

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IMPOSSIBLE FOODS INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 22-311 (WCB)
	)	
MOTIF FOODWORKS, INC. and	)	PUBLIC VERSION
GINKGO BIOWORKS, INC.,	)	
	)	
Defendants.	)	

**DEFENDANT MOTIF FOODWORKS, INC.'S
SUR-REPLY CLAIM CONSTRUCTION BRIEF**

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TABLE OF ABBREVIATIONS

Abbreviation	Phrase
Impossible	Impossible Foods Inc.
Motif	Motif FoodWorks, Inc.
'096 patent	U.S. Patent No. 9,943,096
'241 patent	U.S. Patent No. 11,224,241
'761 patent	U.S. Patent No. 10,863,761
'306 patent	U.S. Patent No. 10,039,306
'250 patent	U.S. Patent No. 11,013,250
'492 patent	U.S. Patent No. 10,273,492
'656 patent	U.S. Patent No. 10,689,656
Alper, ¶__	Declaration of Dr. Hal Alper (D.I. 107) in support of Impossible's Opening Brief
Alper Reply, ¶__	Declaration of Dr. Hal Alper (D.I. 144) in support of Impossible's Reply Brief
Batt, ¶__	Declaration of Dr. Carl Batt (D.I. 123) in support of Motif's Answering Brief
Batt Supp., ¶__	Declaration of Dr. Carl Batt in support of Motif's Sur-Reply Brief, filed concurrently herewith
Legako, ¶__	Declaration of Dr. Jerrad Legako (D.I. 122) in support of Motif's Answering Brief
Legako Supp., ¶__	Supplemental Declaration of Dr. Jerrad Legako in support of Motif's Sur-Reply Brief, filed concurrently herewith
McGorin, ¶__	Declaration of Dr. Robert McGorin (D.I. 121) in support of Motif's Answering Brief
McGorin Supp., ¶__	Declaration of Dr. Robert McGorin iso Motif's Sur-Reply Brief, filed concurrently herewith
Sarnoski, ¶__	Declaration of Dr. Paul Sarnoski (D.I. 143) in support of Impossible's Reply Brief
Ex.	Exhibits attached to Motif's Answering Brief

Animal Terms	“a non-animal heme-containing protein” (’306, ’250 patents)/“free of animal heme-containing protein” (’241 patent) “no animal products” (’096, ’761 patents) / “free of animal products” (’241 patent)
Heme-Protein Terms	“wherein the heme-containing protein is selected from the group consisting of ... a myoglobin ...” (’096, ’241 patents) / “wherein the heme-containing protein comprises [an] amino acid sequence having at least 80% sequence identity to [SEQ ID:18]” (’241 patent)
Compound Terms	“at least one sugar compound” (’761 patent) / “a sugar selected from glucose, ribose, sucrose, fructose, xylose, maltodextrin, and combinations thereof” (’306, ’250 patents)/ “a compound selected from glucose, ribose, fructose, lactose, xylose, arabinose, glucose-6-phosphate, maltose, and galactose, and mixtures of two or more thereof” (’096, ’241 patents)/ “one or more of glucose, ribose, fructose, lactose, xylose, arabinose, glucose-6-phosphate, maltose, and galactose” (’241 patent)/ “at least one sulfur compound” (’761 patent) / “at least one sulfur compound selected from methionine, cysteine and thiamine” (’306, ’250 patents) / “a compound selected from cysteine, cystine, thiamine, methionine, and mixtures of two or more thereof” (’096, ’241 patents)/ “one or more of cysteine, cystine, thiamine, and methionine” (’241 patent)
Mxr1 Terms	“[A Nucleic Acid Encoding] A Mxr1 Transcriptional Activator Sequence from <i>P. pastoris</i> ” / “A First Exogenous Nucleic acid Encoding A Methanol Expression Regulator 1 (Mxr1) Transcriptional Activator”
Replica Terms	“Muscle Replica” (’761 patent) / “Fat Tissue Replica” (’761 patent)
Physical Organization of Meat Term	“Wherein Said Muscle Replica and Fat Tissue Replica Are Assembled In A Manner That Approximates the Physical Organization of Meat” (’761 patent)
Aroma Terms	“Meat-Associated Aroma” (’096, ’241 patents) / “Beef-Like Aroma” (’306, and ’250 patents)
Term ____	Numbered list of terms in Section II of the Joint Claim Construction Statement (D.I. 94-1).

*** All emphasis herein is added, and all internal citations and quotations are omitted unless otherwise noted.**

I. **DISPUTED TERMS**

A. **Animal Terms**

Impossible's focus on "sources" again conflates what a protein *is* with where it is made. D.I. 142, 2-3. The claimed exclusion of "animal" proteins/products is directed to sequence origin (*i.e.*, what the protein *is*), and while such proteins/products could be physically sourced from an animal, there is nothing in the claims or intrinsic record that limits the exclusionary term based on the source where the protein comes from (*e.g.*, from an animal vs. an artificial source). D.I. 120, 4-5.

Impossible knows how to (but did not) include source-related language in the claims, D.I. 120, 4 (identifying examples). Impossible ignores this glaring omission and instead relies on irrelevant post-priority date information. Batt Supp., ¶¶13-15, 20-21. For example, Impossible points to Motif's 2021 GRAS notice, D.I. 142, 1-2, which is immaterial to how a POSITA would have understood the claims 10 years earlier. Impossible also is wrong about the GRAS notice's significance. It reports potential myoglobin allergenicity in terms of the protein's "amino acid sequence homology", D.I. 142, Ex. 12 at IF_00008034, consistent with Motif's argument that protein identity matters for safety. D.I. 120, 5. Even if lacking a carbohydrate modification, "[t]he myoglobin present in Motif FoodWorks' Myoglobin Preparation is 100% identical to bovine myoglobin." D.I. 142, Ex. 12 at 25; Batt Supp., ¶21.

Impossible also mischaracterizes the significance of myoglobin and "myoglobin-like" proteins. Myoglobin is undisputedly a well-known animal protein, Batt Supp., ¶9; D.I. 142, 2 (acknowledging myoglobin "found in abundance in...heart and skeletal muscle"), and the Examiner's deletion of "myoglobin" from the scope of "non-animal" proteins is consistent with that fact. If the Examiner understood "non-animal" to mean "non-animal source" as Impossible

argues, there would be no reason to delete myoglobin. Instead, Impossible agreed with the Examiner. D.I. 120, 3.

B. Heme-Protein Terms

Impossible's prosecution history arguments—including myoglobin's significance, *supra*—support Motif. Impossible admits in discussing '096 prosecution that “***mammalian heme-containing protein***’ ***can be a protein that is not ‘derived from animal tissue.’***” D.I. 142, 4. Thus, a protein can be, but need not be, synthesized in animal tissue—and the protein nonetheless retains its mammalian (animal) identity.

Impossible amended the '096 patent parent's claims to recite a protein based on genetic identity—*Glycine max* (soybean)—because the Examiner required Impossible to establish “an unobvious difference between the claimed product and the prior art product” “compris[ing] ... myoglobin.” Ex. 24; D.I. 120, 7. Impossible did not claim producing (animal) protein—myoglobin—in a non-animal source as a “nonobvious difference.” *Id.* Instead, it limited its claims to plant protein.

C. Replica Terms & Physical Organization of Meat Term

Impossible persists that a “replica” composition cannot include even a small portion of the actual material being replicated (D.I. 106, 7; D.I. 142, 5), but this interpretation is unsupported. Legako Supp., ¶¶7-16. The specification makes clear that these animal tissue replicas may contain actual animal tissue, and places no limitation on the type they can contain. '761 patent, 22:63-23:8.

Impossible's attempt to discredit Motif's “replica” argument based on Motif's use of the word “substitutes” instead of “replicas” draws a distinction without a difference. The '761 patent consistently characterizes “replicas” as “substitutes.” See '761 patent, 1:64-2:5, 2:22-23, 2:26-29, 3:5-7, 3:55-56, 5:1-25, 11:59-67, 12:1-10. Moreover, Impossible uses the term “substitutes” in the same way, all with reference to the claimed “replicas.” See *e.g.*, D.I. 106 at 1, 9; Sarnoski, ¶94.

Impossible's argument that the '306 patent (a family member of the '761 patent) should be ignored when interpreting the '761 patent fails as a matter of law. *See* D.I. 120 at 1 (citing cases).

Finally, Impossible clearly and unambiguously stated—during the IPR to overcome institution—that the prior art did not teach the claimed invention **because** (i) McMIndes's mixture was “homogenous” (which Impossible argued would not approximate meat as claimed), and **because** (ii) its disclosed replicas were not “separate” (which Impossible insisted was required by the claims). *See* D.I. 120, Ex. 12 at 32-34. There is no daylight between Impossible's argument here and its prior statements, nor would a POSITA understand the terms as Impossible suggests in view of the intrinsic record. *See* Legako Supp., ¶¶17-20.

D. “A Concentration of At Least 1.5 mM”

Impossible has made no attempt to explain how its construction is consistent with the claim's plain language. Claim 1 recites a multi-step process, and this element recites the molarity of an ingredient—sulfur compounds—added during one step of the claimed process, not the final product. McGorin, ¶83; McGorin Supp. ¶48.

Impossible's specification examples do not show otherwise. Most describe tests of isolated sulfur compounds within *liquid solutions*, not solid food products, so the basis for using molarity was clear. McGorin Supp., ¶49. Further, Example 1's use of percentage weight-by-weight of the final product (w/w) for some ingredients, but molarity units for sulfur compounds, evinces a distinction between these ingredients. *Id.*, ¶50. Impossible could have given w/w for sulfur compounds but instead used only molarity. *Id.* And although molarity can be converted to w/w, the specification and claims lack data needed for that conversion. *Id.* ¶¶51-52. A product-by-process claim should not require a POSITA to work backward from the finished product to know how to carry out the claimed process. *Id.* The Davis declaration likewise provides no support. Impossible does not dispute that the Examiner only considered whether the claimed

compounds were present in prior art products when determining patentability. *See* D.I. 120, Ex. 16 at 3-4, Ex. 17 at 2.

E. “Food Flavor Additive Composition”

Motif’s FFAC construction—“a composition that modulates a food product’s flavor and/or aroma when added to the food product”—does not import an “adding” step. D.I. 142, 6-7. The qualifier “*when added*” correctly tracks the claim language and specification, both of which make clear that the FFAC is an “**additive**.” ’096 patent, 3:32-35.

Nor does Motif’s construction include unsupported temporal requirements or preclude additional ingredients. D.I. 142, 6-7. That the FFAC must exist before it is present in a final food product is what makes it an “additive.” ’096 patent, 3:32-35, (“flavor additive compositions, *e.g.*, **for addition to another consumable food product** before, during, or after its cooking process”), 3:51-56, 17:28-44 (FFAC examples that are added to foods). Impossible’s unsupported construction that a FFAC can include a combination of unrelated ingredients present only in the final food product reads “additive” out of FFAC. *Baldwin Graphic* is also inapposite because Motif’s construction does not limit any ordering of claim steps.

Moreover, *INVISTA*’s holding that “composition” means “mixture” is not limited to patents that discuss “blends,” as Impossible alleges. 951 F.Supp.2d 604, 611-14 (Fed. Cir. 2013); *see also PIN/NIP, Inc. v. Platte Chemical Co.*, 304 F.3d 1235, 1243-45 (Fed. Cir. 2002) (“composition” refers to “mixture of substances”).

F. “Compound” Terms

Impossible accuses Motif of importing limitations into the “compound” terms, but Motif’s construction simply clarifies how a POSITA would understand the well-known claimed

sugar/sulfur compounds given the intrinsic record and extensive experience in the art.¹ D.I. 120, 17-19; McGorin §V.A-B, VIII.. *Phillips*’s “line between construing terms and importing limitations” can therefore “be discerned with reasonable certainty and predictability” here, 415 F.3d at 1323, and Motif’s construction reflects the former.

Impossible does not dispute that the patents teach sugar/sulfur “compounds” added as flavor precursors to replicas, and its attempts to avoid the unambiguous intrinsic record fall flat.

Impossible ignores Example 33’s purpose—“**Generation of Beef Flavor** in Replica Burgers **by the Addition of...Flavor Precursors**”—and its finding that “**addition of precursors increased the beefy flavor...**in the replica.” ’306 patent, 84:18-20. Its argument that not all Examples teach added sugar/sulfur “compounds” misses the mark because claims are not required to cover every embodiment. *SIMO Holdings Inc. v. Hong Kong uCloudlink Network Tech. Ltd.*, 983 F.3d 1367, 1378 (Fed. Cir. 2021); McGorin Supp., ¶46.

Contrary to Impossible’s insinuation, the patents do not teach or suggest that **plant proteins**, a separately-claimed ingredient, can be the claimed “compounds.” McGorin Supp., §II.A.(d). Impossible’s citation to a vague sentence that flavor precursors “can be derived” from other ingredients does not refer to plant proteins. *Id.* ¶¶26-32. It is also inconsistent with claims which require “compounds” be present **before** cooking. *Id.* ¶25.

Impossible’s prosecution analysis ignores the Examiner’s recognition that Maillard “precursors”—the claimed “compounds”—“are important for meat aroma” and “employed in the product[ion] of meat flavors.” McGorin, ¶76; Ex. M18, 6. In prosecution, Impossible distinguished these “compounds” from trace sugars/sulfurs in plant material. McGorin Supp.,

¹ Impossible’s attempt to distinguish the ’761 patent fails because each “compound” term “should be interpreted similarly across the patents.” Sarnoski, ¶120.

§II.A.(c). *E.g.*, the Davis declaration shows that prior art corn flour contains “at best” low levels of free sulfur compounds—an amount “***less than...required by the claims.***” D.I. 142, 8; *see also* Ex. 22 at 18. Thus, plant materials and any trace free sugars/sulfurs are ***not*** what Impossible claimed as “compounds.” McGorin Supp., §II.A.(c). Impossible’s citation to “compounds” in beef (D.I. 142, 8) aligns with Motif’s argument that “compounds” are added to replicas to mimic meat. *Id.* ¶¶38-40; D.I. 120, 19-20.

G. Aroma Terms

Impossible’s focus on “meaty” or “beefy” terms for aroma misses the point. D.I. 142, 9. The claim language is “meat-***associated***” and “beef-***like***,” and a POSITA would not be able to discern what is sufficiently “associated” with meat or “like” beef without objective guidelines which the patents lack. D.I. 120, 21, 22; Legako ¶¶125-136; Legako Supp. ¶¶21-30. Impossible’s sole argument is that the descriptors “-associated” and “-like” “convey that the product is not animal-based.” D.I. 142, 9. But the terms modify *aromas*, not the food product. 096 patent, cl. 1; ’241 patent, cl. 1, 22; ’306 patent, cl. 14, 27; ’250 patent, cl. 1, 13. None of Impossible’s citations address what it means to be “meat-associated” or “beef-like.” *See* D.I. 142, 9 (citing Sarnoski, ¶¶139-144); Legako Supp. ¶¶21-30.² Impossible also makes no attempt to distinguish Motif’s cases, unpersuasively claiming that the case law “is inapposite given these facts.” D.I. 142, 9 n.3.

Finally, Impossible’s counter-citation to a portion of an EU Opposition decision is not relevant. D.I. 142, 9. There the EU opposition opponent argued specifically that “beefy” or

² There is also reasonable disagreement as to whether certain animal flesh (*e.g.*, fish) even qualifies as meat. *See, e.g.*, D.I. 142, Ex. 22 at IF_0014086-87 (explaining that the same sulfur-containing compounds are responsible for the aroma in meat, beef, and seafood). A term that may have a different meaning depending on the particular religion of the POSITA (*e.g.*, whether or not they consider fish to be meat) is indefinite.

“meaty” smells are “subjective perceptions only.” D.I. 142, 9-10. Those are different terms (lacking the “like” and “associated” modifiers) than those at issue here.

H. Mxr1 Terms

“Mxr1” in the claimed context means a transcriptional activator actually found in—native to—a *Pichia* species. D.I. 120, 23-24; Batt Supp., §II.B. While Impossible asserts, at 11-12, that the specification discloses genetically engineering variations that change native Mxr1 to something different, Impossible does not dispute that the specification uniformly calls such molecules “variants” and “mutations.” See D.I. 142, 11-12; Batt, ¶70.

The parties also agree that the sequence coding Mxr1 can be the same as the sequence native to *P. pastoris* and heterologously expressed in a host of a different *Pichia* species. D.I. 120, 23-24; D.I. 142, 11-12. Whether the expressed Mxr1 is the same as native *P. pastoris* Mxr1 does not depend on the genus and species of the host cell in which it is expressed. Batt, ¶¶124-126.

Additionally, in the context of ’492 claim 1, “Mxr1 transcriptional activator **sequence**” refers to a nucleic acid sequence that encodes Mxr1. The patent uniformly refers to the sequence that codes for Mxr1, not a location to which it binds. *E.g.*, ’492 patent, 1:63-66; 4:26-27; 4:38-43; Batt ¶130. By contrast, when discussing binding, the patent refers to binding. ’492 patent, 5:18-24; Batt ¶130-31. In fact, it refers to a “AOX1 promoter,” not a “sequence,” as the location to which Mxr1 binds. *E.g.*, ’492 patent. Moreover, the only example in the patent that describes claim 1 explains that “Mxr1 is [] **expressed from** the AOX1 promoter” —not that Mxr1 binds to a particular sequence in the construct. ’492 patent, 39:23-31; Batt, ¶133. Impossible also incorrectly asserts, at 10-11, that there is no support for reading claim 14 as reciting two different Mxr1-encoding sequences. The patent, in fact, describes such an embodiment. ’492 patent, 4:18-22.

Impossible’s only support for calling the “sequence” a binding site is its expert’s background explanation of what Mxr1 is, and his attempt to explain away description of

“sequence” as nucleic acid coding regions. D.I. 142, 10 (citing Alper ¶¶29, 56, Alper Reply ¶¶6-10). Impossible has not identified any disclosure in which “Mxr1 transcriptional activator sequence” was used to describe a binding site.

I. “Promoter Element”

Impossible again fails to identify the metes and bounds of a “promoter element.” Because Impossible’s “promoter element” definition is built on disclosures of *other terms* (e.g., “operably linked”), Impossible conflates their function with the function supposedly defining “promoter element. Batt Supp., §II.C(b). Its flawed interpretation fails to provide reasonable certainty of “promoter element’s” scope. *Id.*

The patents do not disclose any structural features of a “promoter element” that would permit a POSITA to identify it in isolation. D.I. 142, 14-16; Batt Supp., ¶35 (reviewing Batt). Impossible’s and Dr. Alper’s binding site discussion is inapt as “promoter elements” need not contain binding sites. Batt, §XI.A.6. *E.g.*, the ’492 claims’ “promoter element” does not require a Mxr1 binding site. Batt, ¶¶150-55. In fact, both parties’ experts agree that a “promoter element” has no uniform meaning in the art. Batt, ¶150; §XI.A; Alper Supp., ¶24.

Impossible mischaracterizes Motif’s argument as requiring an *ex ante* definiteness analysis—rather, Motif argued “promoter element” *outside the promoter context* is indefinite. Batt Supp., ¶35. Such “relative terms” that “only have meaning in a given context with a defined reference”—here, within a known promoter—are indefinite. *Icon Health & Fitness, Inc. v. Polar Electro Oy*, 656 F. App’x 1008, 1015 (Fed. Cir. 2016). *Teva* further supports indefiniteness because the intrinsic record does not clarify how “promoter element” should be understood—e.g., structure, function, or just generically as a “portion” of a promoter. Batt, §XI.A.10, ¶139; ’656 patent 4:56-60.

Impossible's attempts to manufacture confusion by mischaracterizing Motif's positions in IPRs of the '492/'656 patents fall flat. Motif relied on prior art teachings of known gene ***promoters*** containing elements defined subjectively and in reference to promoters. D.I. 142, 14 (AOX1, PEX8); Batt Supp., §II.C.(e). Motif did not propose any construction for "promoter element," D.I. 142, Ex. 23, ¶103, and Motif was unable to challenge "promoter element's" definiteness in that proceeding. 35 U.S.C. §311(b) (limited IPR bases).

"Promoter element" is indefinite, but if it found to constitute an amorphous driver of gene expression with no definite structure, it should at minimum be deemed means-plus-function.

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with Paragraph 13 of Court's Scheduling Order (D.I. 37) because it contains 2470 words as determined by the word count feature of Microsoft Word (excluding the caption, tables, and signature blocks).

/s/ Jeremy A. Tigan

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2023, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

I further certify that I caused copies of the foregoing document to be served on July 14, 2023, upon the following in the manner indicated:

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