similar solid lines and essentially identical shading in Figure 4 and 5 are of no consequence when it comes to conveying the sameness of the three-dimensional contours of the top and bottom indentations. (Ans. 4)

Accordingly, we agree with the Appellant that the original claim language and the original drawings cumulatively convey to a designer of ordinary skill in the teething-toy art that the three-dimensional contour depicted in Figure 1 applies to both the top and the bottom indentations. (*See e.g.* Appeal Br. 8.) We also agree with the Appellant that Figure 6 merely "duplicate[s]" this already-conveyed contour of the bottom indentations. (*Id.* at 9.) Thus, we agree with the Appellant that Figure 6 does not contain new matter, whereby its introduction by amendment does not contravene the written-description requirement.

CONCLUSION

<b>Claim Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/ Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1	112(a)	Written Description		1

REVERSED