

Paper No. ____
Filed: March 1, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MOTIF FOODWORKS, INC.,
Petitioner,

v.

IMPOSSIBLE FOODS INC.,
Patent Owner.

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

PATENT OWNER'S MOTION TO EXCLUDE

I. INTRODUCTION

Patent Owner Impossible Foods, Inc. requests exclusion of Petitioner Motif Foodworks, Inc.'s Exhibits 1021, 1027, 1029-1032, 1034-1036, 1046-1047, 1049-1051, 1056-1057, 1059-1060, 1064, 1067, 1070, 1072-1074, 1082, 1084-1085, 1087, 1089, 1095-1096, 1098-1101, 1106-1115, 1118-1119, 1120, 1123, 1133, 1135, 1137-1138, 1141, 1146-1147, 1149-1150, 1152, 1157-1159, 1180, 1183-1185, and 1187 for violation of the Federal Rules of Evidence (F.R.E.). 37 C.F.R. §4.64(c).

II. UNCITED EXHIBITS

Impossible timely objected to Exhibits 1021, 1027, 1029-1032, 1034-1036, 1046-1047, 1049, 1056, 1060, 1064, 1073, 1082, 1084, 1087, 1095-1096, 1098-1101, 1107-1115, 1119-1120, 1123, 1133, 1135, 1137-1138, 1141, 1146-1147, 1149-1150, 1152, and 1157-1159 under F.R.E. 401-403. Paper 26. These exhibits were filed along with the petition but were not cited in the petition or reply.

Impossible timely objected to Exhibits 1180 and 1184 under F.R.E. 401-403. EX1182, 102:23-104:20; Paper 41. These exhibits were filed but not cited in the reply.

Because these exhibits were not cited in the petition or reply, they cannot be relied on to establish unpatentability and are not relevant to the proceeding. See 37 C.F.R. §42.6(a)(3) ("Arguments must not be incorporated by reference from one

document into another document.”); F.R.E. 401-402. To the extent these uncited exhibits are deemed relevant, their admission would be unduly prejudicial, misleading, and a waste of time in view of the fact that none of these exhibits are relied upon to prove facts relevant to resolution of this case. F.R.E. 403.

III. POST-FILING DATE EXHIBITS

Impossible timely objected to Exhibits 1047, 1050, 1057, 1059, 1064, 1067, 1070, 1074, 1085, 1089, 1106, and 1118 under F.R.E. 401-403. Paper 26. Impossible also timely objected to Exhibits 1183, 1185, and 1187 under F.R.E. 401-403. Paper 41. Petitioner and its experts improperly cite to and rely on each of these exhibits as evidence of the POSA’s understanding at the time of invention.

For example, Dr. McGorin cites to EX1047, EX1064, and EX1118 as evidence that a POSA would understand that “the presence of [volatile] compounds *alone* in a product is not necessarily associated with a meaty aroma.” EX1005, ¶¶172 & n.9, 13, 15 (emphasis original). The Petition and Dr. Tarté cite to EX1050, EX1057, EX1059, EX1067, EX1070, and EX1106 as evidence of the POSA’s knowledge of the components contained within pea flour. Pet., 23, 25, 37-38; EX1003, ¶¶122-24, 154-56, 161, 237. The Petition and Dr. Tarté further cite to EX1074 as evidence of the POSA’s knowledge of emulsifiers and gelling agents and cite to EX1085 as evidence of the POSA’s understanding of synthetic cysteine. Pet., 32, 41; EX1003, ¶¶204, 262-63, 374-75. Exhibit 1089 is cited to

support the Petitioner's assertion that a POSA would understand that glucose "is conventionally derived from plant starches, such as from corn, wheat, and potato." Pet., 23; EX1003, ¶130. Dr. McGorin's reply declaration cites to EX1183, EX1185, and EX1187 as evidence regarding the POSA's understanding of the nutritional benefits allegedly contained in certain flavor additives. EX1181, ¶¶104-108.

According to Petitioner's expert Dr. Hall-Ellis, each of these exhibits was publicly available after the priority date applied in the Petition. *See* Pet., 5-6 (asserting priority date of July 12, 2013); EX1009, ¶¶231 (EX1047 available June 11, 2019), 250-251 (EX1050 available March 8, 2016), 254-55 (EX1059 available March 8, 2016), 305 (EX1057 available May 19, 2017), 340 (EX1064 available September 16, 2015), 356 (EX1067 available August 8, 2016), 381 (EX1070 available November 19, 2020), 412 (EX1074 available May 8, 2015), 433 (EX1085 available September 21, 2020), 465 (EX1089 available May 10, 2019), 551 (EX1106 available April 1, 2019), 582 (EX1118 available December 2, 2020). EX1183, EX1185, and EX1187 also show a publication date after the priority date applied in the Petition. EX1183 (2021 publication); EX1185 (2023 printout); EX1187 (2017 publication). Because these exhibits are not prior art, they are irrelevant to a POSA's knowledge and understanding at the relevant time. F.R.E. 401-402.

Moreover, any testimony of Petitioner's witness(es) that cites to or relies on said exhibits in asserting the unpatentability of the challenged claims should likewise be excluded as it is unreliable, unduly prejudicial, legally erroneous (*e.g.*, not from the perspective of a POSA at the time of the invention) and lacks relevance to Petitioner's obligation to meet its burden of proof. Indeed, as such non-prior art exhibits are interspersed and cited throughout the declarations of Petitioner's witnesses, it would be unduly prejudicial and burdensome for Patent Owner or the Board to sort proper from improper testimony or glean the extent to which such non-prior art references infected the analysis, and thus the citation to and reliance on non-prior art references renders the entirety of said witness testimony unreliable and unduly prejudicial. Expert testimony is neither relevant nor reliable, and is therefore inadmissible, when it is predicated on an erroneous legal standard. *See, e.g., U.S. Gypsum Co. v. Lafarge N. Am. Inc.*, 670 F. Supp. 2d 737, 745 (N.D. Ill. 2009) ("Having applied the incorrect legal standard..., Davis will not be permitted to testify on that topic."). Likewise, any briefing or argument by Petitioner citing to or relying on said exhibits or corresponding testimony should be stricken or, at a minimum, given no weight.

To the extent these uncited exhibits or documents relying upon them are deemed relevant, their admission would be unduly prejudicial, misleading, and a waste of time. F.R.E. 403.

IV. CONCLUSION

Accordingly, each of the exhibits identified above should be excluded; if not excluded, they should be restricted to minimize prejudice so far as possible or given no weight. F.R.E. 105.

Respectfully submitted,

Dated: March 1, 2024

/ Michael T. Rosato /
Michael T. Rosato, Lead Counsel
Reg. No. 52,182

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Patent Owner's Motion to Exclude was filed and served on March 1, 2024, on Petitioner at the electronic correspondence address of the Petitioner as follows:

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Respectfully submitted,

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