

Paper No. ____
Filed: March 15, 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 REPLY IN SUPPORT OF
THE MOTION TO EXCLUDE**

I. INTRODUCTION

Petitioner's Opposition (Paper 48) fails to justify the admissibility of the evidence identified in Impossible's Motion to Exclude (Paper 47).

II. UNCITED EXHIBITS

Petitioner concedes that none of 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 were cited or relied upon in the petition or reply. Opp., 3-7. However, with the exception of two exhibits, Petitioner argues that the exhibits should not be excluded because "these exhibits were all cited to and relied on by one or more of Petitioner's experts." *Id.*, 3.

As an initial matter, Petitioner concedes that Exhibits 1082 and 1180 are neither cited in its briefing nor cited by any of its experts. *Id.* Thus, at a minimum, these exhibits should be excluded as irrelevant because they are not relied upon by Petitioner nor its experts. F.R.E. 401-402.

For the remaining exhibits, Petitioner argues they should not be excluded because they are allegedly cited "as evidence of, but not limited to, the background knowledge of a POSITA, state of the art at the time of the invention, and/or factual information about compound, product, or process," evidence of "PO's failure to show unexpected results," "evidence in support of [Dr. Tarté's] conclusions that

the prior art satisfied one or more limitations of the claims,” evidence “relevant to the lack of secondary considerations of non-obviousness of the challenged patent,” or evidence “relevant for understanding the prosecution history of the challenged patent and/or representations made by the Patent Owner.” Opp., 3-4. Petitioner then lists various paragraphs throughout its four expert declarations in which the fifty exhibits were allegedly cited. *Id.*

The Petition illustrates Petitioner’s ability to cite to evidence relevant to its unpatentability contentions, including, for example, arguments relating to “the background knowledge of a POSITA” or the “state of the art at the time of the invention.” *See, e.g.*, Pet., 23, 25, 32-33. However, the uncited exhibits apparently were not relevant to Petitioner’s arguments to warrant reliance on them in its Petition or Reply, where Petitioner is required to make its case. *See* 37 C.F.R. § 42.22(a)(2) (requiring that petitions and motions include “a detailed explanation of the significance of the evidence”). Indeed, many of the declaration paragraphs listed by Petitioner in its Opposition that allegedly rely on the uncited exhibits were cited in the petition as part of more general citations, including citations to entire sections of the expert declarations. *See, e.g.*, Pet., 1 (citing EX1005, ¶¶27-42), 3 (citing EX1003, Section VII.A-B, Section VII.C; EX1007, ¶¶40-49), 67 (citing EX1005, Section VII.D.3-5). By delegating these exhibits exclusively to its expert declarations and forgoing any attempt to explain the relevance of these

exhibits in its Petition or Reply, Petitioner is tasking the Board to play archaeologist with the record to determine how the exhibits support Petitioner's position. *Cisco Sys., Inc. v. Egenera, Inc.*, IPR2017-01340, Paper 33 at 20 (Oct. 29, 2018); *see also Cisco Sys., Inc. v. C-Cation Techs., LLC*, IPR2014-00454, Paper 12 at 10 (Aug. 29, 2014) (informative) ("A brief must make all arguments accessible to the judges, rather than ask them to play archaeologist with the record.") (quoting *DeSilva v. DiLeonardi*, 181 F.3d 865, 866-67 (7th Cir. 1999)).

Even if deemed relevant, Petitioner's cluttering of the record with exhibits not relied upon in its Petition or Reply would be unduly prejudicial, misleading, and a waste of time. Mot., 2. If not excluded, they should be restricted to minimize prejudice so far as possible or given no weight. Mot., 5 (citing F.R.E. 105).

III. POST-FILING DATE EXHIBITS

Petitioner concedes that Exhibits 1047, 1050, 1057, 1059, 1064, 1067, 1070, 1074, 1085, 1089, 1106, 1118, 1183, 1185, and 1187 are publications that were publicly available after the filing date of the '096 patent and therefore do not constitute prior art. Opp., 7-11. Nevertheless, Petitioner argues that these post-filing date exhibits should not be excluded because they allegedly show inherent characteristics of prior-art materials. *Id.* Inherency, however, was not a theory advanced by Petitioner with regard to these exhibits. As noted in Impossible's

Motion, Petitioner's experts cited to these exhibits in support of their assertions as to what the POSA would have understood at the time of the invention. Mot., 2-3. Thus, whether inherent or not, the exhibits are irrelevant to the purpose for which the exhibits were proffered: as evidence of the POSA's knowledge.¹ See *Titanium Metals, Corp. v. Banner*, 778 F.2d 775, 780, 782 (Fed. Cir. 1985) (explaining "[i]nherency is not necessarily coterminous with the knowledge of those of ordinary skill in the art" and "[a]rtisans of ordinary skill may not recognize the inherent characteristics or functioning of the prior art").

Petitioner also argues that, because Impossible allegedly "did not dispute" certain issues, the motion's challenge to the admissibility of the exhibits "is moot." Opp., 10. However, it is still Petitioner's burden to establish that the prior art

¹ For instance, Petitioner and its experts repeatedly rely on the POSA's alleged knowledge of the components contained in pea flour to support assertions regarding the POSA's motivation to combine Giacino and Brown. See, e.g., Pet., 29, 37-38; Reply, 21; EX1003, ¶¶196, 212, 237; EX1181, ¶40. Yet, in its Opposition, Petitioner contends "it does not matter whether a POSITA at the time of the invention knew that pea flour inherently contained the subject amino acids and proteins." Opp., 8.

teaches each and every limitation of the claims with sufficient evidence. Whether certain limitations were not disputed by Impossible (which Impossible does not concede) does not negate the irrelevancy of the exhibits to the purposes for which they were proffered.

Finally, Petitioner argues that Petitioner proffered other exhibits “for the same position that pre-date the challenged patent.” Opp., 9-10. Petitioner’s contention that the identified exhibits are cumulative supports their exclusion. F.R.E. 403.

IV. CONCLUSION

Accordingly, for the reasons detailed above and in Impossible’s Motion to Exclude, the identified exhibits should be excluded.

Respectfully submitted,

Dated: March 15, 2024

/ Michael T. Rosato /
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Patent Owner's Reply in Support of the Motion to Exclude was filed and served on March 15, 2024, on Petitioner at the electronic correspondence address of the Petitioner as follows:

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Respectfully submitted,

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