Paper No. 20

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MOTIF FOODWORKS, INC.,

Petitioner,

v.

IMPOSSIBLE FOODS INC.,
Patent Owner.

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

"METHODS AND COMPOSITIONS OF CONSUMABLES"

Inter Partes Review No. 2023-00209

PETITIONER'S REPLY BRIEF CHALLENGING PRIORITY CLAIM

TABLE OF CONTENTS

Page

I. BROWN SIMULTANEOUSLY ANTICIPATES AND FAILS TO PROVIDE SECTION 112 SUPPORT 2

II. OTHER CONSEQUENCES TO PO'S CONCESSIONS.....4

TABLE OF AUTHORITIES

Page

Cases

Indivior UK Limited v. Dr. Reddy's Laboratories,
18 F.4th 1323 (Fed. Cir. 2021) 2

In re Thorpe,
777 F.2d 695 (Fed. Cir. 1985) 5

Purdue Pharma L.P. v. Iancu,
767 Fed.Appx. 918 (Fed. Cir. 2019).....4

Western Electric Mfg. Co. v. Ansonia Brass & Copper Co.,
114 U.S. 447, 449-51 (1885) 5

PO argued in its POPRs that once the '096 and '241 priority claims were "corrected," they would be entitled to Brown's priority date (an assertion that would require Brown to provide § 112 support). '096 POPR, 9-11. Now recognizing that its priority date assertion exposes the claims to invalidation on multiple grounds, PO abandons its earlier position in its brief and contends that Brown and the '069 provisional (collectively herein "Brown") "***do[] not disclose*** the elements of the challenged claims" and only provide written description support under *Petitioner's* allegedly "*erroneous* interpretations" of the claims. *See* PO Brief, 4-11. This assertion violates PO's duty of candor.[1] In any event, PO's about-face reveals that the Board and the parties expended substantial time and resources assessing PO's request to cede jurisdiction and "correct" priority claims where PO acknowledges the challenged claims are unsupported and thus not entitled to Brown's filing date.

Notwithstanding PO's inconsistent positions, Brown anticipates and/or renders obvious the challenged claims and simultaneously fails to provide adequate

[1] In Litigation, PO unequivocally construes the "compound" terms as being satisfied by ingredients (*e.g.*, generically "proteins") that contain non-free sulfur compounds (*e.g.*, proteins are chains of amino acids). Ex. 1177, 7. As Petitioner made clear, its grounds are based on PO's interpretations of the claims. '096 Pet., 12. PO's attempt to pawn off this interpretation as "Petitioner's" is false.

§ 112 support for the full scope of those claims as explained below.

I. BROWN SIMULTANEOUSLY ANTICIPATES AND FAILS TO PROVIDE SECTION 112 SUPPORT

PO's contention that Brown "*must*" provide written description support for claims it anticipates is legally incorrect.[2] *See* PO Br. at 1-2. The Federal Circuit has repeatedly held as a matter of law that an application can simultaneously anticipate and fail to contain disclosure that enables the *full scope* of a later-filed application's claims (*e.g.*, by disclosing a species of the later claimed genus). Pet. Op, 7-9 (collecting cases). For example, in *Indivior UK Ltd. v. Dr. Reddy's Laboratories, S.A.*, the Federal Circuit held that claims of a continuation patent that broadly claimed a composition containing about 40-60 wt % polymer lacked § 112 support from a first-filed application that only disclosed a narrower example having 48.2 wt % polymer. 18 F.4th 1323, 1325-30 (Fed. Cir. 2021). Notwithstanding, the Court found the narrower disclosure anticipatory. *Id.* The same is true here. Brown contains an enabling, anticipatory disclosure (*e.g.*, a composition that includes leghemoglobin, glucose, pea flour, plant proteins) that invalidates the challenged claims, yet Brown fails to describe and enable the *full scope* of the numerous claimed sugars, sulfur compounds, and heme protein. Pet. Op., 7-15. PO does not offer any

[2] PO does not address Brown's lack of ***enablement of*** the challenged claims. PO Br. at 4-11. This alone merits denial of PO's priority claim. 35 U.S.C. § 112(a).

contrary facts or authority to this law.

Instead, PO argues that *Petitioner's* interpretation of the claims evidences Brown's written description support because Brown discloses "ingredients [e.g., cornstarch, guar/locust bean gum, pectin, and legumes] having the claimed compounds as subcomponents." PO Br., 5-8. Aside from falsely representing *Petitioner's* interpretation of the claims, PO's contention is flawed for three reasons.

First, PO fails to show that ***all*** of the claimed sugars and sulfur compounds are inherently in Brown's ingredients. For example, PO's reliance on the *Patrick* publication (PO Br., 6 n.1) as support that pea flour allegedly contains glucose-6-phosphate (G6P) is misplaced. *Patrick* discloses only that G6P is an intermediate metabolite ***transiently*** produced during photosynthesis (*see Patrick*, Figure 4). It says nothing about pea flour containing G6P. PO's citation to Brown's paragraph [0362] as disclosing G6P also fails as Brown does not identify any specific sugars, much less G6P, found in meat that produce "characteristic flavor … components." Instead, Brown generally observes that plants, like meat, include sugars and carbohydrates that can react to produce odorants. Ex. 1012, [0362]. PO's arguments that Brown discloses **maltodextrin** and **lactose** similarly fail. While Brown's compositions may include cornstarch and legumes, the inclusion of these ingredient does not mean that Brown discloses maltodextrin and lactose, respectively, simply because cornstarch ***could*** be hydrolyzed to produce maltodextrin and lactose ***could***

be hydrolyzed to create glucose and galactose. PO Br., 7-8; Ex. 1136, 73.

Second, even if Brown's ingredients above did contain all of the claimed sugars/sulfurs (they do not), Brown does not disclose that combining them with heme protein produces a meat aroma as required by the challenged claims.

Third, the ingredients PO relies on are among *hundreds* of other ingredients disclosed generally in Brown. Ex. 1012, [00321]-[00332]. This fails to provide "blaze marks" that "indicate or direct that a particular combination should be made rather than any of the many others which could also be made." *Purdue Pharma L.P. v. Iancu*, 767 Fed.Appx. 918, 923-25 (Fed. Cir. 2019) (specification's "laundry list" of dozens of different gelling agents, which included the claimed HPMC and PEO compounds, failed to provide description support for HPMC and PEO because POSITA would not know which particular compounds to use). And unlike *Purdue*, Brown's ingredients do not recite the actual claimed compounds in a list. Instead, they recite generic ingredients that according to PO inherently include specific subcomponents along with numerous other compounds, which provides even less direction to a POSITA as to what particular compounds should be combined than in *Purdue*. Hence, Brown fails to provide support for the challenged claims.

II. OTHER CONSEQUENCES TO PO'S CONCESSIONS

Petitioner correctly argued that the 1.5 mM limitation, as part of a product-by-process (PBP) claim, does not have patentable weight for ***invalidity***, but is

limiting for ***infringement***. ’241 Pet., n.7, 18-20, 29. In response, PO erroneously argues that Brown provides description support for claim 1 of the ’241 patent if, *inter alia*, the Board agrees with Petitioner that the 1.5 mM limitation does not have patentable weight. PO Br., 10-11. This is incorrect as a matter of law because this limitation is still limiting for infringement (*In re Thorpe*, 777 F.2d 695, 698 (Fed. Cir. 1985)), and thus PO must still show that Brown sufficiently describes and enables this limitation. *Western Electric Mfg. Co. v. Ansonia Brass & Copper Co.*, 114 U.S. 447, 449-51 (1885) (finding both process and PBP claims invalid for specification’s failure to disclose a claimed step). PO does not (and cannot) do so because Brown fails to disclose any concentrations of sulfur compounds in its compositions. Thus, Brown is prior art against ’241 patent claims 1-21.

PO contends that Brown fails to anticipate the ’096 patent claims because Brown’s “muscle replica” is not a “food flavor additive composition” (FFAC). PO Br., 4. This is incorrect. ’096 Pet., 20-22. However, even if the Board finds that Brown fails to disclose an FFAC or otherwise does not anticipate the ’096 claims, then, as PO admits, Brown would also fail to provide written description support. *See* PO Br., 4. Consequently, Brown would remain prior art for all grounds in the ’096 petition, including, but not limited to the obviousness ground (*e.g.*, Ground 2).

PO’s failure to satisfy § 112’s statutory provisions (Pet. Op., 3-6) and Brown’s failure to describe and enable the claims merits denial of PO’s priority claim.

DATED: June 12, 2023

Respectfully submitted,

By: */Joseph Paunovich/*

Joseph M. Paunovich (Reg. No. 59,044)
QUINN EMANUEL URQUHART & SULLIVAN, LLP
865 S. Figueroa St. at 10th Floor
Los Angeles, California 90017
qeimpossibleipr@quinnemanuel.com

Lead Attorney for Petitioner Motif Foodworks, Inc.

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned hereby certify that Petitioner's Reply Brief Challenging Priority Claim, and all exhibits and other documents filed together with the Petitioner's Opposition, were served on Patent Owner on June 12, 2023 by e-mailing copies to:

Lead Counsel	Back-Up Counsel
Michael T. Rosato USPTO Reg. No. 52,182 WILSON SONSINI GOODRICH & ROSATI 701 Fifth Avenue, Suite 5100 Seattle, WA 98104 Tel.: 206-883-2529 Fax: 206-883-2699 Email: mrosato@wsgr.com	Lorelei P. Westin USPTO Reg. No. 52,353 WILSON SONSINI GOODRICH & ROSATI 12235 El Camino Real, Suite 200 San Diego, CA 92130 Tel.: 858-350-2225 Fax: 858-350-2399 Email: lwestin@wsgr.com Wendy L. Devine USPTO Reg. No. 61,309 WILSON SONSINI GOODRICH & ROSATI One Market Plaza, Spear Street Tower, Suite 3300 San Francisco, CA 94105 Tel.: 415-947-2027 Fax: 415-947-2099 Email: wdevine@wsgr.com Matthew R. Reed USPTO Reg. No. 48,879 WILSON SONSINI GOODRICH & ROSATI 650 Page Mill Road Palo Alto, CA 94304 Tel.: 650-565-3990 Fax: 650-493-6811 Email: mreed@wsgr.com

Lead Counsel	Back-Up Counsel
	Tasha M. Thomas USPTO Reg. No. 73,207 WILSON SONSINI GOODRICH & ROSATI 1700 K Street, NW, Fifth Floor Washington, DC, 20006 Tel.: 202-973-8883 Fax: 202-973-8899 Email: tthomas@wsgr.com

Date: June 12, 2023

Respectfully submitted,

By: /s/ *Joseph Paunovich*

Joseph M. Paunovich (Reg. No. 59,044)
QUINN EMANUEL URQUHART & SULLIVAN, LLP
865 S. Figueroa St. at 10th Floor
Los Angeles, California 90017
qeimpossibleipr@quinnemanuel.com

Lead Attorney for Petitioner Motif Foodworks, Inc.