Paper No. ____
Filed: June 12, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MOTIF FOODWORKS, INC.,
Petitioner,

v.

IMPOSSIBLE FOODS, INC.,
Patent Owner.

Case IPR2023-00206
Patent No. 9,943,096

PATENT OWNER IMPOSSIBLE FOODS'
REPLY TO PETITIONER'S OPENING BRIEF

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Petitioner advances two arguments as to why Impossible Foods cannot claim the benefit of the filing date of Brown (EX1012). First, Petitioner alleges that "defects in the existing priority claims fail to satisfy strict statutory requirements and thus even the 'corrected' claims are improper and must be rejected." IPR2023-00206 Paper 17, 1. Second, Petitioner contends that "the prior-filed applications, to which PO now seeks to extend priority, fail to provide § 112 support for the challenged claims." *Id.* As explained below, both arguments fail.

I. THE CORRECTION SOUGHT IS PROPER

Petitioner argues that the corrected priority claim sought by Impossible Foods is defective with regard to the '211 application because the priority claim fails to make "a specific reference to the earlier filed application" by identifying the earlier application's "(1) application number; and (2) familial relationship." Paper 17, 3-6. There is no dispute that the corrected priority claim contains a specific reference to the '211 application by identifying the application number and the familial relationship. Petitioner only takes issue with the "familial relationship" that is identified (*i.e.*, as a "continuation"). *See id.*, 4 ("PO's proposed 'corrected' priority claims fail to satisfy the familial relationship requirement of 37 C.F.R. § 1.78(d)(2) because they incorrectly allege that PCT '347 or PCT '361 are 'continuations' of the '211 App."). Petitioner alleges that the

"familial relationship" identified is incorrect because the PCT '347 and PCT '361 and the '211 application "have different specifications and figures." *Id.*, 4-5.

First, Petitioner improperly reads a requirement into 37 C.F.R. § 1.78(d)(2) that a prior-filed application identified as a "continuation" must be identical to later-filed applications and any differences *per se* defeat a priority claim. *See id.*, 4-6. However, there is no such requirement in 37 C.F.R. § 1.78(d)(2), and there is no dispute that the corrected priority claim at issue here meets the express requirements of § 1.78(d)(2)—*i.e.*, each prior-filed application is identified by its application number and its familial relationship. The cases cited by Petitioner also do not support Petitioner's reading of § 1.78(d)(2). *See* Paper 17, 3-4; *Droplets, Inc. v. E*Trade Bank*, 887 F.3d 1309, 1316-18 (Fed. Cir. 2018) (patent's incorporation by reference of a prior-filed application was insufficient to meet the specific-reference requirements § 1.78(d)(2) for applications referenced only in the prior-filed application); *Medtronic CoreValve, LLC v. Edwards Lifesciences Corp.*, 741 F.3d 1359, 1363-64 (Fed. Cir. 2014) (intermediate application's failure to reference earlier-filed applications in the priority chain defeated priority).

Second, Petitioner's arguments are also contrary to the very anticipation arguments it advances in its petition with respect to Brown. Specifically, Petitioner argues that, because the '211 application contains differences in description, including that it does not mention the words "flavor precursor," the

application cannot be said to be a "continuation," and therefore, the priority claim is improper. Paper 17, 4-6. As an initial matter, Petitioner's arguments in this respect go more toward whether the requirements of 35 U.S.C. § 112 are met, which is separate from the requirement that the priority claim must make specific reference to the prior-filed application under 37 C.F.R. § 1.78(d)(2). *See* 35 U.S.C. § 120; *Droplets*, 887 F.3d at 1315 (noting four distinct requirements under § 120, including § 112 disclosure in the prior-filed application and a specific reference to the prior-filed application). Moreover, Petitioner advances the opposite with respect to Brown: Brown does not recite the words "food flavor additive," it includes different figures and specification, and yet Petitioner argues that Brown anticipates the food flavor additive composition claimed by the '096 patent based on Brown's disclosure of "muscle replica." *See* IPR2023-00206, Paper 19, 4, 11-12.

Lastly, Petitioner argues that the corrected priority claim is improper because the priority claims of intermediate applications PCT '347 and PCT '361 "fail to identify their specific familial relationship" to the '211 application and fail to reference the '069 provisional, Brown, and the '205 provisional. *Id.*, 6-7. As Petitioner notes, the Patent Office noted this aspect of the priority claim in its dismissals without prejudice in related applications (*see id.*), and Impossible Foods has taken steps toward correcting the claim recited in these intermediate

applications. Furthermore, even absent the intermediate applications PCT ’347 and PCT ’361, the priority chain is not broken as co-pendency still existed between the ’211 application (which was abandoned June 13, 2018) and the next filed application in the challenged patents’ priority chain (U.S. Patent App. 14/797,006, filed July 10, 2015; and U.S. Patent App. 14/796,970, filed July 10, 2015).

II. PETITIONER’S § 112 ARGUMENTS ARE CONTRARY TO ITS OWN UNPATENTABILITY THEORIES

Petitioner argues that the scope of the challenged claims is not described or enabled by the prior-filed applications, in particular, Brown. IPR2023-00206, Paper 17, 7. Petitioner argues, for example, that Brown does not explicitly disclose the use of any of the claimed sugars except for glucose or “separately adding” any of the claimed sulfur compounds (although “Brown’s pea flour inherently” contains them). *Id.*, 8-10. As Impossible Foods noted in its opening brief, under the correct interpretation of the claimed subject matter, Brown does not anticipate the challenged claims and thus does not provide written description support for the challenged claims. *See* IPR2023-00206, Paper 19, 4, 10-11. Namely, Petitioner’s argument that Brown’s “muscle replica” equates to the claimed “food flavor additive composition” is baseless with respect to the ’096 patent, and Petitioner’s reading out express claim limitations and reliance on the same component (*i.e.*, pea flour) to satisfy two separate elements with respect to the ’241 patent are improper. *See* IPR2023-00206, Paper 19, 4, 10-12.

However, as also noted in Impossible Foods' opening brief, if Petitioner's logic underlying its theory of unpatentability is applied, *i.e.*, that Brown anticipates and/or is obvious to the challenged claims of the '096 and '241 patents, then Brown's disclosure of meat substitute products having certain ingredients (*e.g.*, pea flour) that may contain the claimed sugar and sulfur-containing compounds would also provide written description support for the challenged claims of the '096 and '241 patents. *See id.*, 5-9, 10-11. Petitioner's logic also applies to the enablement of the challenged claims, as Petitioner relies on the disclosure of claimed compounds as supporting the disclosure of the claimed "production of at least two volatile compounds which have a meat-associated aroma" despite the absence of explicit teachings that such a result occurs. *See* IPR2023-00206 Pet., 33-34 (relying on Giacino's disclosure of certain compounds to assert heating such compounds would produce the required aroma volatiles); POPR, 18-20.

III. IPR2023-00208 AND IPR2023-00209

While Petitioner directs its arguments to all four challenged patents, as Impossible Foods explained in its opening brief, a corrected priority claim will not affect any of the grounds raised by Petitioner in the proceedings, which do not apply Brown as a reference. Thus, for the '250 and '306 patents, the Board need not determine the earliest effective filing date for these claims in order to reach a decision on the merits of Petitioner's grounds. *See* Paper 19, 2-3.

Respectfully submitted,

Date: June 12, 2023

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CERTIFICATE OF SERVICE

I certify that this paper was served on this 12th day of June, 2023, on the Petitioner at the following electronic service addresses:

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