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UNILEVER PATENT GROUP 700 SYLVAN AVENUE Floor A4 ENGLEWOOD CLIFFS, NJ 07632-3100			STOFKO, KATIE JANE	
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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* ANTONIO CHIOCCIONI

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Appeal 2018-007742  
Application 29/430,805  
Technology Center 2900

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Before SCOTT A. DANIELS, JILL D. HILL, and CYNTHIA L. 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 appeal. We REVERSE.<sup>2</sup>

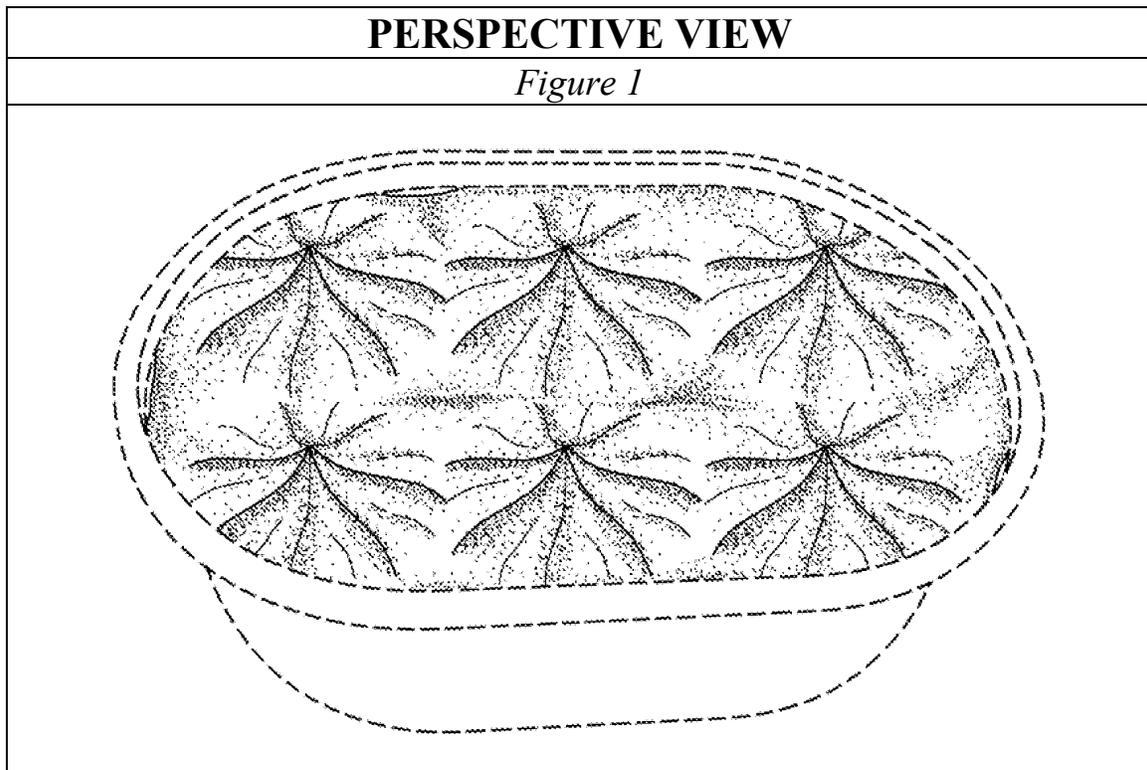
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<sup>1</sup> The Appellant is the "applicant" (e.g., "the inventor or all of the joint inventors") as defined in 37 C.F.R. § 1.42. The Appellant identifies the real party in interest as "Conopco, Inc. d/b/a Unilever." (Appeal Br 3.)

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

### THE CLAIMED DESIGN

The Appellant claims “[a]n ornamental design for an ice cream product” (Appeal Br., Claims App.), a perspective view of which is provided below.



This drawing shows the ice cream product enclosed by a tub-shaped container depicted by broken lines,<sup>3</sup> and this drawing shows shading on the top surface of the ice cream product. The Examiner and the Appellant agree that the illustrated shading portrays a three-dimensional pattern of “rosettes” and that this rosette pattern is the “dominant feature” of the claimed design. (See Appeal Br. 7, Final Action 2.)

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<sup>3</sup> “The broken lines in the drawings illustrate the environment of the claimed design and form no part thereof.” (Spec., as amended on March 31, 2014.)

## REJECTIONS

The Examiner rejects the claim on appeal under 35 U.S.C. § 112, first and second paragraphs. (*See* Final Action 2.) The Examiner determines that “[t]he claim is indefinite and nonenabling” because “the exact appearance of the claimed design cannot be fully understood in view of the drawings.” (Answer 2.) According to the Examiner, the Appellant’s drawing disclosure does not provide “enough information” to understand “the [relative] height of rosette peaks” and/or “the numerous surface undulations” in the rosette pattern. (*Id.* at 5.)

## ANALYSIS

The Federal Circuit clarified in *In re Maatita*, 900 F.3d 1369 (Fed. Cir. 2018) “that in the design patent context, one skilled in the art would assess indefiniteness from the perspective of an ordinary observer.” (*Maatita*, 900 F.3d at 1377.) Thus, a design claim is definite under 35 U.S.C. § 112 “if one skilled in the art, viewing the design as would an ordinary observer,” would “understand the scope of the design with reasonable certainty.” (*Id.*)

In *Maatita*, the claimed design was for a “shoe bottom” which was disclosed only in a “single, two-dimensional plan view.” (*Maatita*, 900 F.3d at 1372.) There was no dispute that this single view did “not adequately reveal the relative depths and three dimensionality between the surfaces provided.” (*Id.* at 1375.) And, to emphasize that the design was “open to multiple interpretations regarding the depth and contour of the claimed elements,” a scenario was proposed in which the depicted pattern was

implemented in different ways by varying the curvature of shoe-sole elements and their relative heights. (*Id.* at 1372.)

Nonetheless, the Federal Circuit held that the drawing disclosure in *Maatita* satisfied the definiteness and enablement requirements of 35 U.S.C. § 112. The court explained that the level of detail required to satisfy § 112 is “a function of whether the claimed design for the article is capable of being defined” by the drawing(s) provided in the specification. (*Maatita*, 900 F.3d at 1378.) In *Maatita*, “[the] two-dimensional drawing clearly demonstrate[d] the perspective from which the shoe bottom should be viewed.” (*Id.*) And, in *Maatita*, the non-disclosure of “all possible depth choices” did not “preclude an ordinary observer from understanding the claimed design.” (*Id.* at 1378–79.)

Here, the Examiner is troubled by dimensional details that could only be precisely discerned by a close inspection of regions of the ice cream product located “below the top lip of the unclaimed container.” (Answer 5.) We do not necessarily disagree that the precise parameters of these dimensional details might be difficult to decipher from the Appellant’s perspective view of the ice cream product. And we do not necessarily disagree that the parameters of these dimensional details could have been precisely disclosed by a multitude of sectional drawings taken along the width, length, and height of the ice cream product.

However, per the Federal Circuit’s holding in *Maatita*, the question is not whether the parameters of these dimensional details could have been more precisely disclosed in additional drawing views. Rather, the correct question is whether these precise parameters are necessary to

sufficiently inform an ordinary observer of the scope of the claim. To answer this question, we observe the Appellant’s illustrated ice cream product from the perspective of an ordinary observer.

We determine, based on this observation, that the precise parameters of geometries located below the container’s top lip are not necessary to understand the scope of the claim. Thus, we disagree with the Examiner that, here, the requirements of 35 U.S.C. § 112 cannot be satisfied without “an exact understanding of the complexity and the specifics” of the top surface of the ice cream product. (Answer 6.)

The Examiner proposes a scenario in which the rosette pattern of the claimed design is implemented in different ways by varying the relative heights of its peaks. (*See* Answer 5.) However, a similar scenario was proposed in *Maatita*, and this did not fatally impact the outcome of the definiteness and enablement analysis.

The Examiner maintains that “[b]ecause the design comprises complex undulations,” the bar to satisfy § 112 requirements “is high.” (Answer 6.) But the bar to satisfy § 112 is not set by a claimed design’s dormant intricacies, but rather by what an ordinary observer needs to know to understand the scope of the claim. Here, the Appellant’s use of shading effectively represents the contour of the undulations in the rosette pattern so as to provide an ordinary observer with a sufficient understanding of the claimed design.<sup>4</sup>

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<sup>4</sup> *See* Design Patent Application Guide, <https://www.uspto.gov/patents-getting-started/patent-basics/types-patent-applications/design-patent-application-guide> (last visited March 9, 2020) (“The two types of shading

The Examiner correctly points out that “[f]ood designs are held to the same standard of definiteness and enablement as another design.”

(Answer 6.) But what must also be taken into account is that this “same standard” is assessed through the lens of an ordinary observer. (*See Maatita*, 900 F.3d at 1376.) Here, the ordinary observer would be the purchaser of a food product such as ice cream.<sup>5</sup> This purchaser would not be visually concerned with the precise parameters of geometries located below the top lip of an ice cream container, and thus would not need to know these precise parameters to understand the scope of the claimed design.

The Examiner also correctly points out that a perspective view of a claimed design is not always alone sufficient to meet § 112 requirements. (*See Answer 6–7.*) Here, however, the Appellant’s drawing disclosure additionally includes front, rear, side, top, and bottom views of the ice cream product. (*See Spec.*, Figs. 2–8.) As such, we need not belabor whether the Appellant’s perspective view of the ice cream product is alone sufficient to meet § 112 requirements.

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commonly employed in design patent application drawings are straight-line surface shading and stippling. Individually or in combination, they can effectively represent the character and contour of most surfaces.”).

<sup>5</sup> “[T]he standard for indefiniteness is connected to the standard for infringement.” (*Maatita*, 900 F.3d at 1376.) A design claim is infringed if “an ordinary observer, familiar with the prior art, would be deceived into thinking that the accused design was the same as the patented design.” (*Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 672 (Fed. Cir. 2008) (en banc); *see also Gorham Mfg. Co. v. White*, 81 U.S. 511, 528 (1871) (holding that design patent infringement is viewed from “the eye of an ordinary observer, giving such attention as a purchaser usually gives”)).

Thus, we agree with the Appellant (*see* Appeal Br. 6–9) that its drawing disclosure satisfies the definiteness and enablement requirements of 35 U.S.C. § 112; and we do not sustain the Examiner’s rejections.

CONCLUSION

<b>Rejected</b>	<b>35 U.S.C. §</b>	<b>Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
Claim	112, first paragraph	Enablement		Claim
Claim	112, second paragraph	Indefiniteness		Claim
<b>Overall Outcome</b>				Claim

REVERSED