Paper No. 17

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE PATENT TRIAL AND APPEAL BOARD**

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MOTIF FOODWORKS, INC.,

Petitioner,

v.

IMPOSSIBLE FOODS INC.,
Patent Owner.

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**U.S. Patent No. 10,039,306**

"METHODS AND COMPOSITIONS FOR CONSUMABLES"

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*Inter Partes* Review No. 2023-00209

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**PETITIONER'S OPENING BRIEF CHALLENGING PRIORITY CLAIM**

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Patent Owner's pending request to correct the priority claims of the '096, '241, '250, and '306 patents ("challenged patents") is futile. Even if the Director grants PO's request (she should not), the challenged patents are only entitled to a priority date of Nov. 25, 2013, which is *later* than the critical date of "Brown."

PO's proposed "corrected" priority claims fail for two reasons. First, defects in the existing priority claims fail to satisfy strict statutory requirements and thus even the "corrected" claims are improper and must be rejected. Second, the prior-filed applications, to which PO now seeks to extend priority, fail to provide § 112 support for the challenged claims. Either failure alone renders PO's "corrected" priority claims ineffective to remove the Brown grounds[1] in these IPR proceedings.

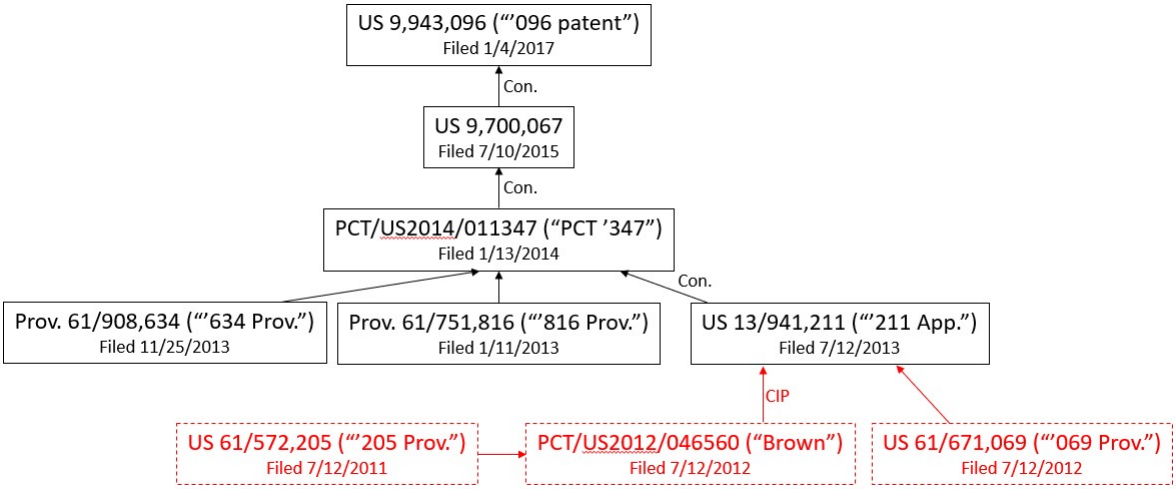
Consequently, Petitioner respectfully requests that the Board reject PO's "corrected" priority claims and find that the challenged patents are not entitled to a priority date any earlier than Nov. 25, 2013.

## I. PO'S PROPOSED "CORRECTED" PRIORITY CLAIMS

Following the Board's May 22, 2023 order, PO filed a request for a certificate of correction and a petition under 37 C.F.R. §§ 1.78(c) and 1.78(e). Ex. 2015. As illustrated for the '096 patent below, PO's existing priority claim specifies that the challenged patents are continuations of the '211 App. The proposed "correction" (in

[1] IPR2023-00206, Paper 7, 20-44; IPR2023-00207, Paper 6, 26-46.

red) adds Brown, the '069 Prov., and the '205 Prov. (collectively "Prior-filed Applications") to the priority claim, where the '211 App. is a CIP of Brown.[2]




Critically, PO's proposed "corrected" priority claim relies on its existing priority claim to the '211 Application to extend priority further to Brown and the other Prior-filed Applications in an attempt to obviate the Brown grounds in these proceedings. However, as explained below, PO's proposed "corrected" priority claim fails to support and enable the challenged claims. Consequently, the challenged patents are not entitled to any of the priority dates of the Prior-filed

[2] The '241 patent is a continuation of the '096 patent and has the same proposed "corrected" priority claim as the '096 patent. The '250 and '306 patents claim priority to PCT/US2014/011361 ("PCT '361") instead of PCT '347", but the "correction" is otherwise identical.

Applications. Hence, Brown is prior art to the '096 and '241 patents.[3]

## II. THE "CORRECTED" PRIORITY CLAIMS ARE DEFECTIVE

### A. Relevant Law for Priority Claims

To claim the benefit of an earlier filing date, 35 U.S.C. § 120 requires "a ***specific reference*** to the earlier filed application."[4] The reference must "identify[] [the earlier filed application] by [its] application number (consisting of the series code and serial number)" and "the ***relationship*** of the applications, namely, whether the later-filed application is a ***continuation, divisional, or continuation-in-part*** of the prior-filed" application. 37 C.F.R. § 1.78(d)(2). "The regulation thus requires that the specific reference include each prior-filed application's: (1) application number; and (2) familial relationship." *Droplets, Inc. v. E*Trade Bank*, 887 F.3d 1309, 1315-16 (Fed. Cir. 2018) (finding that incorporation by reference did not satisfy the statutory requirements for claiming priority). Additionally, "the specific reference requirement mandates ***each intermediate application*** in the chain of priority to refer to the prior applications." *Medtronic CoreValve, LLC v. Edwards*

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[3] The challenged patents are also not entitled to the '816 Prov. Jan. 11, 2013 priority date. IPR2023-00206, Paper 7, 5-10; IPR2023-00207, Paper 6, 13-17. PO did not contest this fact. IPR2023-00206, Paper 8, 9-11; IPR2023-00207, Paper 7, 13-15.

[4] All emphasis added unless otherwise indicated.

*Lifesciences Corp.*, 741 F.3d 1359, 1363 (Fed. Cir. 2014) (internal quotations omitted) (patent with corrected priority claim not entitled to priority date of first-filed application where intermediate applications failed to satisfy the "specific reference" requirement of § 120).

The Federal Circuit has held that "***strict adherence***" to these requirements is required. *Droplets, Inc.*, 887 F.3d at 1315-17 (collecting cases). For this reason, the Federal Circuit has rejected attempts by patentees to lessen or replace these requirements. *Medtronic*, 741 F.3d at 1365-66 (rejecting "reasonable person" test in place of "a specific reference to each prior-filed application in ***precise detail***").

### B. The Challenged Patents Improperly Identify PCT '347 and PCT '361 as "Continuations" of the '211 Application

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. *See* Section I, *supra*. "By definition, ***a continuation adds no new matter*** and is akin to an amendment of a pending application." *Applied Materials, Inc. v. Advanced Semiconductor Materials America, Inc.*, 98 F.3d 1563, 1579 (Fed. Cir. 1996) (Mayer, J., concurring); *Litton Systems, Inc. v. Whirlpool Corp.*, 728 F.2d 1423, 1438 (Fed. Cir. 1984) (continuation application does not include anything which would constitute new matter); MPEP § 201.07 (same). Hence, applications, like PCT '347 and PCT '361, that add new figures and description cannot properly be

"continuations" of the '211 App. Indeed, PCT '347 and PCT '361, on the one hand, and the '211 App., on the other hand, have different specifications and figures. *Compare* Ex. 1160 (PCT '347) and Ex. 1163 (PCT '361) *with* Ex. 1161 ('211); *see also* Exs. 1162, 1164 (redline comparisons of PCT '347/PCT '361 and '211 App.).

For instance, PCT '347 and PCT '361 disclose various examples and tables that describe flavor precursors (*e.g.*, cysteine, thiamine, methionine, ribose, maltodextrin, etc.) and the aromas and/or volatiles they generate when cooked. Ex. 1160, 11-66 (Examples 1-14, Tables 1-18); Ex. 1163, 124-125, 131-134 (Example 27, 33; Tables 5, 8-10). The '211 App. does not. *See* Ex. 1161. The '211 App. does not even recite the words "flavor precursor." *Id.* The PCT applications also do not share a single figure in common with the '211 App. *Compare* Ex. 1160 (PCT '347), FIGS. 1-2 and Ex. 1163 (PCT '361), FIGS. 1-4 *with* '211 App., FIGS. 1-16). Accordingly, both PCT '347 and PCT '361 are not continuations of the '211 App.[5]

This glaring defect means that the challenged patents do not properly claim priority to the '211 App. (and every application that extends from the '211 App. including the Prior-filed Applications) because they fail to correctly identify the

[5] The overlap between the PCT applications and the '211 App. cannot even be properly characterized as a CIP, which would require the PCTs to "repeat[] some [] ***substantial portion***" of the '211 App. MPEP § 211.08.

familial relationship (if any exists) between PCT '347/PCT '361 and the '211 App., as required by § 1.78(d)(2). Hence, the challenged claims are not entitled to the priority dates of the '211 App. or the Prior-filed Applications.

### C. Intermediate Applications, PCT '347 and PCT '361, Fail to Claim Priority to Either the '211 App. or the Prior-Filed Applications

The priority claims of intermediate applications PCT '347 and PCT '361 are also defective. These applications fail to identify their specific familial relationship (continuation, divisional, or CIP) to the '211 App., as required by § 1.78(d)(2). Instead, they merely "claim[] priority" to the '211 App. *See* Ex. 1160, 1:2; Ex. 1163, 1:3. Indeed, the Patent Office has already dismissed one of PO's requests for a certificate of correction in a related application (17/531,422) that applies equally in these proceedings. That dismissal states in relevant part:

> Application number PCT/US2014/011361 fails to state its relationship to application number 13/941,211 as required under 37 CFR 1.78(d)(2). A proper relationship would be continuation, continuation-in-part, or divisional. ***"Claims priority to" is insufficient***.

Ex. 1171 at 2.

PCT '347 and PCT '361 also fail to claim priority to the Prior-filed Applications. *See* Ex. 1160, cover page (item 30); Ex. 1163, cover page (item 30). The aforementioned CoC dismissal separately rejected PO's priority claim in the related application on this basis. Ex. 1171 at 3. Hence, the challenged claims are not entitled to the priority dates of the Prior-filed Applications because their intermediate applications, PCT '347 and PCT '361, do not identify a familial

relationship to the '211 App. and fail to make any reference to the Prior-filed Applications, as required by law. *See Medtronic*, 741 F.3d at 1363.

## III. THE PRIOR-FILED APPLICATIONS FAIL TO PROVIDE WRITTEN DESCRIPTION SUPPORT AND FAIL TO ENABLE THE CHALLENGED CLAIMS

To prevail on its priority claim, PO must show that Brown and the other Prior-filed Applications provide written description support for and enable the challenged claims under 35 U.S.C. § 112. 35 U.S.C. §§ 119(e), 120. As explained below, the Prior-filed Applications fail to provide Section 112 support for the full scope of the challenged claims,[6] even though Brown contains an anticipatory disclosure.

A "prior application must enable one of ordinary skill in the art to practice the ***full scope*** of the claimed invention." *Chiron Corp. v. Genentech, Inc.*, 363 F.3d 1247, 1253 (Fed. Cir. 2004) (holding CIP patent's claims covering murine, chimeric,

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[6] As PO concedes, "[t]he '069 provisional [] contains substantially the same content as Brown." IPR2023-00206, Paper 8 (POPR), 10; *see also* Ex. 1172 (redline comparison of Brown and '069 Prov. showing almost complete overlap). Hence, arguments herein that Brown fails to sufficiently describe and enable the challenged claims equally apply to the '069 Prov. Since the '205 Prov. is a provisional application of Brown, PO's priority claim to the '205 Prov. similarly fails because Brown fails to describe and enable the challenged claims.

and humanized antibodies were not entitled to the benefit of prior-filed applications because the applications only enabled murine antibodies). The Supreme Court recently confirmed this requirement in *Amgen Inc. v. Sanofi*. In *Amgen*, the patentee attempted to claim a broad genus of antibodies that included potentially millions of antibodies even though the patent's specification only described how to make 26 and provided a "roadmap" for finding other undisclosed antibodies. No. 21-757, slip op. at 5 (2023). The Supreme Court held that, "even allowing for a reasonable degree of experimentation," the claims were invalid under § 112 because the specification failed to enable the broad genus of undisclosed antibodies. *Id.*, slip op. at 15-17. The court found that the claims "seek[] to monopolize an entire class of things *defined by their function*," yet the patent failed to identify a quality common to every functional embodiment. *Id.* Also, the patent's roadmap merely described a trial-and-error process requiring "painstaking experimentation." *Id.*, at 17.

Here, the ***full scope*** of the challenged claims are not sufficiently described and enabled by the Prior-filed Applications because the challenged patents broadly claim many different sugar and sulfur compounds, including a myriad of possible combinations of each, that are not disclosed in the Prior-filed Applications.[7] For

[7] A reference "could still be section 102[] prior art as to *broader* claims of a subsequent application although not contain[] a disclosure satisfying the section 112

example, the '096/'241 patent claims require that "a compound [be] selected from glucose, ribose, fructose, lactose, xylose, arabinose, glucose-6-phosphate, maltose, and[/or] galactose." '241 patent, cl. 1; '096 patent, cl. 1 (additionally claiming maltodextrin).[8] Yet, Brown does not disclose *any* of these sugars except for glucose. Ex. 1012, [00364]. Moreover, Brown fails to disclose separately adding any of the claimed sulfur compounds—cysteine, cystine, methionine, and thiamine—to its compositions. While Brown's pea flour inherently has cystine, methionine and

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description requirement with respect to the anticipated broader claims." *Chester v. Miller*, 906 F.2d 1574, 1577 (Fed. Cir. 1990); *see also Indivior UK Limited v. Dr. Reddy's Laboratories*, 18 F.4th 1323, 1328-30 (Fed. Cir. 2021) (claims of a continuation patent that recited a broad range of values lacked written description in the first-filed application even though the application's specific examples within the claimed range anticipated the broad claims). Similarly, a prior art reference "need not enable the claim in its entirety…[it] need only enable a single embodiment of the claim." *In re Morsa*, 803 F.3d 1374, 1377 (Fed. Cir. 2015).

[8] Similarly, the '250 and '306 patents require that a sugar be selected from glucose, ribose, sucrose, fructose, xylose, and/or maltodextrin. *See, e.g.*, '250 patent, cl. 1.

thiamine in its composition (*see, e.g.*, IPR2023-00206, Paper 7, 22-23),[9] Brown does not disclose separately adding these sulfur compounds as individual ingredients and combining them with the claimed sugars and a heme-containing protein. The '205 Prov., which at 10 pages is only a fraction of the length of Brown, is worse yet as it does not disclose *any* claimed sugars and sulfur compounds, nor does it contain Brown's anticipatory disclosure at Ex. 1012, [0364]. *See generally* Ex. 1173 ('205).

Brown's anticipatory disclosures do not demonstrate that Brown's inventors had possession of the *broader* alleged inventions claimed in the challenged patents that include many other undisclosed sugar compounds and sulfur compounds, including combinations thereof. For example, each of the claimed but undisclosed sugars has a unique chemical structure that is different from glucose. Ex. 1005, ¶63. Similarly, the claimed sulfur compounds also have unique chemical structures. *Id.*, ¶65. As Dr. McGorrin previously explained when discussing the '816 Provisional's failure to provide Section 112 support, chemical structure is significant because it affects the compounds' chemical reactivity. Ex. 1005, ¶96. For example, 5-carbon sugars (e.g., ribose) are more reactive in the Maillard reaction than 6-carbon sugars

[9] Whether Brown's disclosure of pea flour satisfies the claimed sulfur compound limitation rests on that limitation not being limited to free sulfur compounds, which is the position advanced by PO. *See, e.g.*, IPR2023-00206, Paper 7, 12, 22 n.7.

(e.g., glucose-6-phosphate). Compounds with slower reactivity may be less successful at achieving the desired aroma profile with limited cooking time constraints. *Id.*, ¶¶62-64; Ex. 1151, 151. Hence, Brown's disclosure of a composition including glucose alone does not show possession of the claimed invention reciting numerous other different sugar and sulfur compounds.

Additionally, the Prior-filed Applications fail to provide sufficient support and enable the full scope of the challenged claims because they do not disclose to a POSITA how to make and use the combinations of the undisclosed sugar and sulfur compounds and heme-containing protein to produce "at least two volatile compounds which have a [meat-associated/beef-like] aroma," as claimed. As in *Amgen*, the challenged patents claim literally millions of combinations of sugar and sulfur compounds and heme proteins based on their function: those that produce meat-associated/beef-like aromas. As a simple illustration, the '096 patent purports to claim any combination of 10 different claimed sugars and 4 different claimed sulfur compounds (and mixtures of two or more of each) with any heme protein (which includes hundreds, if not thousands, of proteins), all of which the Prior-filed Applications must enable to support the proposed "corrected" priority claim. Similarly, the '241 patent claims 9 different sugars and 4 different sulfur compounds and the '250/'306 patents claims 6 different sugars and 3 different sulfur compounds, all in combination with *any* heme protein, which again results in an almost

innumerable number of possible compositions.[10]

Notably, however, the Prior-filed Applications fail to provide any guidance—not even an insufficient trial-and-error "roadmap"—on how to select from the genera of sugars and sulfur compounds and heme proteins to produce at least two volatiles having a meat/beef-associated aroma. Instead, a POSITA is "forced to engage in 'painstaking experimentation' to see what works" (*Amgen*, slip op. at 17) because as the '096/'241 patents themselves reveal, not every combination of the claimed sugar and sulfur compounds and heme protein produce a meat-associated/beef-like aroma. *See, e.g.*, '096 patent, 21:17-22:55 (Table 7) (disclosing that cysteine, methionine, ribose, and leghemoglobin produce a "cooked potato aroma"; ribose, cysteine, lactic acid, and leghemoglobin produce "bready, malty, browned, breadcrust" aromas). "That is not enablement." *Amgen*, slip op. at 17.

Relatedly, a POSITA would understand that different combination(s) of the compounds recited in the challenged claims could produce dramatically different aroma and flavor profiles. For example, Dr. McGorrin opines that a POSITA would understand that the claimed sugar and sulfur compounds will chemically react differently upon cooking the composition, and that the volatile products of the

[10] Putting aside the heme protein, the '096 patent's 10 claimed sugars and 4 claimed sulfur compounds allow for 15,345 unique combinations of compositions alone.

reactions depend on various factors including temperature, pH, and the structural diversity of the precursor molecules that react to form volatiles. Ex. 1005, ¶¶ 56-70. As explained above, the '096/'241 patent specifications demonstrate the unpredictability of combining and heating different sugar and sulfur compounds in the presence of leghemoglobin—a disclosure which is absent from the Prior-filed Applications—generating aromas that are ***not*** meat-associated or beef-like at all. *See, e.g.*, '096 patent, 21:17-22:55 (Table 7) ("cooked potato" and "bready, malty, browned, breadcrust" aromas). Hence, a POSITA could not readily conclude based on Brown's disclosure of a single sugar compound species (glucose), a single sulfur-containing ingredient (pea flour), and a single heme protein (leghemoglobin) that other undisclosed sugars, sulfur compounds, and heme proteins would similarly produce meaty/beefy aromas. *See Bilstad v. Wakalopulos*, 386 F.3d 1116, 1125 (Fed. Cir. 2004) ("if the art is unpredictable, then disclosure of more species is necessary to adequately show possession of the entire genus").

That Brown fails to disclose the vast majority of the claimed sugars and all of the sulfur compounds (at least expressly or in isolation) is readily explained by the fact that the challenged patents have a ***continuation-in-part*** relationship with Brown. *See* Section I, *supra*. At least "some subject matter of a CIP application is ***necessarily different*** from the original subject matter." *University of West Virginia Board of Trustees v. Vanvoorhies*, 278 F.3d 1288, 1297 (Fed. Cir. 2002). "New

subject matter does not receive the benefit of the earlier priority date." *Go Medical Industries Pty., Ltd. v. Inmed Corp.*, 471 F.3d 1264, 1270 (Fed. Cir. 2006). Taking the '096 and '241 patents as examples, that new subject matter that is not disclosed in Brown is readily identifiable. First, there is virtually no express overlap between their specifications. *See* Ex. 1174 (redline comparison of the '096 specification vs. Brown's specification). In particular, the examples and tables in the '096/'241 patent specification that describe combinations of the various claimed precursor compounds and heme proteins and the aromas they generate are entirely missing from Brown. *See, e.g.*, '096 Patent, (Examples 1-14, Tables 1-18); *see also id.*, 8:1-43 (Table 1 listing all claimed sugar and sulfur compounds). Second, the figures are completely different—the '096/'241 patent figures illustrate amino acid sequences of 27 heme proteins and a "beefiness" chart, while Brown does not. The same is true for the '069 and '205 Provs. They too do not disclose the above examples and tables and have different figures. *See* Ex. 2012 ('069 patent) and Ex. 1173 ('205 patent). A redline comparison of their specifications also shows virtually no overlap. Exs. 1175 ('069 Prov. vs. '096 patent), 1176 ('205 Prov. vs. '096 patent).

Additionally, Brown's deficiencies are not remedied by its disclosure of a laundry list of generalized classes of compounds that may undergo a chemical reaction: "amino acids, fats, peptides, nucleotides, organic acids, sulfur compounds, sugars and other carbohydrates." EX1012, [00362]; *see also id.*, [00295], [00361].

Such generalized references to "sugars" and "sulfur compounds," especially when indiscriminately found among a host of other classes of compounds (*e.g.*, nucleotides, fats, acids, etc.), does not inform a POSITA that the inventors were in possession of compositions containing the undisclosed sugar and sulfur compounds. *See* Ex. 1005, ¶105 (Dr. McGorrin concluding same for a similar disclosure in the '816 Prov.). Indeed, "simply describing a large genus of compounds is not sufficient to satisfy the written description requirement as to particular species or sub-genuses." *Fujikawa v. Wattanasin*, 93 F.3d 1559, 1571 (Fed. Cir. 1996); *see also Purdue Pharma L.P. v. Iancu*, 767 Fed.Appx. 918, 923-24 (Fed. Cir. 2019) ("Such 'laundry list' disclosures do not provide adequate specificity to constitute written description support for [a] claim of priority."). Instead, an application must provide "***blaze marks***" that single out a claimed species from a genus of compounds and, thus, "something more than the disclosure of a class of … even 48 compounds is required." *Application of Ruschig*, 379 F.2d 990, 994-95 (C.C.P.A. 1967). Brown's laundry list disclosures fail to do so.

## IV. CONCLUSION

In view the foregoing, the challenged patents are not entitled to claim priority to the '816 Prov., '211 Appl., Brown or the other Prior-filed Applications. Consequently, the earliest possible priority date for these proceedings only is Nov. 25, 2013, which is the filing date of the '634 Prov. Brown remains prior art.

DATED: June 1, 2023

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## CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned hereby certify that Petitioner's Opening Brief Challenging Priority Claim, and all exhibits and other documents filed together with the Petitioner's Opposition, were served on Patent Owner on June 1, 2023 by e-mailing copies to:

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