

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ROBERT BOSCH LLC, and
MERCEDES-BENZ USA, LLC,
Petitioner,

v.

WESTPORT FUEL SYSTEMS CANADA INC.,
Patent Owner

Inter Partes Review No. IPR2023-00292
Patent No. 6,298,829

PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE

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PATENT OWNER'S EXHIBIT LIST

Exhibit	Description
2001	Report of Dr. J. Matt Quinlan (December 2, 2022)
2002	Deposition Transcript of Dr. J. Matt Quinlan (January 12, 2023)
2003	CV of Dr. Christopher Atkinson
2004	Declaration of Dr. Christopher Atkinson
2005	DE 199 42 816 A1 (“Klenk”)
2006	DE 199 42 816 A1 - Translation
2007	DE 198 56 617 A1 (“Klügl2”)
2008	DE 198 56 617 A1 - Translation
2009	DE 199 46 732 B4 (“Schmutzler”)
2010	DE 199 46 732 B4 – Translation
2011	DE 199 62 177 A1 (“Gottlieb”)
2012	DE 199 62 177 A1 – Translation
2013	U.S. Patent No. 6,513,487
2014	Bosch Motion to Stay Pending IPR
2015	Order Denying Bosch Motion to Stay Pending IPR
2016	GB 2 321 278 A
2017	U.S. Patent No. 4,803,393
2018	U.S. Patent No. 5,031,841
2019	U.S. Patent No. 5,875,764
2020	U.S. Patent No. 6,062,533

Exhibit	Description
2021	Bosch Declaratory Judgment Complaint
2022	Declaration of Dr. Christopher Atkinson in Support of the Patent Owners' Response
2023	Deposition Transcript of Dr. J. Matthew Quinlan (March 1, 2024)
2024	Quinlan Dep. (March 1, 2024) Exhibit 2
2025	Deposition Transcript of Dr. J. Matt Quinlan (April 19, 2024)
2026	Declaration of Heike Holthaus
2027	German-English Automotive Engineering Dictionary
2028	Delmar's Automotive Dictionary
2029	Lane's Complete Dictionary of Automotive Terms
2030	Dictionary of Mechanical Engineering
2031	Westport Innovations Inc. Annual Report 2015 (Excerpts)
2032	Quinlan Dep. (April 19, 2024) Exhibit 13
2033	Westport Fuel Systems Corporate Presentation March 2023
2034	Oct. 26, 2001 News Release, WFS369772-73
2035	Nov. 9, 2001 News Release, WFS369782
2036	Oct. 28, 2023 News Release, WFS370088-93
2037	Oct. 27, 2024 News Release, WFS370207-08
2038	Updated CV of Dr. Christopher Atkinson

Exhibit	Description
2039	Westport's Technology Tutorial, Case No. 2:23-cv-00038-JRG-RSP (E.D. Tex.)
2040	IPR Dep. Exhibit 6

Pursuant to 37 C.F.R. §42.64(c), the Board's Scheduling Order (Paper 11), and the Federal Rules of Evidence, Patent Owner (Westport) hereby moves to exclude (1) Exhibit 1006; (2) Exhibit 1025; and (3) Exhibits 1029, 1031, 1033, 1035, and 1037, along with any testimony or argument relying on any of these three categories of excludable exhibits.

Exhibit 1006 is Petitioner's fatally flawed English translation of the underlying German reference (Klügl, Exhibit 1005). The only competent evidence conclusively shows that Petitioners' translation is inaccurate and unreliable.

Exhibit 1025 is a copy of a discussion from a message board discussing possible interpretations of the German word "Übertragung." The exhibit is rife with hearsay for which no exception applies and also is irrelevant.

Exhibits 1029, 1031, 1033, 1035 and 1037 are German references for which Petitioners have not submitted *any* required translation, much less a certified one. These exhibits are excludable for failure to comply with 37 C.F.R. §42.63 and a lack of relevance.

Westport timely objected to each exhibit. (Paper 15; Paper 24). Petitioners did not serve any supplemental evidence in response. Thus, Petitioners failed to cure the deficiencies Westport identified in its objections.

I. EXHIBIT 1006 AND THE TESTIMONY AND ARGUMENTS RELYING THEREON SHOULD BE EXCLUDED

A. Exhibit 1006 should be excluded.

Westport timely objected to Exhibit 1006 under Federal Rules of Evidence (“FRE”) 401, 402, 802, 803, and 901. (Paper 15 at 4.) The only competent evidence establishes that Petitioners’ English translation of the original German Klügl reference is fundamentally inaccurate and unreliable. (Ex. 2026; Ex. 1026 at 11:21-12:13, 14:6-15:1, 16:18-17:3, 32:22-34:3.) Westport’s translator, Ms. Holthaus, left no doubt about this:

Q. ... Do you believe that Exhibit 1006 is a reliable translation of Exhibit 1005?

A. I do not.

(Ex. 1026 at 34:1-3.) Petitioner served no supplemental evidence in response to Patent Owner’s objections and did not otherwise attempt to cure the defects in this evidence. The fatally flawed translation should be excluded. Petitioners had every opportunity to submit contrary evidence in support of their Reply, but failed to do so. Instead, Petitioners relied on attorney argument which is not evidence. (*E.g.*, Paper 23 at 4-5 (relying solely on attorney argument to assert that “the record here shows that, whatever words are used to translate ‘Hubübersetzung,’ the term would have been understood by a POSITA to refer to the amplification or application of a ratio to a fuel injector stroke.”); *see, e.g., FastShip, LLC v. United States*, 892 F.3d

1298, 1309 (Fed. Cir. 2018) (rejecting reliance on an annotated figure because “these annotations were prepared by attorneys, and ‘[a]ttorney argument is not evidence.’”); *Icon Health & Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034, 1043 (Fed. Cir. 2017) (“Attorney argument is not evidence”); *Gemtron Corp. v. Saint-Gobain Corp.*, 572 F.3d 1371, 1380 (Fed. Cir. 2009) (“[U]nsworn attorney argument ... is not evidence and cannot rebut ... other admitted evidence....”))

Exhibit 1006—with its critical unreliability—is the centerpiece of Petitioners’ grounds. (See Paper 1 at 8, identifying Klügl in the combination of every asserted Ground.) Petitioners’ fatally flawed translation uses the phrase “stroke translation” only twice, both in connection with the description of its figures:

The invention is explained in more detail with reference to the figures; showing:

Fig. 1 shows a device for power transmission ***without stroke translation***,

...

Fig. 3 shows a device for power transmission ***with stroke translation***.

(Ex. 1006, 1:39-46 (emphasis added).)

Stroke translation, however, is not defined in Klügl, and is not used again in Petitioners’ English translation. (See Paper 19 (Patent Owner’s Response) at 19.) Westport’s technical expert further explained that “stroke translation” is not a

commonly used term of art that a POSITA would have understood to have a special meaning at the time of the invention (or now). (*See* Ex. 2022, ¶¶76-77.)

In an attempt to better understand what Klügl meant by “stroke translation,” Westport’s German translator isolated the German word that Petitioners interpreted as “stroke translation”: “Hubübersetzung.” (Ex. 2026, ¶3, translating Ex. 1005, 1:44-45, 1:48-19.) Surprisingly, Westport’s translator found the same German word used two additional times in the original German Klügl reference. (Ex. 2026, ¶4.) But in each of those instances, Petitioners interpreted the same word differently: “stroke ratio” and “stroke transmission,” respectively. (Ex. 1005, 7:11-12, 7:17-18; Ex. 2026, ¶¶4-5.)

Petitioners relied on these differences in their proffered translation to mislead the Board into imparting critical importance to the different words used to translate “Hubübersetzung” from the original German reference. Petitioners first relied on “stroke translation” to draw significance between “with” and “without” “stroke translation.” (Paper 9 (Petitioners’ Request for Rehearing) at 2 (arguing that Klügl describes “two separate embodiments, one with and one without stroke translation.”)) Petitioners contended that applying a “stroke translation” would result in a “stroke ratio,” relying on the same German word interpreted different ways to manufacture an argument that simply does not exist based on the original German reference. (*Id.* at 2 (Petitioners argued “instead of being ‘*without stroke translation*’

as Klügl unambiguously says, the interpretation of Klügl’s Figure 1 embodiment proffered by Patent Owner and adopted by the Board results in a hydraulic link ‘**with stroke translation**’ that applies a ‘**stroke ratio**’ to the piston movement.”) (emphasis in original); *see also id.* at 7 (same); 10 (Petitioners argued “[b]ecause Klügl’s first embodiment is ‘without **stroke translation**,’ no **stroke ratio** is applied, **and** the piston **moves by the same amount** as the actuator.”) (emphasis added); 14 (Petitioners argued that Westport’s interpretation “operates ‘with **stroke translation**’ and applies a ‘**stroke ratio**’ (i.e., the piston moves **by a different amount** than the actuator).”) (emphasis added).) Petitioners’ argument illustrates that they do not use “stroke translation” and “stroke ratio” synonymously. (*Id.*) Instead, Petitioners employed this translation anomaly to their benefit, seizing on the different translations of a single German word to manufacture their argument that Klügl’s Figure 1 inherently teaches an embodiment in which “the piston **moves by the same amount** as the actuator.” (*Id.* at 1, 10.) Petitioners’ arguments amount to little more than a ruse based on the unreliable translation that Petitioners—each of which are subsidiaries of German entities—employed to mislead the Board.

Instead of now standing by the original distinctions that the Board relied on in reversing its denial of institution, Petitioners contend that the variances are “synonyms” without any import. (Paper 23 at 4-5.) Yet Petitioners do not provide any support for this argument from their translator. In fact, despite Klügl serving as

the core reference on which all four of Petitioners' grounds are based, Petitioners do not provide any curative or responsive declaration from their translator. The only plausible inference to be drawn from Petitioners' evidentiary silence is that they could not get a translator to support the flawed translation once those fatal flaws were brought to light. Petitioners also do not contend that their arguments would stand if only one interpretation was used because to do so would effectively admit that Exhibit 1006 is flawed.

Instead of proffering evidence, Petitioners employ only attorney argument in response. They effectively contend that translation is a fluid exercise wherein all possible variations (alleged synonyms) are poured in and from which Petitioners can form whatever translation fits their purpose. However, as Westport's translator explained, this translation methodology is not proper. (Ex. 2026 at ¶¶5-8.) The result is an unreliable translation. (Ex. 1026 at 34:1-3.) Petitioners' attempt to serve the Board "word soup" should be rejected and their fatally flawed translation excluded as unreliable.

In short, Exhibit 1006 is inadmissible because these inconsistencies render it so unreliable that it has no probative value. *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1322 (Fed. Cir. 2018) (finding unreliable evidence lacks probative value); *see also, e.g., Capizzano v. Sec'y of the Dep't of Health & Hum. Servs.*, No. 00-759V, 2006 WL 3419789, at *9 (Fed. Cl. Nov. 8,

2006) (“[u]nreliable evidence has no probative value.”). That is, Exhibit 1006 does not have any tendency to make a fact of consequence (including the proper translation of “Hubübersetzung”) in this proceeding more or less probable, for the reasons explained above. (*See* Fed. R. Evid. 401, 402.)

Relatedly because of such inaccuracies, Exhibit 1006 is not “sufficient to support a finding that [Exhibit 1006] is what the proponent claims it is,” (i.e., an accurate and reliable translation) under FRE 901(a). (*See* Fed. R. Evid. 901.) Exhibit 1006 also constitutes hearsay to which no exception applies under the factual circumstances here, indicating a lack of trustworthiness. (*See* Fed. R. Evid. 802, 803.)

B. If Exhibit 1006 is excluded, then the testimony and arguments relying on Exhibit 1006 also should be excluded.

In short, if Exhibit 1006 is excluded as inadmissible, all reliance on it also should be excluded because such proffered evidence and/or arguments would not be relevant or reliable. That is, opinions and arguments based on excluded evidence do not have any tendency to make a fact of consequence in this proceeding more or less probable. (Fed. R. Evid. 401, 402.)

Specifically, the following declaration paragraphs should be excluded:

1. Ex. 1003, ¶¶ 116-29, 142-44, 193, 203-29, 231-35, 237, 238, 240-43, 245, 246, 248, 252, 264, 268, 269, 271, 272, 274-78, 280, 286, 287, 289, 291, 294-304, 310-27, 333-43, 345-48, 350,

352, 359-61, 368-85, 387, 389-94, 397-402, 404-414, 417-33, 435, 436, 438, 439, 441, 442, 444-48, 450, 451, 453, 454, 456-60, 462, 463, 466-71, 473, and 475; and

2. Ex. 1040, ¶¶ 6-32, 34-40, and 42-52.

As to the papers, the portions of the Petition (Paper 1) and Reply (Paper 23) that cite to or rely on Ex. 1006 or any of the above paragraphs of Exs. 1003 or 1040 should be excluded. (See Paper 1 at 2-4, 8, 15, 17, 20, 21, 24, 35-41, 44-74; Paper 23 at 1-24.)

II. EXHIBIT 1025 AND THE ARGUMENTS RELYING THEREON SHOULD BE EXCLUDED

A. Exhibit 1025 should be excluded.

Westport timely objected to Exhibit 1025 under FRE 401, 402, 403, 801, and 802. (Paper 24 at 2.) Exhibit 1025 is a discussion on a message board called ProZ that translators use at times. (Ex. 1026 at 17:21-18:7.) The exhibit captures various aspects of conversations that all are hearsay to the extent Petitioners are relying on the exhibit as support for their proffered interpretation of “Hubübersetzung.” (Paper 23 at 3-4.) No hearsay exception applies. (See Fed. R. Evid. 802, 803.)

Further, because the proffered interpretations in Exhibit 1025 actually address a different German word “Übertragung,” the exhibit also should be excluded because it does not have any tendency to make a fact of consequence in this proceeding more or less probable. (Fed. R. Evid. 401, 402.) Further, even assuming *arguendo* there is

some marginal probative value in Exhibit 1025, that would be substantially outweighed by unfair prejudice or confusion of the issues. (Fed. R. Evid. 403.)

B. If Exhibit 1025 is excluded, then the arguments relying on it also should be excluded.

In short, if Exhibit 1025 is excluded as inadmissible, all reliance on it also should be excluded because such proffered evidence and/or arguments would not be relevant or reliable. That is, opinions and arguments based on excluded evidence do not have any tendency to make a fact of consequence in this proceeding more or less probable. (Fed. R. Evid. 401, 402.)

Specifically, any portion of the Reply that cites to or relies on Ex. 1025 should be excluded. (Paper 23 at 3-4.)

III. EXHIBITS 1029, 1031, 1033, 1035, AND 1037 AND THE ARGUMENTS RELYING THEREON SHOULD BE EXCLUDED

A. Exhibits 1029, 1031, 1033, 1035, and 1037 should be excluded.

Exhibits 1029, 1031, 1033, 1035, and 1037 are German references for which Petitioners have not submitted any translation, much less certified translations. (Paper 24 at 3.) Because Petitioners do not even attempt to satisfy the requirements of 37 C.F.R. §42.63, requiring an English translation of a document in a language other than English and an affidavit attesting to the accuracy of the translation, these exhibits should be excluded. *Volkswagen Grp. of Am., Inc. v. Emerachem Holdings, LLC*, IPR2014-01555, Paper No. 20 (P.T.A.B. March 16, 2015) (“When a document is in a foreign language, and a party intends to rely on the document, the party should

submit . . . an affidavit attesting to the accuracy of the translation. 37 C.F.R. §42.63(b). Compliance with §42.63(b) is mandatory.”); *Zhongshan Broad Ocean Motor Co., Ltd. v. Nidec Motor Corp.*, IPR2014-01121, Paper No. 20, at 11-12 (P.T.A.B. Jan. 21, 2015) (holding that because an affidavit was not filed with a translation, the Board would not consider the reference); *Square, Inc. v. REM Holdings 3, LLC*, IPR2014-00312, Paper No. 58 (P.T.A.B. July 7, 2015) (excluding exhibit because translation was not accompanied by an affidavit as required by 37 C.F.R. §42.63(b)).

Further, these untranslated exhibits lack relevancy. That is, they do not have any tendency to make a fact of consequence in this proceeding more or less probable. (Fed. R. Evid. 401, 402.) These exhibits all are untranslated German documents that have no tendency to make any fact more or less probable than it would be without the evidence and such testimony is of no consequence in determining any issue in this IPR.

Westport further objected to these exhibits and any arguments submitted on or about these exhibits because such arguments would not meet the personal knowledge foundation requirements of FRE 602 and would be improper expert testimony under FRE 702 and 703. (See Fed. R. Evid. 602, 702, 703.) Any arguments from counsel about these exhibits constitutes improper opinions that are inadmissible under FRE 602, 702, and 703 because they lack foundation, are

conclusory, do not disclose underlying facts or data in support, are unqualified, and are unreliable. *See, e.g., FastShip*, 892 F.3d at 1309 (rejecting reliance on an annotated figure because “these annotations were prepared by attorneys, and ‘[a]ttorney argument is not evidence.’”); *Icon Health*, 849 F.3d at 1043 (“Attorney argument is not evidence”); *Gemtron*, 572 F.3d at 1380 (“[U]nsworn attorney argument ... is not evidence and cannot rebut ... other admitted evidence....”). Nor does any expert witness provide testimony about these exhibits.

To the extent the exhibits have some minimal probative value, they should also be excluded under FRE 403 due to the risk of unfair prejudice and confusion of the issues. (Fed. R. Evid. 403.) Petitioners’ attempt to correlate the German language in these exhibits is likewise based on attorney argument, is entirely speculative, and is unreliable.

B. If Exhibits 1029, 1031, 1033, 1035, and 1037 are excluded, then the arguments relying on them also should be excluded.

In short, if Exhibits 1029, 1031, 1033, 1035, and 1037 are excluded as inadmissible all reliance on them also should be excluded because such proffered evidence and/or arguments would not be relevant or reliable. That is, opinions and arguments based on excluded evidence do not have any tendency to make a fact of consequence in this proceeding more or less probable. (Fed. R. Evid. 401, 402.)

Specifically, any portion of the Reply that cites to or relies on Exs. 1029, 1031, 1033, 1035, or 1037 should be excluded. (Paper 23 at 4-5.)

IV. CONCLUSION

For the foregoing reasons, Westport respectfully requests the Board grant its motion to exclude the fatally flawed Ex. 1006 and any testimony or arguments based thereon.

Westport also requests that the Board grant its motion to exclude the hearsay and irrelevant Ex. 1025 and any testimony or arguments based thereon.

Westport further requests the Board grant its motion to exclude the untranslated German references Exhibits 1029, 1031, 1033, 1035 and 1037 and any testimony or arguments based thereon.

Dated: October 15, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §42.6(e), the undersigned certifies that on October 15, 2024, a complete and entire copy of Patent Owner's Motion to Exclude Evidence was served on Petitioners by email to the following email addresses:

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